

ASPECTS OF DOUBLE JEOPARDY

by

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To Kobus Smit, my father

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SUMMARY

The common law right of the accused to be protected against double jeopardy recently acquired constitutional status in South Africa. Although South African courts previously applied this rule in various procedural contexts, there has been very little critical discussion of the values on which the rule is based. Nor have all contexts in which the rule should be applied been recognised. In the light of the new constitutional dispensation, it has become necessary to identify and analyse the values which determine the application of the rule.

This thesis addresses the treatment of various aspects of double jeopardy in other constitutionally-grounded jurisdictions. Double jeopardy jurisprudence in the jurisdictions of England, Canada, India, Germany and the federal system of the United States of America is considered on a comparative basis. The historical origin and development of the rule are considered first. This is followed by an assessment of the current application of the rule in the various jurisdictions.

The study demonstrates that South African courts have relied largely on outdated principles derived from English common law, rather than applying the rule by focusing on the values that underlie the rule. This approach has become unacceptable in the new constitutional dispensation, *inter alia*, because a teleological, value-orientated interpretative approach has been adopted by the Constitutional Court. This thesis indicates which of the principles that developed in foreign constitutional double jeopardy jurisprudence may be of value in developing an appropriate body of South African constitutional double jeopardy principles. Proposals are made for future implementation of the rule in various procedural contexts. These suggestions include constitutional interpretation, legislative amendment and re-evaluation of various common law principles of criminal procedure.

Key words: double jeopardy; *res judicata*; *autrefois acquit*; *autrefois convict*; issue estoppel; plea of former jeopardy; appeal; retrial; finality in criminal proceedings.

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PART ONE

INTRODUCTION

CHAPTER ONE

INTRODUCTION

1.1 The double jeopardy rule - its origin and rationale

The procedural right of the accused not to be tried more than once for the same matter is the most ancient of all procedural guarantees. The earliest known formulation of the rule is that by the Greek statesman and orator, Demosthenes. It is recorded that in the year 355 BC Demosthenes stated that¹

the laws forbid the same man to be tried twice on the same issue ...

In Roman law, the rule evolved into a separate doctrine, known as the doctrine of *res judicata*.² This doctrine was also received into common law in England. However, the idea of a prohibition on relitigation of the same issue attained particular significance at that stage in English legal history when the state began to institute action against an individual at its own discretion. It was during this period (towards the thirteenth century) that the rule realised its most important function: the prevention of abuse by the state of the

¹ Demosthenes 589 (J Vince translation 4th ed 1970) cited by Mr Justice Rehnquist in the United States Supreme Court case of *Whalen v US* 445 US 684, 699 (1980).

² See chapter two *infra* under 2.1 for a discussion of the doctrine of *res judicata* as developed in Roman law.

criminal process.³ By placing certain restraints on the prosecutor's powers to institute criminal proceedings, the rule gradually developed into a powerful instrument to protect the individual against the arbitrary exercise of state power.

It is to be expected that a rule of such antiquity would by now have been thoroughly simplified and refined. On the contrary, the rule can be described as one of the most complex and least understood areas in the field of criminal procedure. In South African law, the rule (applied in a number of procedural contexts) has also given rise to a fair amount of confusion.⁴ This confusion can be ascribed to a failure of our courts to focus on the values which underlie the rule.

The common law rule against double jeopardy recently acquired constitutional status in South Africa. Section 35(3)(m) of the 1996 Constitution⁵ provides that

[e]very accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.⁶

³See chapter two *infra* under 2.3.1 for a discussion of the development of the rule in common law.

⁴See for instance chapter four *infra* under 4.6.7 for the different interpretations by our courts of the standard for determining the permissibility of multiple trials as proposed by the Appellate Division in *S v Ndou* 1971 (1) SA 668 (A).

⁵Constitution of the Republic of South Africa 1996 Act 108 of 1996.

⁶The Afrikaans version reads as follows: "Elke beskuldigde persoon het die reg op 'n billike verhoor, waarby inbegrepe is die reg om nie verhoor te word weens 'n oortreding ten opsigte van 'n handeling of versuim ten opsigte waarvan daardie persoon voorheen vrygespreek of skuldig bevind is nie".

At the time of writing this thesis, the provision has not been interpreted by the Constitutional Court. Since the rule against double jeopardy is now an entrenched fundamental human right, it has become essential once again to give consideration to the values which underlie the rule as well as to the objectives it seeks to achieve. The purpose of this thesis is, *inter alia*, to identify the values which underlie the rule. This is done by tracing the historical development of the rule as well as considering contemporary applications of the rule in certain foreign jurisdictions.

The systems of criminal justice considered on a comparative basis in this thesis are the English, Canadian, Indian and German systems as well as the American federal system. The treatment of double jeopardy issues in these jurisdictions is compared to the South African approach for the following reasons. Firstly, the South African law of criminal procedure is a hybrid system based on the common law and Roman-Dutch law. All the systems considered in this thesis, except the German system, derive from the common law. The German system is essentially founded on principles of Roman law. The Roman law principles of *res judicata* were also received (via Roman-Dutch law) into the South African law of criminal procedure. Secondly, all the systems considered on a comparative basis in this thesis, except the English system, have written constitutions with Bills of Rights. Moreover, these constitutions are all based on the same values. In fact, the drafters of the Bill of Rights of the South African Constitution⁷ have drawn extensively on the provisions of the Bills of Rights of these various constitutions.⁸ Thirdly, since the inception

⁷Act 108 of 1996.

⁸This is apparent from the reports of the Technical Committee entrusted with the task of drafting a Bill of Rights for the new South African order. See *Overview of method of work prepared by Technical*

of the interim Constitution⁹ in 1993, South African courts, in interpreting fundamental human rights entrenched in the Bill of Rights, have focused primarily on the interpretation of similar rights by courts in these particular jurisdictions.¹⁰

Section 39 of the South African Constitution¹¹ provides that in interpreting the Bill of Rights a court *must* consider international law and *may* consider foreign law.¹² In one of the first cases handed down by the Constitutional Court, the President of the court, Justice Chaskalson, recognised that in interpreting the provisions of the Bill of Rights the courts may draw on "[c]omparative 'bill of rights' jurisprudence ... particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw".¹³ However, he cautioned that although the Bill permits consideration of foreign law, the latter will not necessarily offer a safe guide to the interpretation of the provisions of the Bill of Rights.¹⁴

Committee of Theme Committee Four obtained from the Internet at <http://www.constitution.org.za> (hereinafter referred to as *Report - Theme Committee four*).

⁹Act 200 of 1993.

¹⁰South African courts have also considered the interpretation of fundamental human rights entrenched in the Constitution of Namibia. The treatment of double jeopardy issues in the Namibian system is not considered in this study because, at the time of writing of this thesis, the double jeopardy provision of the Namibian Constitution has not as yet been interpreted.

¹¹Act 108 of 1996.

¹²Section 39(1)(b and (c).

¹³See *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 37.

¹⁴*Id.*

The aspects of double jeopardy considered in this thesis have not as yet featured in international law. They have, however, featured prominently in the systems of criminal procedure considered on a comparative basis in this thesis. It is submitted that in order to consider the constitutionality of certain rules and practices of criminal procedure in South Africa which involve double jeopardy issues, the courts might benefit substantially from a knowledge of the treatment of these issues in the jurisdictions of England, Canada, India, Germany and America.

In *Park-Ross v Director: Office for Serious Economic Offences*¹⁵ a division of the Supreme Court¹⁶ recognised the value of foreign jurisprudence. However, the court (per Tebbutt J) cautioned that regard to foreign jurisprudence should be exercised "with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries ... and the different historical backgrounds against which the various constitutions came into being".¹⁷ The court added that¹⁸

one must be wary of the danger of unnecessarily importing doctrines associated with those constitutions

¹⁵1995 (2) SA 148 (C) 160F-G.

¹⁶In terms of section 166 of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996) a provincial or local division of the Supreme Court is now referred to as a High Court. The Appellate Division of the Supreme Court is referred to as the Supreme Court of Appeal. The 1996 Constitution came into force at the beginning of 1997. Therefore, where reference is made to South African cases decided at a stage before the Act came into force, the various courts will be referred to by their previous names.

¹⁷At 160G-H.

¹⁸*Id.*

into an inappropriate South African setting. The South African Constitution must be interpreted within the context and historical background of the South African setting.

In *Berg v Prokureur-Generaal van Gauteng*¹⁹ Eloff JP criticised the applicant (and to a lesser degree the respondent) for relying on decisions of *inter alia* Canadian, American and English courts without also providing comprehensive information about the systems of criminal procedure which prevail in those jurisdictions.²⁰ The court pointed out that without this information, it could not be inferred solely from the wording of a particular provision of the Bill of Rights that a foreign case was in fact of comparable value.²¹

This thesis purports to indicate which of the principles developed in foreign constitutional double jeopardy jurisprudence may be of value in developing an appropriate body of South African constitutional double jeopardy principles. The different systems of criminal procedure followed in the various jurisdictions are investigated exhaustively and full information is given of the basic procedural approaches followed in the various systems. Their double jeopardy rules are contextualised. This is done in order to identify which foreign principles of double jeopardy may be regarded as valid also in the South African system of criminal procedure and which principles cannot be reconciled with our own system of criminal justice. This research is in accordance with the suggestions made by Eloff JP in the *Berg* case.

¹⁹1995 (11) BCLR 1441 (T).

²⁰At 1445G-H.

²¹*Id.*

A valuable consequence of this study is the following. Consideration of constitutional double jeopardy jurisprudence in foreign jurisdictions reveals that certain rules have effectively protected the accused against double jeopardy, while others have been less effective and even unworkable, once applied in a practical situation.²² This study purports to highlight also the dangers and pitfalls of adopting certain foreign principles into South African law, even if these principles may be reconcilable with our own system of criminal justice.

1.2 Field and general scheme of study

In South Africa, as well as in other jurisdictions, the double jeopardy rule has featured in *inter alia* the following areas of criminal procedure

- (a) recharging of an accused in a second proceeding of the identical offence of which he has previously been acquitted or convicted
- (b) recharging of an accused in a second proceeding of a different offence to the one of which he has previously been acquitted or convicted, albeit for an offence arising from the same facts as those relating to the offence previously charged
- (c) relitigation of issues as opposed to actions (issue estoppel)
- (d) state appeals against acquittals on various grounds
- (e) state appeals against sentences imposed on convicted accused
- (f) the institution of new proceedings against accused whose convictions have been set aside by courts of appeal
- (g) imposition of a more severe sentence on appeal instituted by the accused, or on retrial

²²See for instance chapter four *infra* under 4.5.7 for the difficulties encountered by the United States Supreme Court in applying the "same conduct" test as proposed in *Grady v Corbin* 495 US 508 (1990).

- (h) substitution of a conviction for a conviction of a more serious offence on appeal instituted by the accused or on retrial
- (i) sentencing on multiple counts in a single trial
- (j) the jurisdictional relationship between courts of law and other tribunals, for instance military and prison disciplinary tribunals and
- (k) international aspects of double jeopardy, for instance convictions by foreign courts and extradition.

This thesis focuses on the most important issues that have given rise to double jeopardy jurisprudence in certain domestic areas. These areas are set out in (a)-(h) above. The thesis is divided into six parts. Part I is the introduction. Parts II-IV deal with the treatment of double jeopardy issues in the Anglo-American systems of criminal procedure, namely the English, Canadian, Indian and federal American systems. Although not wholly part of the Anglo-American systems, South African law is also discussed in this part. Part V deals exclusively with the treatment of double jeopardy issues in German law. The German law is discussed separately because of the different (inquisitorial) nature of the German system of criminal procedure. Part VI sets out the conclusions of this study. In this final part of the thesis, the writer considers whether certain prevailing rules and practices of criminal procedure which involve double jeopardy issues can survive constitutional scrutiny. This is done by investigating whether the particular rules and practices serve the values which underlie the constitutional guarantee against double jeopardy, as well as the values which underlie the Constitution as a whole. In final analysis, this thesis considers whether prevailing rules and practices which have been identified as defeating these values, may nevertheless be viewed as justifiable and reasonable limitations of the accused's right against

double jeopardy in terms of the provisions of the limitation clause.²³ The conclusions and recommendations of this study are drawn extensively from the guidelines laid down by the Constitutional Court (in interpreting other provisions of the Bill of Rights), as well as from the treatment of similar double jeopardy issues in the foreign jurisdictions under consideration in this thesis.

²³Section 36 of the 1996 Constitution. See chapter 10 *infra* under 10.5 for a detailed discussion of the criteria laid down in this provision to determine the reasonableness and justification of limitation of a fundamental human right.

PART TWO

THE PROHIBITION AGAINST DOUBLE JEOPARDY AND SUCCESSIVE PROSECUTIONS

CHAPTER TWO

HISTORICAL OVERVIEW

2.1 ROMAN LAW

The idea of a prohibition against trying a man more than once for the same offence was a fundamental principle of Roman jurisprudence. The principle found expression in the so-called doctrine of *res judicata*¹, and the relevant plea afforded the aggrieved party was known as the *exceptio rei judicatae*.²

Literally translated, *res judicata* means "matter adjudged". In essence, this is a policy which expounds that a matter, once put to an end, may not be re-opened or re-litigated. The Roman jurist Modestinus explained the principle as follows³

¹See Bower GS *The doctrine of res judicata* 1924 for a comprehensive study of this teaching (or tenet) as applied in civil and criminal law.

²The doctrine of *res judicata* as applied in Roman law is treated at length in Books 42, 44, 47 and 48 of the *Digest* compiled by Justinian. The texts from the *Digest* referred to in these paragraphs are (unless indicated otherwise), taken from the translation by Mommsen T, Krueger P & Watson A *The Digest of Justinian* Vol IV 1985.

³D42.1.1: *Res iudicata dicitur, quae finem controversarium pronuntiatione iudicis accipit: quod vel condemnatione vel absoluteione contingit*). The translation advanced by Scott SP *The Civil Law* Vol 9 1932 228 is: "By *res judicata* is meant the termination of a

An issue is said to be determined [*res judicata dicitur*] when an end is put to the dispute by the pronouncement of the judge which can be either a condemnation or an absolution.

It follows that the remedy or defence available to the aggrieved party, the *exceptio rei judicatae*, is based on the ground that the matter or question raised by one's adversary has already been adjudicated on in previous legal proceedings and can therefore not be raised once again. In Roman law, the *exceptio rei judicatae* could be raised in civil disputes as well as in criminal (or public) matters. The famous Roman jurist Paul observed as early as the third century after Christ that⁴

controversy by the judgment of a court. This is accomplished either by an adverse decision, or by discharge from liability".

⁴D48.2.14. See also Justinian *Codex* 9.2.9 (translated by Scott SP *The Civil Law* Vol 14 1932 360). This text contains a *constitutio* issued by Emperors Diocletian and Maximian (issued 289 years after Christ) which provided that "[a]nyone who has been charged with a public crime, cannot again be accused of the same crime by another person". However, in the following text (*Codex* 9.2.9.1) this statement is qualified. It provides that "[i]f several offences arise from the same act, and complaint is only made of one of them, it is not forbidden for an accusation of another to be filed by some other individual". In *Codex* 9.2.9.2 it is furthermore stipulated that "[t]he judge will grant a hearing for both crimes, as he will not be permitted to pass sentence for one of them separately before a thorough examination of the other has taken place" (Scott's translation at 360). Cf also D48.2.7.2 where Ulpian is cited as stating that "[t]he governor must not allow a man to be charged with the same offenses (*sic*) of which he has already been acquitted....". (However, he added that another person may, in exceptional circumstances, bring an accusation: if he pursued his own injury and he had not known that an accusation had previously been brought and, if there is good reason that he be allowed to bring the accusation). In D47.15.3.1 Macer is cited as stating that "if a defendant in a public proceeding asserts to his accuser that he has been previously charged with the same offense (*sic*) by someone else and been acquitted, it is provided by the *lex Julia* that the present proceedings cannot go on". The only exception made by this jurist is if collusion by the previous

[t]he senate has ruled that a person cannot be charged on account of the same crime [*idem crimen*] under several statutes [*pluribus legibus*].

At a much later stage, the Roman-Dutch writer Voet asserted that the main reason for the introduction of the exception in Roman law was to avoid the inextricable difficulties which could arise if different courts gave different (or perhaps) mutually contradictory decisions on the same topic.⁵ However, Roman texts also reveal a concern that an end should be brought to matters or disputes; the underlying idea being that the community ought to be protected against what may be regarded as oppressive multiplication of suits namely, that the same thing be demanded twice.⁶

This brings us to the Roman understanding of the concepts "same thing", "same cause of action" or "same offence". The basic rules emerging from the texts may be summarised as follows. The *exceptio rei judicatae* could be invoked if the subject matter of the *res judicata* and of the subsequent action dealt with the same issue or question

accuser could be proved.

⁵Voet J *Commentarius ad Pandectas* translated by Gane P *The Selective Voet being the Commentary on the Pandects* Vol 6 (1957) 553.

⁶In D50.17.57 Gaius is cited as stating that "[g]ood faith does not permit of the same thing being demanded twice" (*Bona fides non patitur ut bis idem exigatur*). Other texts which demonstrate a concern that matters be brought to an end are *Codex* 7.1 (providing that "[a] judicial decision should be adhered to..." and *Codex* 7.4 stating that "[i]t is a bad precedent to revive a case which has been decided under the pretext of the discovery of new documents..." Scott's translation Vol 9 195). D 50.17.207 expresses the inevitable consequence of this premise: "[a] matter once adjudged is accepted as the truth" (*res judicata pro veritate accipitur*).

(*eadem questio*). The Roman jurist Ulpian, for instance, made the following observation⁷

And generally ... the defence of *res judicata* avails whenever the same issue (*eadem questio*) is raised again between the same persons, *albeit in a different kind of action*.

That the form of action as such did not determine the identity or sameness of the subject-matter also emerges from other texts.⁸ Paul, for instance, placed emphasis on the "same ground of complaint" (*eadem causa petendi*). He is cited as stating that the criteria are⁹

... the same ground for claiming (*eadem causa petendi*) and the same parties; unless all these exist together, it is a different issue.

The jurist Ulpian is also cited as claiming that¹⁰

⁷D44.2.7.4 (my emphasis).

⁸The same rule as appears in D44.2.7.4 is stated (in slightly different language) in D44.2.3 & 44.2.5.

⁹D44.2.14. Bower 220 expresses the view that the relevant texts all indicate that the words *eadem causa petendi* refer to the "same ground of complaint", and not the "form of action or remedy". He refers to D44.2.5 where Ulpian gave the example of a person prohibited from bringing an action on mandate following an action of *negotiorum gestorum* (based on the same complaint). These Roman texts were interpreted on the same basis by Steyn CJ in *African Farms & Townships v Cape Town Municipality* 1963 (2) SA (A) 555, 562B. See chapter four *infra* under 4.6.9, text at note 586 for a detailed discussion of the interpretation of Roman principles of *res judicata* in that case.

¹⁰D44.2.7.

[i]f a person should claim a part after he had claimed the whole, the defence of *res judicata* bars him; for the part is included in the whole, for it is considered to be the same issue even if a part is claimed of that which was claimed in its entirety.

He illustrated this principle by giving examples from private law. However, as will become clear from the comparative study of current law on the topic, this principle has also been widely recognised in the field of criminal law.¹¹

These were the most important Roman texts which were built on in Roman-Dutch law. The interpretation and application of these principles in Roman-Dutch law will be analysed in the following paragraphs.

2.2 ROMAN-DUTCH LAW

The doctrine of *res judicata* as introduced and applied in Roman law was further refined by Roman-Dutch jurists. The most important contribution in this field of law was undoubtedly made by the jurist Voet.¹² According to Voet, the *exceptio rei judicatae* lies when a dispute which has been brought to an end (*lis terminata*) is again set in motion between the same persons about the same thing and/or the

¹¹Cf chapter four *infra* under 4.2.1 (text at note 17) and 4.5.5 (text at note 269) for references to the "lesser included offence" doctrine applied in the common law and the law of the United States.

¹²Voet's treatment of the topic in his *Commentarius ad Pandectas* Book 42 is described by the translator (Sir Percival Gane) as one of his best titles. The *exceptio rei judicatae* is focused upon in Book 42. All subsequent references to texts by Voet are, unless indicated otherwise, taken from the translation by Gane.

same cause for claiming (*ex eadem petendi causa*).¹³ It is available "to a defendant who has been absolved by judgment of a judgewhether he has been absolved in a private or in a popular or in a public or criminal proceeding".¹⁴ As pointed out above, Voet held the view that the doctrine was adopted to prevent inconsistent and contradictory decisions.¹⁵ However, he also recognised the need for such a defence on the basis that principles of equity require that an end be brought to legal proceedings.¹⁶

Voet's understanding of the "same thing" can be explained as follows. A thing is the same "as often as what is sought before the earlier judge is sought before the later judge".¹⁷ However, the thing need not be *precisely* the same. The defence may also be raised where a part is claimed of something which has been claimed in whole, or the thing claimed has been increased or lessened.¹⁸ For the purposes of criminal law, Voet's explanation of the "same cause of action" (*causa petendi*) is vital. He explained the concept in the

¹³Voet 44.2.3. He added that the defence falls away if one of these three things is lacking.

¹⁴Voet 44.2.1, relying upon D48.2.7.2 (discussed *supra*, note 4).

¹⁵Voet 44.2.1. See *supra*, text at note 5.

¹⁶See Voet 44.2.2: "Moreover, the pleading of this exception is needful because a decision given on behalf of a defendant does not *ipso jure* destroy the action for the plaintiff. Thus since that action can in strict law be raised over again, it had to be smashed by the fair means of an exception". Voet also recognised the consequences of this premise. He reiterates (44.2.1) that "the only question is whether there was a judgment, for the reason that a matter adjudged is considered the truth".

¹⁷Voet 44.2.3.

¹⁸Voet 44.2.3.

following terms¹⁹

The cause for claiming is the same even though steps are not taken by the same class of action, but the same question is aired by another form of judicial proceeding, since it is not so much the action, as rather the source of the claim [*origo petitiones*] which makes a cause the same.

The meaning of the "same cause of action" as advanced by Voet has been regarded as authoritative in South African private as well as criminal law.²⁰

Other Roman-Dutch jurists who contributed in this particular field of law were Huber,²¹ Vinnius,²² Grotius²³ and Van der Keessel.²⁴ Van der Keessel made certain comments on some of the Roman texts which are worth discussing in some detail.²⁵ He stated that if a person has been charged by someone and placed on the roll of accused, he cannot be prosecuted by another unless the first

¹⁹Voet 44.2.4.

²⁰See the *African Farms Townships* case discussed in chapter four *infra* under 4.6.9, text at note 586 and *S v Vermeulen* 1976 (1) SA 623 (C) discussed in chapter four *infra* under 4.6.9, text at note 581.

²¹Huber U *Heedendaegse Rechtsgeleertheyt* 1742. Reference to this work is taken from the translation by Gane P under the title *Jurisprudence of my Time* 5th ed 1939.

²²Vinnius A *Institutionum Imperialium Commentarius* 1726.

²³Grotius H *Inleiding tot de Hollandsche Rechtsgeleerdheid* 1767.

²⁴Van der Keessel DG *Praelectiones ad Ius Criminale* translated by Beinart B & Van Warmelo P *Dionysius Godefridus Van der Keessel Lectures on Books 47 and 48 of the Digest* Vols 1,2 & 5 1969, 1972, 1978.

²⁵These particular texts are *D48.2.11.2* and *Codex 9.2.9*.

prosecutor had discontinued or had procured a withdrawal of the case,²⁶ or, unless another offence is inherent in the same act.²⁷ He added that in the last-mentioned instance, "the judge ought to pronounce upon both matters simultaneously".²⁸ Van der Keessel also stated that an accused may be charged again if there has been some contravention of a matter which relates to the procedure, for instance, if the indictment has not been correctly drafted.²⁹ A person "already acquitted by judgment of the court" would, however, in Van der Keessel's view, "much less be able to be prosecuted by another".³⁰

He also elaborates upon the Roman jurist Paul's statement that "[i]f one crime is punished under several statutes, the accused can be charged only under one of them".³¹ He suggests that the rule only

²⁶For this statement, he relies upon *D48.2.11.1* where Macer is cited as stating that "[s]omeone cannot accuse a person who has been accused by another but if that person is removed from the list of those charged, whether because of a public or private amnesty or because of the withdrawal of the accuser, another person is not forbidden to accuse him."

²⁷Beinart & Van Warmelo translation Vol 2 563. Van der Keessel relies upon *Codex 9.2.9.1* for this statement. (See note 4 *supra* for the wording of this particular text).

²⁸*Id* (relying upon *Codex 9.2.9.2*. See note 4 *supra* for the wording of this text).

²⁹Beinart & Van Warmelo translation Vol 1, 2019. He relied upon *D48.2.3.1* which provides as follows: "... if the documents of indictment are not set out in legal form, the name of the one charged is deleted, and there shall be power to renew the charge all over again".

³⁰*Id*. He referred to *D48.2.7.2* (set out in note 4 *supra*), adding that Ulpian made room for certain exceptions to this rule. (See note 4 *supra* for Ulpian's qualifications in this regard).

³¹*D48.2.14*. See text at note 4 *supra*.

forbade that a private as well as a public action (based on the same act) be instituted.³² He gives the following example. Violence is punishable as public violence and private violence under Julian law. In his view, if an act "falls foul of both statutes" (public and private violence), an accused may be prosecuted only for one. However, this rule did not prohibit (in his view) an accused being prosecuted by way of *public actions* for several crimes under the same statute, or under different statutes.³³

³²*Id.* See Joubert CP "Nemo debet bis vexari pro una et eadem causa" *Huldigingsbundel Paul Van Warmelo* (red J Van der Westhuizen *et al*) 110, 110-111 1984 for a brief exposition of common features of Roman public and private actions. The author (and honorable judge) points out that Roman private (delictual) actions (like, for instance, the *actio furti* and the *actio iniuriam*) also contained an element of punishment. Another common feature (of public and private actions) was that both could be instituted by any aggrieved private party. (Public actions were instituted for crimes, for instance, murder, kidnapping, bribery, adultery etc.)

³³Beinart & Van Warmelo 565. Van der Keessel's view seems to be that one act could give rise to several prosecutions by way of public actions but that prosecutions (based upon the same act) by way of private *and* public actions were prohibited. Joubert gives a different interpretation to these texts (*D48.2.14* and *Codex 9.2.9 & 9.2.9.1*. See note 4 *supra* for the contents of these texts). Although he also concludes that Roman law in fact allowed prosecutions for several crimes arising from the same act, he added that multiple prosecutions were only allowed if each crime charged violated a different legal interest. Joubert bases his conclusion upon comments made upon these texts by the medieval jurist Bartolus. In dealing with the meaning of the concept *idem crimen* in *D48.2.14*, Bartolus distinguishes between crimes which are *eiusdem generis* and crimes which are *diversi generis*. Multiple prosecutions were (according to Bartolus) allowed for crimes which were *diversi generis*. In Joubert's view, crimes which were *diversi generis*, were, in fact, crimes which violated different legal interests. (See Joubert 113-116).

The treatment of the topic by Huber, Vinnius and Grotius are the same as that advanced by Voet.³⁴ A detailed discussion of the relevant texts by these writers is therefore not necessary.

2.3 ENGLISH LAW

2.3.1 General³⁵

Unlike the position in Roman law, the existence of a double jeopardy prohibition cannot be demonstrated to be deeply rooted in English law.

³⁴Huber 5.38.4 reiterates that "to justify the exception, it is necessary that the persons should be the same, the things the same and the causes of action the same". He adds that if one of these things is different, then it is fair that a new action should be allowed, since then, "it cannot be said that the same question has been previously disposed of" (Gane's translation 338). Vinnius 4.13.5 also emphasised the identity of the question which is again raised. He stated: *Haec autem exceptio non aliter agenti obstat quam si eadem questio inter easdem personas revocetur; itaque ita demun nocet si omnia sunt eadem, idem corpus, eadem quantitas, idem jus; eadem causa petendi, eademque conditio personarum.* (Freely translated: But this plea does not stand in the way of the litigant otherwise than if the same complaint is lodged again between the same persons; thus in this manner it may only bring harm [to the litigant] if all things are the same, the same matter, the same quantity, the same right, the same cause of action, the same personal circumstances). Grotius 3.49 merely makes the general statement that "[v]erzet van vonnisse ofte gewysde zake heeft plaets wanneer de zelve zake by de zelve, van de zelve, uyt de zelve oorzaken werd geeycht, waer over vonnisse ist gestreken, ende gegaen in kragte van gewysde". He adds that "[d]e zelve zake werd ook verstaen te zyn, wanneer 't geheel eerst zynde geeycht, daer na een deel werd geeycht".

³⁵The following discussion of the early development of double jeopardy draws largely on Friedland ML *Double Jeopardy* 1969 5-16; Sigler JA *Double Jeopardy - The development of a legal and social policy* 10th ed 1969 1-21 (hereinafter referred to as Sigler *Double Jeopardy*); Sigler JA "A history of double jeopardy" *The American Journal of Legal History* vol 7 1963 283-298 (hereinafter referred to as Sigler *History*) and Hunter J "The development of the rule against double jeopardy" *The Journal of Legal History* Vol 5 1984 3-19.

Legal historians speculate that it initially found its way into English law through the Canon law introduced in England after the Norman Conquest or by the introduction of the Roman law principle of *res judicata* in civil and criminal law during the latter half of the twelfth century by teachers of Roman law at Oxford.³⁶

In early church law, the principle arose that God does not punish twice for the same transgression.³⁷ During the latter half of the twelfth century, Archbishop Thomas à Becket opposed the judicial system introduced by Henry II that clerks convicted in ecclesiastical courts could also be punished for the same transgressions in the King's courts.³⁸ After the murder of Becket in 1176, King Henry abolished these laws. Friedland suggests that this clash between the

³⁶See Friedland 5-6 and Sigler *Double Jeopardy* 3. The latter author observes that speculation on this point is difficult to resolve since "most of Western law derives from a common fund of shared judicial concepts".

³⁷Friedland 5 explains that this principle, well known in ecclesiastical law, stemmed from St Jerome's comment in AD 391 on the prophet Nahum: "For God judges not twice for the same offence". As a matter of interest, Sigler *History* (284 note 6) mentions that no reference to double jeopardy is to be found in the Babylonian Code of Hammurabi or in Talmudic law. According to his research, the concept is however briefly mentioned in the Hebrew law. The author concludes that the "alleged universality" of the double jeopardy principle is not apparent from a study of early law.

³⁸In the Constitutions of Clarendon clause (iii) January 1164, Henry II declared that a clerk suspected of committing a criminal offence would be arraigned and accused in the King's court to enable the accusation to be brought to the attention of the King's officials. Thereupon, he would be sent to the ecclesiastical court for trial and, if found guilty, stripped of his clerical status and returned to the King's court for punishment - death and forfeiture of all his property to the King. This allowed the church to punish its own members. However, once punished by the church, they could not lawfully be excluded from the King's jurisdiction. Therefore, these enactments allowed double punishment, not double trials. See Hunter 6.

state and the church and the subsequent concession by King Henry (following Becket's murder) that clerks convicted in ecclesiastical courts were exempt from further punishment in the King's courts, "probably was primarily responsible for bringing about the concept of double jeopardy in common law".³⁹

Be that as it may, the abolition of these laws established the immunity from secular law enforcement known as the "benefit of clergy" which meant that the church could bring justice to its own members. An even more significant aspect of this occurrence in English legal history was that it prevented the establishment of dual sovereignty over a multitude of crimes - a situation which "would have retarded the development of the protection against double jeopardy for centuries".⁴⁰

However, despite this important breakthrough and the fact that Roman law was introduced at Oxford at more or less the same time, no reference of the concept of double jeopardy appears in the Magna Carta, adopted in 1215. Hunter therefore expresses the alternative view that the protection against double jeopardy evolved during the Middle Ages as a statement of procedure, rather than as the product of post-Norman conquest immigration.⁴¹ Hunter made a comprehensive study of the development of the rule against double jeopardy in medieval criminal procedure.⁴² From this study, she concludes that the rule against double jeopardy never attained the

³⁹At 6.

⁴⁰See Hunter 5.

⁴¹At 7.

⁴²See *supra* note 35. Her research on medieval criminal procedure is far more extensive than that of Sigler or Friedland.

status of a fundamental legal right in post-Norman Conquest England.⁴³ Instead, she proposes that the rule gradually developed in English law during the Middle Ages to prevent abuses of the court's process.⁴⁴ The following discussion of the development of criminal procedure during the Middle Ages will demonstrate that Hunter's thesis is plausible.

In the thirteenth century, the first signs of the idea of a former judgment barrier offering partial protection from re prosecution were apparent in English legal practice.⁴⁵ It was from this time on, and particularly during the late Middle Ages, that abuse of process became particularly acute in English law. In order to understand why, it is necessary to explain the nature of substantive criminal law and the state of criminal procedure before and after this period.

As in Roman law, no clear distinction was drawn between civil and criminal cases in early Anglo-Saxon law; a distinct feature of Anglo-Saxon criminal procedure was that suits were initiated by private persons. Since a true double jeopardy situation involves a limitation upon state power, *viz* the power of bringing a criminal suit, criminal procedure must, therefore, have developed to a point where the state has the power to conduct criminal action at its own discretion. The separation between the area of criminal law and civil law began to

⁴³Hunter 7.

⁴⁴*Id* note 26. The author cites Lord Pearce in the landmark decision of *Connelly v DPP* (1964) AC 1254, 1362 that "[i]t was no doubt, to meet these two abuses of criminal procedure [ie repetition of charges after an acquittal or after a conviction] that the court from its inherent power evolved the pleas of *autrefois acquit* and *autrefois convict*".

⁴⁵See *infra*, text at note 49.

develop, albeit very slowly, from the end of the thirteenth century.⁴⁶ The King independently began to institute action against an alleged transgressor of substantive criminal law, as substantive criminal law developed as a separate branch of the law. However, a private person could still institute action if he showed a special harm or grievance.⁴⁷ A suit by a private person usually yielded damages, while the King's suit could result in harsher punishment for those found guilty. Consequently, there developed a system of dual prosecutions. These were respectively known as the appeal of felony⁴⁸ and the King's indictment.

In the thirteenth century, the practice developed that a judgment of acquittal or conviction for a transgression brought by a private person by means of appeal of felony, barred a further suit by the private person, and a judgment in a suit brought on indictment by the King barred a further suit by the King.⁴⁹ For the protection to attach, the appeal must have been on the merits, that is in the case of trial by battle, victory to the appellant or duelling until the stars appeared, or in the case of inquest by a jury, a verdict of acquittal.⁵⁰ Since

⁴⁶See Sigler *History* 287.

⁴⁷*Id.*

⁴⁸The meaning of the word *appeal* during this time denotes a prosecution brought by a private person. The mode of trial *appeal by felony*, created by the Normans, perpetuated the ancient concept of private prosecution. This mode of trial became obsolete during the sixteenth century. However, it was only abolished finally by the legislature in 1819. See Walker RJ *The English Legal System* 1985 6th ed 15 hereinafter referred to Walker 1985 ed.

⁴⁹See Friedland 8.

⁵⁰See Hunter 9. The author relies on Bracton's description in 1250 of the appeal procedure as set out in Woodbine GE *Bracton on the Laws and Customs of England* 1968 Vol 2 400.

conviction for a felony carried a mandatory death penalty, the plea of *autrefois convict* was irrelevant during this period.⁵¹ If the appeal failed in the pleading stage, or the appellant retracted or defaulted on his appeal, the appellee (the defendant) could not plead a previous acquittal because the first appeal had not been determined on the merits.⁵² However, the appellant himself could not bring the appeal a second time in these circumstances.⁵³ Nevertheless, the protection against double jeopardy was limited; any other individual who had detailed first hand knowledge of the case could still proceed with an appeal.⁵⁴

However, during this period (the thirteenth century) and also during the fourteenth century, a suit by an appellant (a private person) would not bar a suit by the King, and vice versa.⁵⁵ Despite this apparent denial of double jeopardy protection in the context of dual prosecutions during this time, Hunter explains that the practice did not prevail unqualified.⁵⁶ According to her assessment of the law which prevailed at this stage, the King could only proceed to institute action when the appellee (the defendant) had avoided the appeal at committal stage or prior to trial; in other words, if the appellant's case failed

⁵¹See *id* note 37.

⁵²*Id.*

⁵³Hunter speculates that this was presumably prohibited because it would "leave the system open to vexatious and time-consuming litigation" (at 9).

⁵⁴Later the appeal was only available to the victim, or in the case of murder, to the heir or widow.

⁵⁵See Friedland 8-9.

⁵⁶At 11.

*without a proper trial on the merits.*⁵⁷ She expresses the view that the King would only step in if the allegation remained unanswered through lack of alternative prosecuting appellants.⁵⁸

Nevertheless, it later became the practice that if no appellant (private person) had prosecuted the crime within a year and a day of its commission, the King could proceed by indictment. Although the right of private prosecution was still considered an important fundamental right, the growth of the state administration and the obvious benefit to the state of controlling prosecution, conflicted with this medieval idea. Therefore, from 1350-1482, there arose a gradual acceptance of the King's premature indictment and a consequent rejection of the year and a day rule. As a result, the practice was established of allowing an acquittal on the indictment to establish a bar to a later appeal.⁵⁹ In fact, in the early fifteenth century, it was settled by statute that an acquittal on an indictment was a bar to a prosecution for the same offence by appeal and that an acquittal after a jury trial on charges initiated by appeal was a bar to a subsequent indictment.⁶⁰

⁵⁷The author relies on the writings of Bracton as set out by Woodbine 402 and Britton's assessment of the law during this period as set out by Nichols FM *Britton* 1901 94 [1, 44b 5] and [1, 41b]. See Hunter 9 notes 36 and 37.

⁵⁸Hunter 11.

⁵⁹See Hunter 12.

⁶⁰See Friedland 9 note 5. The author cites 14 Ed 3 (RS) 154 (61) (1340) and (in note 4) p 9 Hen 5, f 2, pl 7 (1421).

However, in 1482 the judiciary insisted on observation of the year and day rule in instances of homicide.⁶¹ Obviously, this step was disapproved of by the executive. Therefore, in order to balance the desire of the crown to take over the prime prosecuting role with the medieval right to private revenge in homicide cases, an Act was introduced in 1487 to allow the King to proceed in the case of homicide before an appeal had been brought *without* thereby affecting the right of the individual to bring an appeal if the defendant was acquitted.⁶² In all other cases, the plea of previous acquittal would bar a second prosecution.

During this period (the fifteenth century), jeopardy attached at the stage when the defendant had pleaded not guilty.⁶³ However, if a jury was discharged, the defendant could be tried again despite the fact that the jury was discharged after he had pleaded not guilty.⁶⁴

During the sixteenth century there was very little development of double jeopardy principles in English legal practice. The only significant event was the decision of the King's Bench in *Vaux's*

⁶¹See Hunter 12 note 53. She cites (1482) 22 Ed 1V Fitz Cor 44: "Note that all the judges of both benches said that it was their common opinion if one be indicted for the death of another, that he should not be arraigned within a year for the said felony at the King's suit, and they counselled all the lawyers to execute this point without variance so that the suit of the party might be saved".

⁶²3 Hen VII, c 1 cited by Friedland 9 note 6. This statutory exception (which was only abolished by the legislature in 1819) became "totally anachronistic to eighteenth and nineteenth century criminal jurisprudence". See Hunter 12.

⁶³See Sigler *History* 294.

⁶⁴*Id.* A jury is discharged by the court if its members cannot agree on the verdict.

case.⁶⁵ William Vaux, indicted for murder, answered that he had previously been indicted and acquitted for the same offence. However, the court held that because the first indictment had been defective in form (it did not aver that the deceased had received and had drunk the poison), Vaux was not entitled to a plea of *autrefois acquit*.⁶⁶ The court argued as follows

When the offender is discharged upon an insufficient indictment, there the law has not had its end; nor was the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offences should go unpunished ...⁶⁷

The justification for a subsequent prosecution advanced in *Vaux's case*, namely that the offender was never in jeopardy of a conviction at the previous trial, was approved of and confirmed in the mid-nineteenth century case of *R v Drury*.⁶⁸ In that case the accused was re-indicted for the same offence on reversal of his conviction by a Court of Error on the ground of a technical error in the original indictment. The court rejected his plea of *autrefois acquit*, proceeding on the principle suggested in *Vaux's case* that "in such a case [conviction upon a defective indictment] the prisoner has never been in jeopardy".⁶⁹ The court explained that

[t]he true meaning therefore of "not having been in jeopardy" in this rule seems to be that, by reason of some defect in the record, either in the indictment, place

⁶⁵4 Co Rep 44a, 76 Eng Rep 992 (KB) (1591).

⁶⁶At 993.

⁶⁷At 994.

⁶⁸(1849) 3 Car & K 193, 175 ER 516.

⁶⁹At 519.

of trial, process or the like, the prisoners were not lawfully liable to suffer judgment for the offence charged on that proceeding...

The introduction in the nineteenth century by the legislature of powers to amend indictments, to enable the courts to turn a defective indictment into a good one, either by correcting a defect apparent on the face of the indictment or by making the facts alleged in the indictment correspond with the proof, did not (as could have been expected) bring about any change in this approach.⁷⁰ In *Regina v Green*⁷¹ the court held that when the accused is acquitted because of some defect in the indictment (*in casu* the ownership of the goods stolen was laid in the wrong person), the accused can be tried again despite the fact that the indictment could have been amended. The court per Erle J argued that

[w]ith reference to the plea of *autrefois acquit* we must consider what the indictment was and not what it might have been made. The Judge was not bound to amend, he did not amend and the prisoner was acquitted upon an indictment upon which she was never in peril of a conviction.

These decisions left their mark on present Anglo-American double jeopardy jurisprudence. The rule that a discharge on a defective indictment does not prohibit a subsequent prosecution for the same offence (even if the indictment could have been amended), still forms part of the law of criminal procedure of the majority of Anglo-American legal systems under consideration in this comparative study.⁷²

⁷⁰See Friedland 69.

⁷¹Dears and Bell 113, 169 ER (1856) 940.

⁷²See in general chapter three *infra*.

To return to significant events which occurred during the sixteenth century: another occurrence during that period which is worth mentioning, is that the first legal textbook which contained a detailed description of the pleas in bar was published. Using the Norman-French labels, the author Staunford, in his work *Les Plees Del Coron*,⁷³ presented the pleas in bar of *auterfoitz acquite* (previous acquittal), *auterfoitz convict* (previous conviction) and *auterfoitz attainit* (previous attainder and punishment) as principles of law.⁷⁴ Staunford did not mention the requirement that for the first jeopardy to attach, there need be an acquittal on the merits (as required by Bracton).⁷⁵ However, he averred that an acquittal based on an error of law does not found a plea of *autrefoitz acquite*.⁷⁶ Staunford also acknowledged that the offences must be the same, but made no analysis of the issue of identity of a crime. According to the author, the pleas could only be raised if a person's life was in jeopardy. Therefore, they were limited to felonies which carried the mandatory death sentence.

During the 17th century, the concept of double jeopardy as set out in the different pleas of *autrefois acquit*, *autrefois convict* and *autrefois attainit* was described in detail by two prominent English

⁷³This work, published in 1557, was reproduced by London Professional Books 1971 ed II. See Hunter 13-14 who gives a detailed account of the writer's exposition of the pleas in bar.

⁷⁴Hunter 13.

⁷⁵See *supra*, text at note 57.

⁷⁶Staunford 105a. This was probably the basis of *Vaux's case* 34 years later. (See *supra*, text at note 65 for a discussion of *Vaux's case*).

writers of this century, Edward Coke⁷⁷ and Matthew Hale.⁷⁸ Unlike subsequent versions, the pleas as set out by Coke pertained to criminal matters only; a clear indication of recognition of the importance of protection of the individual against arbitrary exercise of state powers. Hale's treatment of the pleas was even more extensive than that of Coke. However, the pleas as set out by both these writers are not the same as understood in contemporary doctrine; the plea of *autrefois acquit* remained tied to the benefit of clergy and both *autrefois attainé* and the effect of the pardon ranked equally in importance with the plea of *autrefois acquit*.

The rule that a previous acquittal barred a subsequent prosecution was applied frequently by the English courts during the seventeenth century. In 1660, the Court of King's Bench held that the crown prosecutor had no right to seek a new trial after an acquittal.⁷⁹ Subsequent cases confirmed the principle that no new trial would be granted following an acquittal.⁸⁰ For instance, in *R v Jackson*,⁸¹ the court denied a motion for a new trial following an acquittal for perjury. This case is an early example of application of double jeopardy principles in misdemeanour cases (cases for less serious offences). The court reporter explained simply that the new trial motion was

⁷⁷See Coke EL *The Third Part of the Institutes of the Laws of England* (1644 ed) 212-214 (referred to as Coke 1644 ed).

⁷⁸See Hale M *The History of the Pleas of the Crown* 1736 ed reprinted 1971 Vol II Chapters XXXI; XXXII; XXXIII and LV (first published in 1713 - 40 years after his death).

⁷⁹*R v Read* 1 Lev 9, 83 Eng Rep 271 KB (1660). The fact that the defendant assented to the new trial was not explained.

⁸⁰See *R v Jackson* 1 Lev 124, 83 Eng Rep 330 KB (1660); *R v Fenwick & Holt* 1 Keb 546, 83 Eng Rep 1104 (1663) and *R v Davis* 1 Show 336, 89 Eng Rep 609 KB (1691).

⁸¹*Supra*.

denied "...it being in a criminal case, wherein the party being once acquitted, shall never be tried again".⁸²

A hundred years after Coke published his *Institutes*, the important eighteenth century English writer Blackstone reiterated in some detail the pleas referred to by Coke.⁸³ Blackstone explained the plea of *autrefois acquit* as follows

First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.⁸⁴

Likewise, Blackstone explained that a plea of *autrefois convict* or former conviction "for the same identical crime,... is a good plea in bar....And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime".⁸⁵

⁸²At 330.

⁸³See Blackstone *W Commentaries on the Laws of England* Vol 1V 18th ed 1829 chapter XXVI (text based on the 1788 ed).

⁸⁴At 334. Blackstone notes (at 335) the exception that, in homicide cases, an acquittal following an indictment did not, in principle, bar a future prosecution by way of common law appeal. However, he states earlier (at 316 notes 20-21) that by his time, private appeals had "become nearly obsolete".

⁸⁵At 335-336. The author also refers (at 336-337) to the pleas of *autrefois attain* and pardon as of equal importance during this time.

In eighteenth century England, it was settled that the pleas of *autrefois acquit* and *autrefois convict* could only be raised after an actual verdict of acquittal or conviction.⁸⁶ In general, this rule still applies today.⁸⁷ A consequence of the retention of this rule is that the early English practice that a defendant can be recharged after a jury discharge still forms part of English law today.⁸⁸

At the end of the nineteenth century, contemporary principles of double jeopardy were established in English law. A person charged with an offence could raise the pleas of *autrefois acquit* or *autrefois convict* if he had previously been convicted or acquitted of the *same* offence, irrespective of whether the conviction or acquittal was on indictment or summary (in other words the principle applied to serious as well as less serious offences), provided that it was on a valid indictment, before a court of competent jurisdiction and after a hearing on the merits.⁸⁹

2.3.2 The development of the concept "same offence"

As the above discussion of English case law demonstrates, the main issue with which courts were confronted up to the eighteenth century

⁸⁶See *Turner's case* 89 Eng Rep 158 (1776).

⁸⁷See chapter three *infra* under 3.2.1.

⁸⁸See chapter three *infra* under 3.2.2.

⁸⁹See Archbold JF *Archbold's Pleading, Evidence and Practice in Criminal Cases* 22nd ed 1900 155-163 (hereinafter referred to as Archbold 1900 ed.) As indicated above, the right of a private party to institute action for homicide was abolished in 1819 by the legislature. Furthermore, in the course of the nineteenth century, a successful reliance on the pleas of *autrefois acquit* and *autrefois convict* were no longer dependent on the so-called "benefit of clergy". The plea of *autrefois attain* also became obsolete in the latter half of that century (see Archbold 1900 ed 162).

was whether a second prosecution for *precisely* the same offence was barred in terms of double jeopardy rules. The problematic issue which courts have to deal with in modern times, namely whether a prosecution for a *separate* legal offence arising from the same factual transaction as already adjudicated on in a previous trial for a different legal offence should be barred on double jeopardy grounds, did not arise before the eighteenth century. In order to understand why, it is necessary to describe once again certain features of English criminal procedure which prevailed before the eighteenth century.

During the Middle Ages, the number of legal categories of criminal offences was relatively small and the scope of each offence was comparatively large.⁹⁰ In view of the paucity of separate legal categories of criminal offences during this period, the entire criminal transaction was set forth in indictments.⁹¹ Consequently, when the

⁹⁰For instance, at the end of the thirteenth century there were only nine felonies. All of these were punished severely - a judgment of "life or member". (See Pollock F and Maitland FW *The History of English Law before the time of Edward I* 2nd ed 1898 reprinted 1968 470). By Coke's time the number had increased to twenty seven, and in Blackstone's time there were one hundred and sixty. (See Stephen JF *A History of the Criminal Law of England* Vol II (1883) 219 hereinafter referred to as *Stephen Criminal Law*.) Most of these increases in the eighteenth century were in the field of larceny because many forms of theft which came to be recognised (for example embezzlement of an employer's goods), did not fall into any common law category. See in general Comment: "Statutory implementation of double jeopardy clauses: new life for a moribund constitutional guarantee" *The Yale Law Journal* Vol 65 1956 339, 342 (hereinafter referred to as "Comment: statutory implementation of double jeopardy clauses").

⁹¹One fourteenth century indictment (taken from Putnam *Proceedings before Justices of the Peace* cxxxiii (1938)) alleges in six lines of Latin that the prisoner raped the prosecutor's wife and abducted her and carried off his goods and chattels. See "Comment: statutory implementation of double jeopardy clauses" 342 which refers to this example.

courts developed the rule barring a second prosecution for the "same offence", they did not distinguish between the legal theory of an offence and the underlying factual situation.⁹² The law was concerned more with evidentiary facts than with definitions of "offence". Gradually, as the number of offences increased, indictments also increased in length, technicality and number of counts.⁹³ However, the indictment still described everything the accused had allegedly done. Therefore, when courts considered the validity of a plea of former jeopardy, the judges in practice compared prior and subsequent indictments and if the *facts* alleged in the second had been set forth in the first, the plea was sustained. For instance, in *Rex v Segar and Potter*⁹⁴ the defendants were acquitted of burglary (breaking and entering followed by theft at night) on the ground that the breaking and entering took place in the day-time. On a subsequent attempt to indict them for larceny of the same articles during day-time, the court held that "they could not be indicted a-new (*sic*) for the *same fact*".⁹⁵

During this period there was little incentive for prosecutors to subject an accused to two trials; the conviction rate was high, the conviction of a felony meant death or deportation and when a criminal transaction did give rise to more than one offence, the prosecutor was not forced by the court to elect on which count he was to proceed. Also, the courts were more inclined to permit a finding of a lesser

⁹²See "Comment: statutory implementation of double jeopardy clauses" 342.

⁹³See Stephen *Criminal Law* Vol 1 280-282.

⁹⁴Comb 401, 90 Eng Rep 554 KB (1696).

⁹⁵At 554 (my emphasis).

offence when a felony was charged.⁹⁶ However, these rules ceased to apply in the eighteenth and nineteenth centuries. As the number of offences increased, it became customary to frame pleadings in terms of legal theories rather than factual transactions. In addition, rigid technicalities of pleading and proof were introduced in eighteenth century English criminal procedure. No provision was made for possible amendment of an indictment after trial commenced. The result was that the slightest variance between what was alleged in the indictment and what was proved, often gave rise to acquittals which had nothing to do with the merits of a case.⁹⁷

As it was felt that these strict rules of pleading and proof unduly advantaged the accused, the courts began to permit re prosecution on the same facts but under a different legal theory. This was first achieved by introduction of the "same evidence" test in the case of *The King v Vandercomb & Abbot*⁹⁸ at the end of the eighteenth century. In that case, the defendants were charged with burglary (nocturnal breaking and entering followed by larceny). They were acquitted because there was no proof that any of the goods had been stolen during night-time (an element of the offence of burglary at that time).⁹⁹ In fact, it appeared from the evidence at trial that, although they had broken into the dwelling-house at night-time, the larceny had actually been committed on a prior day. A second indictment was then brought which charged the defendants with breaking and entering with

⁹⁶See in general Friedland 90-91.

⁹⁷See Stephen *Criminal Law* Vol 1 283-284 & Kirchheimer O "The act, the offense (*sic*) and double jeopardy" *The Yale Law Journal* 1949 Vol 58 513, 529.

⁹⁸2 Leach 708, 720, 168 Eng Rep 455, (1796).

⁹⁹At 457 the court stated that "the form of the indictment decides the question".

intent to steal. On this charge there was no need to prove any actual larceny. The accused raised the plea of *autrefois acquit*. The court rejected this contention and convicted the accused of the crime charged in the latter indictment. In order to justify a second prosecution (and subsequent conviction) based upon the same factual transaction, Buller J formulated the "same evidence" test. He ruled that

[u]nless the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.¹⁰⁰

Therefore, since the accused could not be convicted on the first indictment (burglary) on proof of mere breaking and entering with the intent to steal (the proof required for a conviction on the second indictment), the subsequent prosecution for breaking and entering with intent to steal was allowed in terms of this test.

The "same evidence" test as formulated by Buller J was neither clear nor accurate.¹⁰¹ Friedland observes that the proposed test did not specify whether it referred only to the principal offence charged in the first indictment, or also to lesser offences of which the accused could be found guilty on the first indictment.¹⁰² He explains that if the test could only be applied to the principal offence charged in the first indictment, it would lead to the unreasonable result that a person acquitted or convicted of rape, for instance, could be convicted of indecent assault on a second indictment - the evidence which is necessary to procure a conviction of indecent assault is obviously not

¹⁰⁰At 461.

¹⁰¹See Friedland 98-101 for a comprehensive analysis of the *Vandercomb* test.

¹⁰²*Id.*

sufficient to procure a conviction of rape. On the other hand, Friedland expresses the point of view that the test would offer too much protection if it applied to lesser included offences which could be found in the first indictment.¹⁰³ He explains that, whenever there is a common connecting offence between the two charges, a second indictment for such an offence would be prohibited. Since this is often "an accidental occurrence which can be brought about by the way in which the indictment is framed or by the peculiarities of legislation",¹⁰⁴ an expanded version of the test would, in Friedland's view, leave the issue of the permissibility of successive prosecutions to pure chance. He gives the example that if legislation should permit a finding of carrying a concealed weapon on charges of robbery as well as on charges of homicide, the accused could never be charged with one of these offences (robbery or homicide) after the other. Therefore, Friedland concludes that on either possible interpretation, the test would be arbitrary and ineffective: it would bar prosecutions where they should be permitted or permit them when they should be barred.¹⁰⁵

As an exclusive criterion to determine identity of offences for double jeopardy purposes, the *Vandercomb* test is clearly inadequate. As indicated earlier,¹⁰⁶ the rule proposed in *Vandercomb* was intended to apply to variance cases; in other words, the rule was developed to compensate the prosecution for undue advantages given to the accused by the highly technical rules of pleading and proof which historically prevailed. Therefore, it may be argued that with the

¹⁰³*Id.*

¹⁰⁴At 98.

¹⁰⁵At 98.

¹⁰⁶See *supra*, text at note 98.

subsequent amelioration of these rules and the recognition in criminal procedure of powers to amend indictments after trial commences, the rule lost its reason for existence.¹⁰⁷ It was nevertheless sporadically applied by the courts during the nineteenth and early twentieth centuries.¹⁰⁸ Moreover, in 1964, the test was recognised by the House of Lords in the landmark double jeopardy decision of *Connelly v DPP* as *one* of several criteria which may be implemented by English courts to determine whether a successive prosecution ought to be stayed on double jeopardy grounds.¹⁰⁹ Ironically, the fact is that although the "same evidence" test as proposed in *Vandercomb* found favour in South African law¹¹⁰ and a variant of the rule came to be recognised as an exclusive criterion to determine identity of offences in American federal criminal jurisprudence,¹¹¹ the rule never acquired similar status in its country of origin.¹¹²

Soon after its introduction in *Vandercomb*, it became obvious that strict application of the same evidence test would, in the

¹⁰⁷The valid point is also raised that even if the variance problem had not disappeared, it would be difficult to justify application of the test in former conviction cases because variance would only be a harmful technicality when the defendant is acquitted. See Notes and Comments: "Twice in Jeopardy" *The Yale Law Journal* Vol 75 1965 261, 274 (hereinafter referred to as "Comment: twice in jeopardy").

¹⁰⁸See eg *R v Bird* (1851) 5 Cox CC 20 and *R v Kupferberg* (1918) 13 Cr App R 166.

¹⁰⁹(1964) AC 1254. See chapter four *infra* under 4.2.1 for a detailed discussion of this decision.

¹¹⁰See chapter four *infra* under 4.6.2.

¹¹¹See chapter four *infra* under 4.5.3.

¹¹²The so-called "in peril" test came to be recognised as the basis of the special pleas in English law. See chapter four *infra* under 4.2.1 for a detailed discussion of the application of this test in English law.

overwhelming majority of cases, result in a denial of defence pleas of double jeopardy - often unjustifiably. This is because the same evidence test does not purport to ferret out any difference in the respective modes of criminal behaviour. Kirchheimer observes that it rather "compares the two indictments in order to determine whether the second indictment became necessary because the first judge failed to convict when he could have, if he had only explored all possibilities inherent in the first indictment".¹¹³ Furthermore, it is irrelevant whether the same facts or same evidence are once again offered to prove the charge contained in the second indictment; instead, the crucial issue is whether "the facts are so combined and charged in the second indictment as to constitute the same offence".¹¹⁴

On the other hand, the *Vandercomb* test does not always favour the prosecution. Irrespective of whether a narrow or an expanded version of the test is applied, it would bar a subsequent prosecution for murder or manslaughter in the so-called "intervening death" cases. If the *Vandercomb* test applies, it means, for instance, that a person once convicted or acquitted of assault, cannot subsequently be charged of murder or culpable homicide in respect of the same victim, even if the victim died after the trial for assault was concluded.¹¹⁵

Therefore, in view of the inadequacies of the same evidence test, several other criteria were introduced by the courts during the

¹¹³At 528.

¹¹⁴See Kirchheimer 528. The author cites the nineteenth century American case of *Commonwealth v Clair* 89 Allen 525 (Mass 1863) in which the court pointed out the inadequacies of the test in these terms.

¹¹⁵If the *Vandercomb* test applies, then the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first.

nineteenth and early twentieth centuries to establish identity of offences.¹¹⁶ Of these, the most important was the so-called "in peril" test. This test, which bars a prosecution for an offence if the accused has already been in peril of a conviction of that offence on a former indictment, was first applied in 1835 in the case of *Dann*.¹¹⁷ However, the test is mostly associated with the early twentieth century decision of *R v Barron*.¹¹⁸ In that case the court held that the criterion proposed to establish whether a subsequent prosecution for an offence should be barred, namely whether the accused had on the first indictment, been in peril of a conviction of the offence charged in the second indictment,

...applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment.¹¹⁹

At first glance, it seems as if the in peril test as formulated above supplements the *Vandercomb* test in an important respect: it prevents a second prosecution for a lesser included offence of which the accused could have been convicted on the first indictment. As pointed out above, this cannot be achieved in terms of the restricted version of the *Vandercomb* test. However, it can be achieved in terms

¹¹⁶The most important of these was the so-called "in peril" test. This test or rule came to be recognised as the basis of the special pleas in English law and also found favour in South African law. See chapter four *infra* under 4.2.1 and 4.6.4 for a detailed discussion of the application of this test in English as well as South African law.

¹¹⁷(1835) 1 Mood 424, 168 ER 1329.

¹¹⁸[1914] 2 KB 570. South African courts have relied on *Barron's* case as authority for the application of this test in our law. See chapter four *infra* under 4.6.4.

¹¹⁹At 574.

of the expanded version of the *Vandercomb* test.¹²⁰ Nevertheless, the in peril test is also susceptible to a broad or narrow interpretation. Friedland explains that, in terms of a narrow interpretation, the test refers only to whether the accused has been in peril for the *principal* offence charged in the *second* indictment.¹²¹ According to this interpretation, the test will not prevent the crown from recharging an accused with a more serious offence, for instance, charges which include additional elements not contained in the first charge. A broad interpretation of the in peril test, namely that a subsequent charge is barred in terms of this test if the accused has been in peril of a lesser offence for which he is *again* in peril on the *second* indictment, would bar a subsequent prosecution for a greater offence. However, Friedland opposes the application of this expanded version of the in peril test on the same grounds as he opposes the application of an expanded version of the *Vandercomb* test: the barring of a charge would then be dependent on "accident" rather than "policy".¹²²

Be that as it may, the restricted version of the in peril test became the basis of the special pleas in England at the beginning of the twentieth century.¹²³ Moreover, it was also the restricted version of the in peril test which was recognised by the House of Lords much later (in 1964) in the case of *Connelly v DPP*; Lord Devlin explicitly preferred the restricted version of the in peril test as one of several criteria which may be applied to establish whether a second

¹²⁰See *supra* text at note 102 for a discussion of the possible different interpretations of the rule in *Vandercomb*.

¹²¹At 102.

¹²²See Friedland 102 and *supra*, text at note 104.

¹²³See *Barron supra* and *Bannister v Clark* (1920) 26 Cox CC 641.

prosecution should be barred.¹²⁴ The result of a limited application of the in peril test was that an accused convicted or acquitted of a minor offence could be charged again on the same facts with a greater offence, or a more aggravated form of the crime charged in the first indictment.

To return to the *Vandercomb* test. Although the rule could in most cases be invoked to bar a subsequent prosecution for a more aggravated form of the crime previously charged, the courts also developed the rule that a person convicted or acquitted of a minor offence could not be charged again on the same facts with a more serious offence. This principle emerged in the important nineteenth century decision of *The Queen v Elrington*.¹²⁵ The facts of that case were as follows. Elrington was acquitted of assault and battery. Subsequently he was charged, on the same facts, of assault and battery as well as malicious cutting and wounding so as to cause grievous bodily harm. Although the court could ostensibly have applied the *Vandercomb* test in this case to bar a subsequent prosecution, it did not explicitly invoke this test. Instead, Cockburn CJ based his conclusion that Elrington could not be charged again with a more serious offence on the following *dicta*

We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged on the same facts in a more aggravated form.¹²⁶

¹²⁴At 1339 his Lordship states: "For the doctrine of *autrefois* to apply, it is necessary that the accused should have been put in peril of conviction *for the same offence as that with which he is then charged*". (My emphasis.)

¹²⁵(1861) 121 ER 870.

¹²⁶At 873. Cf also *R v Miles* (1890) 24 QBD 423 where the court relied on *Elrington's* case to prevent a subsequent prosecution for

However, the courts consistently recognised the following exception to the principle set out above. If a person had been convicted of an assault or other offence of violence while the victim was still alive and the victim subsequently died, a plea of *autrefois* could not bar a subsequent prosecution for homicide based on the same facts.¹²⁷ Moreover, from a number of other decisions handed down during the nineteenth and early twentieth centuries, it is evident

aggravated assault after the accused had already been convicted of common assault in a previous trial.

¹²⁷As pointed out above, these cases are known as the "intervening death" cases. See *R v Morris* (1867) LR 1 CCR 907 and *R v Friel* (1890) 17 Cox CC 325. In both these cases, where the death of the victim only occurred after the respective accused had been convicted of assault, their summary convictions for assault did not prevent later proceedings for manslaughter. In *R v Thomas* [1950] 1 KB 26 the Court of Criminal Appeal held that where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies, *autrefois convict* is not a good defence to a subsequent indictment for murder. Choo ALT *Abuse of process and judicial stays of criminal proceedings* 1993 22-24 observes that, from a purely logical perspective, the answer to the question whether a person may be charged with a more serious offence, should depend on whether the person had previously been *convicted* or *acquitted* of a lesser offence. He explains that an *acquittal* of common assault must logically bar a subsequent prosecution for aggravated assault: the common assault "core" of the aggravated assault offence has already not been proved. However, the same cannot be said of a prosecution for aggravated assault following a *conviction* of common assault: an acquittal of aggravated assault could still result if the aggravating circumstances are not proved. The author points out (at 23) that the courts have nevertheless "followed the path of mercy rather than the path of logic" in these cases, and accordingly also prohibited a subsequent prosecution for a more aggravated form of the offence of which the accused has previously been convicted. However, Choo points out that the courts have recognised certain limits to the concession of mercy rather than logic; in the "intervening death" cases, the courts preferred to let strict logic prevail. Consequently, the courts have allowed a subsequent prosecution for murder or manslaughter after a *conviction* of a lesser offence in these exceptional cases, namely where the victim subsequently died.

that the English courts did not regard themselves bound to application of the *Vandercomb* or in peril tests only. In fact these cases demonstrate that the courts, in exercising criminal jurisdiction, retained a power to prevent a repetition of prosecution even when it did not fall within the exact limits of the pleas in bar. For instance, in the early case of *Wemyss v Hopkins*¹²⁸ the court, in order to bar a subsequent prosecution, invoked the general principle of *transit in rem judicatam*; the offence has passed into a conviction and therefore, the offence has ceased to exist.¹²⁹ In this case, the defendant was convicted for a statutory offence, that as a driver of a carriage he had struck a horse ridden by the prosecutor, causing hurt and damage to the prosecutor. He was then summoned again for what was apparently a different offence; that he did unlawfully assault, strike and otherwise abuse the prosecutor. Both these prosecutions were based on one and the same incident. On a case stated (an appeal on a question of law), the second conviction was quashed. Blackburn J argued as follows¹³⁰

The defence does not arise on a plea of *autrefois convict*, but on the well-established rule at common law, that

¹²⁸(1875) LR 10 QB 378.

¹²⁹See the respective discussions of the *Hopkins's* decision by Lord Pearce and Lord Devlin in *Connelly's* case (at 1362-1363 and 1365). See also *supra* under 2.1 and 2.2 for a discussion of the civil law doctrine of *res judicata*.

¹³⁰At 381. In *R v Miles* the court explained (at 433) that the real reason why the court invoked the larger doctrine of *transit in rem judicatum* in *Hopkins*, was to afford the same finality to decisions rendered by summary courts that the *autrefois* doctrine accords to decisions by superior courts. (Traditionally, the pleas of *autrefois* could only be raised in superior courts. Therefore, the court implied (in *Miles*) that *Hopkins* did not introduce a broader principle than the traditional *autrefois* pleas, but merely made the same principles available in summary trials, by invoking the doctrine of *transit in rem judicatum*.)

where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence.

In a few other cases, prosecutions were stayed on the basis that it was for an offence which was "practically the same" as an offence of which the accused had previously been convicted or acquitted.¹³¹ In *R v King*¹³² for instance, the accused was charged with obtaining goods by fraud. After conviction of this offence, he was charged again of larceny of the same goods. On a case stated, the Court of Crown Cases Reserved quashed the conviction. Hawkins J stated that

[t]he man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation.¹³³

The court did not invoke the *Vandercomb* test in this case. In fact, from the words used by Hawkins J, namely that "the offences are practically the same, *though not their legal operation*",¹³⁴ it would

¹³¹See *R v King* [1897] 1 QB 214, 218. The words "substantially the same" were later used by the court in *R v Kendrick and Smith* (1931) All ER Rep 851, 855 and by Lord Morris in *Connelly's* case at 1306 (see chapter four *infra* under 4.2.1, text at note 24).

¹³²*Supra*.

¹³³At 218.

¹³⁴*Id.* (My emphasis).

seem as if the *Vandercomb* test by itself would not have prevented a second trial. It seems therefore, as if a "same facts" approach was followed in *King*. However, in the subsequent case of *Barron*,¹³⁵ the court rejected the argument (advanced by counsel for the accused) that the test applied in *King* was the identity of facts rather than the identity of legal elements. In *Barron* Lord Reading CJ did not regard *King's* case as authority for the point of view that a man cannot be placed twice in jeopardy on the same facts even if the offences charged are different.¹³⁶ Instead, he stated that

[i]t would appear that the decision of the court [in *King*] was given, either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment.¹³⁷

R v Frederick Miles is another case which is worthy of mention.¹³⁸ In that case, the accused was first charged with larceny. The prosecution's case was that he was seen taking money from a sailor's pocket. He was acquitted of the crime of larceny but subsequently charged with a statutory offence, namely that he was found in a place with the intention of committing a felony. The evidence advanced by the prosecution was the same as on the previous charge. He was convicted and appealed on the basis of

¹³⁵*Supra*. As pointed out above (text at note 118) the in peril test was advanced in *Barron* to determine identity of offences.

¹³⁶At 575.

¹³⁷*Id.*

¹³⁸(1909) 3 Cr App R 13.

former jeopardy. The court of appeal rejected his plea of former jeopardy. Although the court recognised that a judge has a discretion to stay proceedings "...if, when a man has been acquitted, he [the judge] considers the acquittal should make an end of the whole case ..."¹³⁹, the court of appeal rejected his plea of former jeopardy on the basis that the offences charged successively contained different legal elements (an intent to steal and actual theft as required for larceny, and presence and an intent to commit any felony as required for the statutory offence charged in the second indictment).

The notion that a subsequent prosecution based on the same facts as already adjudicated upon in a previous trial for another offence should necessarily be barred in terms of the pleas of former jeopardy, was also rejected in the case of *R v Kendrick and Smith*.¹⁴⁰ In that case, the court did not apply either the *Vandercomb* or the in peril test, but merely compared the offences as to their legal elements and ruled that the plea of former jeopardy could not succeed because the offences were not in definitional terms substantially the same. The court argued that, although both offences arose out of the same act, they were nevertheless separate in law.¹⁴¹ In giving the judgment of the court, Swift J remarked

The fact that the evidence is the same, or that the facts

¹³⁹At 15.

¹⁴⁰(1931) All ER Rep 851.

¹⁴¹At 855. The accused were first charged and convicted of a contravention of the Larceny Act, namely threatening to publish photographic negatives with intent to extort money in violation of section 31(2) of the Larceny Act 1916. In the same indictment they were also tried for uttering letters demanding money with menaces (in contravention of section 29 of the same Act). However, because the jury disagreed on this count, they were retried and convicted on this charge.

proved are the same, does not make the two offences identical. They are quite distinct and separate.¹⁴²

Several other decisions dealt with the issue of identity of offences. However, the cases discussed above represent the basic criteria which were invoked by the courts to determine whether a plea of former jeopardy should be upheld. The principles developed in these cases can be summarised as follows

- (a) the same evidence test as proposed in *Vandercomb*
- (b) the restricted version of the in peril test as proposed in *Barron*
- (c) the rule set out in *Elrington*, namely that a person may not be charged with a more aggravated form of conduct, unless the aggravating circumstance occurred after the first trial had ended (*Thomas*)
- (d) legal identity of offences, namely whether offences can be regarded as the same in terms of their legal elements (*Frederick Miles and Kendrick and Smith*)
- (e) the broader principle of *res judicata*, namely that a matter once adjudged may not be re-opened (*Hopkins*)
- (f) inherent discretionary powers of a court to stay proceedings on the basis of similar facts and undue harassment of the accused (*King*).

In the landmark double jeopardy decision of *Connelly v DPP*, (handed down by the Criminal Court of Appeal in 1964) the principles set out in (a) to (e) above were consolidated. Moreover, the notion that English criminal courts have inherent discretionary powers to prevent abuse of process by staying proceedings, also on double

¹⁴²At 855.

jeopardy grounds, (set out in (f) above), was finally recognised in *Connelly*. This decision is discussed in detail in chapter four, which deals with the definitional issue of "same offence" in current Anglo-American law. Before proceeding with that issue, it is necessary to explain first of all what is understood in current Anglo-American systems under the concept "attachment of jeopardy".

CHAPTER THREE

SUCCESSIVE PROSECUTIONS FOR "THE IDENTICAL OFFENCE" - A COMPARATIVE ANALYSIS OF THE "ATTACHMENT OF JEOPARDY" ISSUE

3.1 INTRODUCTION

Any double jeopardy claim necessarily involves the question of whether criminal proceedings against an accused have reached a stage that it can be said that a person has been put in jeopardy or in peril of a conviction of the offence(s) allegedly committed. In the American federal legal system, this stage in a criminal proceeding is referred to as the "attachment" of jeopardy. In the legal systems considered on a comparative basis in this chapter, it is generally recognised that a person is put in jeopardy (or in peril) of a conviction at the commencement of the main proceedings, in other words, at the commencement of the criminal trial. It is argued, for instance, that it is at this stage that "the defendant's interest [in finality] reaches its highest plateau, because the opportunity for prosecutorial overreaching thereafter increases substantially, and ... stress and possible harassment of the defendant from then on is sustained".¹ Courts have accordingly held that in a jury trial, jeopardy attaches at a stage when the jury is sworn and in a non-jury trial, at the stage when the accused pleads to the charge, or when the first witness begins to give evidence.

¹See the decision of the Supreme Court of the United States in *Crist v Bretz* 437 US 28, 38 (1978) discussed in detail *infra*, text at note 154.

From the position sketched above, it may be assumed that any termination of proceedings at a stage after the jury has been sworn, or (in a non-jury trial) after the accused has pleaded or the first witness has begun to give evidence, bars a second prosecution for the same offence. However, this is not always the case. In general, it may be said that in the absence of bad faith on the part of the prosecution or collusion, courts in the legal systems under consideration require nothing less than a termination of proceedings based on a finding as a matter of fact that a person charged is guilty or innocent before they prohibit a second prosecution for the same offence on double jeopardy grounds.

There are, of course, exceptions to this approach. In some jurisdictions (for example South Africa, America and India), courts have ruled that a withdrawal of a case by the prosecution at a stage after jeopardy has attached, amounts to an acquittal which bars a second prosecution. However, where a discharge of the accused occurred on the basis of a so-called "technical" ground, courts have been less willing to abandon the requirement that the termination should be based on the factual merits of the case. The courts have justified this approach by arguing that an accused who has been discharged on a technical ground or defect in the proceedings, has never been in jeopardy of a conviction.²

However, the traditional understanding of a trial "upon the merits" (an adjudication of the factual guilt or innocence of the accused), has been subjected to scrutiny in Canadian constitutional jurisprudence. The Supreme Court of Canada has rejected the notion that only a

²As pointed out in the historical overview, this rationale was first advanced in the fifteenth century, in *Vaux's case*. See chapter two *supra* under 2.3.1, text at note 65 for a discussion of this case.

finding as a matter of fact that the accused is either guilty or innocent of the offence charged, bars a second trial.³ Instead, it has suggested that a second trial ought to be prohibited if jeopardy had attached in the temporal sense of the word (in other words if the trial had commenced), and if the court had the necessary jurisdiction to acquit or convict. This approach resulted in a rejection of the traditional theory advanced in the English case of *Drury*,⁴ namely that a discharge on a defective indictment cannot operate as an acquittal, which brings into effect protection against double jeopardy, even if the indictment could have been amended by the court at the first trial. Nevertheless, these and other developments in this particular field of double jeopardy jurisprudence are discussed and considered on a comparative basis in the paragraphs that follow.

3.2 ENGLISH LAW

3.2.1 General

During the twentieth century, English courts have not extended the traditional ambit of the pleas of *autrefois acquit* and *autrefois convict*. In general, the requirements for successful reliance on the pleas that prevailed during the nineteenth century, still apply today.⁵ These requirements are that there should be

- a previous conviction or acquittal (which involves, in principle,

³See *infra* under 3.3.2 for a discussion of the Canadian cases of *R v Riddle* (1980) 48 CCC (2d) 365 (SCC) & *R v Moore* (1988) 41 CCC (3d) 289 (SCC).

⁴See chapter two *supra* under 2.3.1, text at note 68 for a discussion of this case.

⁵No distinction is drawn between acquittals or convictions on indictment and those following summary trial.

- an adjudication on the guilt or innocence of the accused)
- for the same offence
- on a valid indictment
- by a court of competent jurisdiction.

However, this does not mean that no developments occurred during contemporary times in this particular field of law. In the 1960's, the House of Lords suggested in the case of *Connelly v Director of Public Prosecutions*,⁶ that double jeopardy protection is afforded not only by the pleas in bar, but also by the judicial discretion to stay proceedings as an abuse of process.⁷ The existence of inherent powers vested in a court of law to stay proceedings in cases where the pleas cannot be relied on but the second prosecution (in the court's view) amounts to oppressive or improper conduct on the part of the prosecutor, was confirmed by the House of Lords in 1977 in the case of *Director of Public Prosecutions v Humphrys*.⁸ In that case, Lord Salmon explained the scope of the "abuse of process discretion" in the following terms⁹

A judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has

⁶*Supra*.

⁷See the opinions of Lord Reid 1295-1296; Lord Devlin 1338-1361 and Lord Pearce 1361-1368. The *Connelly* decision is discussed in detail in chapter four under 4.2.1.

⁸[1977] AC 1. The main issue in this case was whether the doctrine of issue estoppel forms part of English law. See chapter four *infra* under 4.2.3 for a detailed discussion of the *Humphrys* case.

⁹At 46C-E.

the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred.

Since the decision in *Humphrys*, English courts have stayed proceedings on double jeopardy grounds in a number of cases where the pleas of *autrefois* could not be relied on by the accused. Most of these cases dealt with a subsequent prosecution for a different offence, albeit on the same facts as previously adjudicated on.¹⁰ In the field of attachment of jeopardy (addressed in this chapter), the discretion to stay proceedings has been exercised in favour of the accused in only one particular instance: a second preliminary hearing was found to be vexatious after a court of law had (in a previous preliminary hearing for the same offences) considered the merits and found that there was no case to answer.¹¹

As indicated by the *dicta* of Lord Salmon cited above,¹² the discretion to stay proceedings is exercised on a case to case basis, depending on whether the particular facts of each case reveal an abuse of process. Recognition of such discretionary powers to stay proceedings has opened the door for constant re-evaluation of traditional premises in this particular field of law. Therefore, the possibility is not excluded that new principles may develop in the course of time which may be reconciled with contemporary practices

¹⁰See chapter four *infra* under 4.2.2 for a discussion of these cases.

¹¹See *Regina v Horsham Justices, Ex parte Reeves* (1981) 75 Cr App R 236 discussed in detail *infra* under 3.2.2, text at note 55.

¹²See text at note 9 *supra*.

of criminal procedure.

3.2.2 The attachment of jeopardy

The principle advanced in the case law is that a person is "twice vexed" if he was in peril (or in jeopardy) of a valid conviction for the same offence at the first trial.¹³ A person is put in peril of a conviction in a trial on indictment as soon as the jury is sworn, and, in a trial in a magistrate's court, as soon as he has pleaded to a charge.¹⁴ However, this does not mean that all types of discontinuances of proceedings at a stage after jeopardy has attached, operate as a bar to a second prosecution for the same offence. The basic approach followed by the courts is that for double jeopardy principles to apply, there needs to be a discontinuance of proceedings based on a finding as a matter of fact that the accused is either guilty or innocent of the crime(s) charged. This becomes particularly apparent from the courts' unwillingness to depart from the ancient rule that a discharge of a jury from giving a verdict at a stage after jeopardy has attached amounts to a mere temporary discontinuance of proceedings, despite the possibilities for abuse of the rule.¹⁵ Moreover, the Appeal Court recently held that a plea of *autrefois*

¹³See *Director of Public Prosecutions v Porthouse* (1989) 89 Cr App R QB 21, 24. See also *Williams v Director of Public Prosecutions* (1991) 93 Cr App R QB 319, 327.

¹⁴See *Williams v Director of Public Prosecutions* 327.

¹⁵Friedland (23) criticises the fact that the discretion of the trial judge to discharge the jury is not reviewable by a higher court. He points out the following possibilities for abuse of the rule. The trial judge discharging the jury when the prosecutor has not made out a case; a discharge during the jury's deliberation when it is felt that an acquittal will be forthcoming, or a discharge caused by the deliberate introduction of inadmissible prejudicial evidence by a desperate prosecutor.

convict can only be sustained by evidence that the offence for which the accused is charged has already been the subject of complete adjudication against him; in other words, a decision establishing his guilt (whether it is a decision of the court or the jury or the entry of his own plea), and the final disposal of the case by passing sentence, or the making of some other order, for example, an absolute discharge.¹⁶

Other principles which emerge from a study of the case law are the following. In *Regina v Dorking Justices, ex parte Harrington*¹⁷ the House of Lords laid down the principle that an accused is not, in the context of *autrefois*, in jeopardy merely because he is standing trial on a particular charge and, in a popular sense, in peril of a conviction. Jeopardy arises only after a *lawful* acquittal or conviction.¹⁸ Therefore, when a magistrate dismisses a case in circumstances where the process resulting in the adjudication was invalid (for example, where he failed to discharge his duty to listen to prosecution evidence), the decision is treated as a nullity. This means that the acquittal may be taken on review, and, on being quashed by a superior court, the prosecution may institute new proceedings against the accused for the same offence. An acquittal treated as a nullity is also referred to in the case law as an adjudication by a court acting "without jurisdiction".¹⁹ The phrase "without jurisdiction" is used in

¹⁶See *Richards v The Queen* (1993) AC 217. The court argued (at 226) that the underlying rationale of *autrefois convict* is simply to prevent duplication of punishment and not (also) to prevent a second trial as such.

¹⁷[1984] AC 743. See chapter six *infra* under 6.2.5, text at note 50 for a discussion of this case.

¹⁸At 753.

¹⁹*Id.*

this context in the sense that when a court disregards a rule of criminal procedure in the process of adjudication, the decision which results from that invalid process of adjudication is one which the court has no jurisdiction to make.²⁰

In *R v Bryan Gwyn Green*²¹ the court held that a finding of contempt of court which involved a finding of assault, did not provide the accused with an effective plea of *autrefois convict* against a subsequent prosecution in a criminal court for the very same assault.²² The court in *Gwyn Green* argued that the contempt jurisdiction of the court is quite separate from the criminal jurisdiction of any other court. The court explained that power to punish for contempt is an inherent power which derives from a court's jurisdiction to enforce its orders.

A discharge based on an insufficient or defective indictment²³ (even

²⁰In the *Harrington* case (discussed in chapter six *infra* under 6.2.5, text at note 50) the magistrates' action by dismissing a case without hearing the prosecution amounted to a breach of the rules of natural justice. The court *per* Lord Roskill stated (at 735H) that "the test[is] whether the decision of the justices to dismiss an information is a decision which they had no jurisdiction to take, because they were declining to adjudicate on a matter on which it was their duty to adjudicate, and thus was a nullity".

²¹1993 Crim LR 46.

²²*Contra* the position in the law of the United States discussed in chapter four *infra* under 4.5.8.

²³Friedland (63) explains that an indictment may be defective in two ways: it may be defective on its face because it does not, for example, allege all the necessary elements of the offence, or because of a discrepancy between what is alleged in the indictment and what is proved at the trial. He points out that in the last instance, it is actually wrong to refer to a "defect" in the indictment because there is nothing wrong with the indictment itself. However, the word "defective" is commonly used in English law in both situations.

at a stage after jeopardy has attached) does not effect protection against double jeopardy.²⁴ Despite powers vested in courts to amend indictments, no exceptions have been made to this rule. Friedland severely criticises this position.²⁵ In his view, the principle laid down in the early case of *Green*,²⁶ (namely that with reference to the plea of *autrefois acquit*, it must be considered what the indictment was and not what it might have been), can result in injustice to the accused in the case where he desires that an amendment be made so that there can be a determination on the merits of the case, but the court refuses such request and instead directs that the accused be acquitted. Friedland suggests that a fair and workable rule would be a proviso that the accused cannot be tried again if the court finds that the trial judge, in refusing the amendment and directing that the accused be acquitted, did not exercise his discretion properly. In other words, if the reviewing court finds that the trial judge ought to have amended the indictment, a second prosecution should be barred. Furthermore, he suggests that an accused should be estopped from saying that he was not in jeopardy at the first trial if in fact he had resisted the amendment. Unlike the position in Canadian law, English courts have not as yet reconsidered the rule laid down in *Green* from these suggested perspectives.²⁷

²⁴See Archbold 1995 ed 1/487. The author points out that the rules laid down in *R v Drury* (*supra*) still apply.

²⁵At 70-71.

²⁶See *supra* chapter two under 2.3.1, text at note 71 for a discussion of this case.

²⁷See *infra* under 3.3.2 for a discussion of developments in this particular field in Canadian law.

In *Williams v Director of Public Prosecutions*²⁸ the court held that a dismissal of a summons *before* the accused had pleaded, does not amount to an acquittal for the purpose of double jeopardy protection. However, the court also considered in which circumstances a dismissal of a summons at a stage *after* the accused had pleaded operates as a bar to further proceedings. The facts were as follows. Williams was arrested for drunken driving as a result of a positive breath test. At the police station he also provided a specimen of blood. According to a provision of the Road Traffic Act, once the specimen of blood had been provided, no breath analysis could be used in proceedings against him. Nevertheless, he received a summons alleging that he had driven a vehicle with excess alcohol on his *breath*. However, the analyst certificate sent to him indicated excess alcohol in his *blood*. At the hearing, William's counsel objected to the charge before he entered a plea. The justices dismissed the summons and the prosecution issued a fresh summons, correctly relating the proportion of alcohol to the accused's *blood*, accompanied by a new certificate of analysis of blood. On appeal by case stated (on a point of law), Williams contended that under the rule against double jeopardy, he could not be tried for an offence of which he had been acquitted. The court rejected this contention on the basis that Williams had never been in peril of a conviction at the first trial.

The court explained that there are two possible situations in which a defendant may or may not be in jeopardy. The first is the "temporal" question, namely that the proceedings have reached such a stage that he was in peril of a conviction.²⁹ The second is "qualitative", namely whether the "imperfection" of the proceedings

²⁸*Supra*.

²⁹At 327.

which led to the original decision in the defendant's favour was of such a nature that the defendant would never have been in danger of conviction.³⁰ The court pointed out that these two issues are independent of each other. It continued by explaining that the temporal situation involves some formal stage at or after the start of the proceedings. In a trial on indictment, a trial starts, not on arraignment of the accused, but once the jury has been sworn and the defendant has been put in their charge. Therefore, this is the stage in a trial on indictment when jeopardy attaches.³¹ On the other hand, in proceedings before justices in the magistrate's court, the "logical moment" at which a defendant begins to be in peril of a conviction is when his plea is taken.³² The court expressed the view that when a preliminary point is taken before plea, it can be said that "battle has been joined".³³ However, the accused is not in peril of conviction of the charge he is called to answer as a result of the decision of the court on that particular point (either for or against him). This only occurs as soon as he has pleaded to the charge.

As far as the qualitative question is concerned, the court concluded that the prosecution, having framed the charges incorrectly by referring to the breath analysis rather than blood, had put themselves out of court when it came to proving the charge of how much alcohol the accused had consumed. Therefore, it followed (in the court's view) that the accused was never in jeopardy of a conviction.³⁴ The

³⁰*Id.*

³¹*Id.* The court referred to the case of *Tonner & Others* 1985 80 Cr App R 170.

³²*Id.*

³³At 328.

³⁴*Id.*

court distinguished this decision from the early twentieth century decision of *Haynes v Davis*³⁵ on the basis that the error which occurred in that case, which was a mere procedural irregularity, would not necessarily have prevented a conviction of the crime charged. The facts of the *Haynes* decision are as follows. The accused was charged with having sold adulterated milk and, in similarity to the *Williams* case, no certificate of analysis had been served in accordance with the appropriate section of the Sale of Food and Drugs Act 1899. The magistrate dismissed the summons without hearing any evidence as to the facts. A second summons was then taken out in respect of the same offence. The majority of the court of appeal held that the appellant had been in peril of being convicted on the first summons and was therefore entitled to plead *autrefois acquit* on the second. The report made no mention as to whether the defendant was ever asked to plead at his first appearance. Nevertheless, the court (per Ridley J) argued as follows³⁶

I think ... that we must treat the absence of the analyst's certificate in this case as a mere informality in procedure. If that is so, was this a case in which upon the first summons the appellant was in peril and in respect of which therefore he could plead *autrefois acquit*? I think he was in peril and therefore that he was entitled to plead *autrefois acquit*. The magistrate had jurisdiction unless objection was taken at the proper time to the informality, and unless that objection was taken there was a possibility, and indeed a probability, that the magistrate would proceed to a decision and convict the appellant. The appellant was thus in peril. *It is not quite correct to say, although it is rather an attractive phrase, that there must have been an acquittal upon the merits in order that there may be a good plea of autrefois acquit. In whatever way a person obtains an acquittal, whether it be by the verdict of a jury on the merits or by*

³⁵[1915] 1 KB 332.

³⁶At 335.

*some ruling on a point of law without the case going to the jury, he is entitled to protection from further proceedings. Once there is an acquittal he cannot be tried again for the same offence.*³⁷

The court in the *Williams* case did not find it necessary to comment on the correctness of the majority's *dicta* in the *Haynes* case. However, before reaching its conclusion, it did refer to the minority opinion of Lush J, (in the *Haynes* case) observing that this approach had been preferred by the Court of Appeal in the 1980's in the civil case of *Jelson (Estates) Ltd v Harvey*.³⁸ The *Jelson* case concerned proceedings regarding alleged contempt of court. The original summons had been defective in that it failed to specify the aspects in regard to which it was alleged that the defendant had been in contempt, and it was accordingly dismissed by the judge. Subsequently, the plaintiffs issued a further summons, this time in the correct form with proper particulars. The defendant took the point that since proceedings for contempt of court were analogous to criminal proceedings, he was entitled to rely upon the doctrine of *autrefois acquit*. This contention was rejected by the court of appeal. In reaching a decision, the court considered the decision in *Haynes*, preferring the minority view of Lush J, to that of the majority opinion set out above. Lush J, expressed his views (in the *Haynes* case) in the following terms

I quite agree that "acquittal on the merits" does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not

³⁷My emphasis.

³⁸(1984) 1 All ER 12 AC.

guilty, and to that extent the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudication upon it. This is why this expression is important, however one may qualify it, and *I think that the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty.*³⁹

The court in *Williams* concluded (on the qualitative question), that the facts in that case were comparable with that present in the *Jelson* case. It followed that the accused had never been in jeopardy of a conviction at his first trial. In this respect, the *Williams* decision can be viewed as an implied approval of the minority view expressed in the *Haynes* case.

On the other hand, a dismissal of an information as a result of the accused pleading not guilty and the prosecution offering no evidence, brings protection into effect against a second prosecution for the same offence.⁴⁰ However, there is an important qualification. In *Director of Public Prosecutions v Porthouse*⁴¹ the court held that if the first information was so faulty in form and content that the accused could never have been convicted on it, its dismissal as a result of the prosecution offering no evidence will not bar a second prosecution for the same offence.⁴² The court emphasised that a defendant is "twice-vexed" only if he was in peril of a valid conviction

³⁹My emphasis.

⁴⁰See *Grays Justices ex parte Low* [1990] 1 QB 54.

⁴¹*Supra*.

⁴²At 26.

at his first trial.⁴³

Where a court of appeal quashes an accused's conviction, the successful appellant is treated as if he has been acquitted by the jury that tried him. This means that he cannot be prosecuted again for the same offence, unless the court of appeal orders a retrial.⁴⁴

An accused may be re-indicted for the same offence notwithstanding that the Attorney-General has, at any stage after a bill of indictment against an accused has been signed and before judgment, entered a *nolle prosequi* which terminates a prosecution. Whether or not to enter a *nolle prosequi* is entirely within the Attorney-General's discretion and is not subject to control by the courts.⁴⁵

Provided that the defendant has not yet pleaded, the prosecution may, with the court's leave, withdraw a summons in a summary trial.⁴⁶ In *Grays Justices ex parte Low*⁴⁷ the court held that such a withdrawal of a summons is not equivalent to an acquittal. Nolan J,

⁴³At 24.

⁴⁴See section 7 of the Criminal Appeal Act 1968 as amended. See chapter eight *infra* under 8.2 for a detailed discussion of retrials upon appellate reversal of convictions in English law.

⁴⁵See *Turner v Director of Public Prosecutions* (1978) 68 Cr App R 70, 76 & *Gouriet v Union of Post Office Workers* [1978] AC 435, 487. However, Blackstone's *Criminal Practice* 1991 897 (hereinafter referred to as Blackstone 1991 ed) is of the opinion that in practice it is unlikely that a person will be re-indicted after the entering of a *nolle prosequi*.

⁴⁶*Redbridge Justices, ex parte Sainty* [1981] RTR 13.

⁴⁷*Supra*.

observed⁴⁸

it must now be regarded as settled law that ... the withdrawal of a summons with the consent of the justices will not of itself operate as a bar to the issue of a further summons in respect of the same charge where there has been no adjudication upon the merits of the charge in the original summons, and the defendant has not been put in peril of conviction upon it.

The Director of Public Prosecutions⁴⁹ has certain statutory powers to withdraw proceedings in summary trials as well as in trials on indictment, albeit only during the preliminary stages of proceedings.⁵⁰ In summary trials such notice of discontinuance may only be given before the prosecution start calling their evidence and in trials on indictment, before the accused is actually committed for trial.⁵¹ A discontinuance by the Director does not bar fresh proceedings for the same offence at a later stage. However, the accused's interests are also served; he may insist (within 35 days of the discontinuance) that the prosecution against him goes ahead.⁵² This gives him the opportunity to obtain a formal acquittal which will later entitle him to a plea of *autrefois acquit*.

Instances where the courts recognised their inherent powers to stay

⁴⁸At 59A-B.

⁴⁹The Director is responsible to the Attorney-General and his duty is to conduct all criminal proceedings initiated by the police. See Sprack J *Emmins on Criminal Procedure* 6th ed 1995 5.

⁵⁰See section 23 of the Prosecution of Offences Act 1985.

⁵¹See *id.*

⁵²Section 27(7) of the Act.

proceedings on the basis of abuse of process are the following. In *Manchester v Stipendiary Magistrate, ex parte Snelson*⁵³ the court held that a discharge of the accused by examining judges after committal proceedings (preliminary hearings), does not amount to an acquittal. However, the court stated that it may exercise its discretionary power to ensure that the use of repeated committal proceedings is not allowed to become vexatious or an abuse of the process of the court. In the court's view, the facts of the case did not reveal such an abuse. At the first committal proceedings, the prosecution who expected that the examining judges would agree to an application for an adjournment had literally no evidence available at court on the day fixed for hearing. The case had accordingly not been considered on the merits. The institution of further committal proceedings, at which they were prepared to offer evidence, did not, in the court's view, amount to oppressive governmental action which justified a stay of proceedings.⁵⁴

In *R v Horsham Justices, Ex parte Reeves*⁵⁵ on the other hand, the first committal proceedings, which lasted three days and involved full consideration of the prosecution evidence, ended in a discharge of the accused. The prosecution subsequently sought to bring fresh charges against the accused, based on the original charges. However, the court granted the accused an order of prohibition directed against a fresh bench of justices from continuing the second committal proceedings. The court reasoned that repeated committal proceedings could in this instance be categorised as an abuse of process on the following grounds. In the first committal proceedings, the

⁵³[1977] WLR 911.

⁵⁴At 913.

⁵⁵*Supra*.

prosecution's case had not been presented effectively because much confusing and irrelevant evidence had been put before the justices along with the cogent evidence.⁵⁶ The second committal proceedings were merely an attempt to repair the damage done by the prosecution's mistakes at the first proceedings. The prosecution was not entitled "to treat the first committal proceedings, for all practical purposes, as a dummy run, and, having concluded that they over-complicated them, bring virtually the same proceedings but in a form in which they should have been brought if proper thought had been given by the prosecution to them, in the first place...".⁵⁷ Such a course of action, in the courts view, amounts to oppressive and vexatious conduct, encouraging also "poor preparation [of cases] with resultant waste of time and money".⁵⁸

In *Brooks v Director of Public Prosecutions*⁵⁹ the Privy Council confirmed the principles laid down in the *Reeves* case, observing that "[t]here have to be exceptional circumstances to warrant prosecuting a defendant after it has been found in committal proceedings that there is no case to answer".⁶⁰

3.2.3 Summary

* The basic premise in English law is that an accused may only rely on the plea of former jeopardy if the termination of criminal proceedings at the first trial amounted to an adjudication on the facts

⁵⁶At 240.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹[1994] WLR 381.

⁶⁰At 390.

of his guilt or innocence of the crime(s) charged. Moreover, the accused may only rely on the plea if he has previously been *lawfully* acquitted or convicted. If the trial was contaminated by an error, it must be determined whether he was in jeopardy of a conviction at the first trial. This entails an investigation as to the nature of the error. If the error was of such a nature that it rendered the trial a nullity, the accused may be tried again because he was never in jeopardy of a conviction. A trial is also treated as a nullity if the court acted without jurisdiction. For instance, a court acted "without jurisdiction" if it committed a breach of the rules of natural justice by dismissing a case without hearing prosecution evidence. On the other hand, if the error did not render the trial a nullity, the accused may not be tried again. In other words, if the accused could have been convicted despite the error, he was in actual fact in jeopardy of a conviction and may therefore rely on the plea of former jeopardy.

* An accused acquitted as a result of a defective indictment is regarded as never having been in jeopardy of a conviction and may therefore be tried again. In determining whether he was in jeopardy, it is *not* taken into consideration whether the indictment *could* have been amended.

* In order to protect the accused against double jeopardy in deserving instances (where the pleas of former jeopardy cannot be raised), English courts have used their inherent discretionary powers to stay proceedings permanently as an abuse of process. The basic premise which emerges from the case law is that the courts regard attempts by the prosecution to treat preliminary hearings as a dummy run, in other words as mere preparation for subsequent preliminary hearings, as oppressive and vexatious conduct which justifies a permanent stay of proceedings on double jeopardy grounds.

* An accused tried on indictment may be re-indicted after entering of a *nolle prosequi* by the Attorney-General, even after he has pleaded. The only limitation is that it must be entered before judgment; the court has no control over the decision of the Attorney-General. In summary trials on the other hand, the prosecution may only withdraw a charge at a stage before plea. The Director of Public Prosecutions may withdraw in both summary trials and trials on indictment, albeit only during the preliminary stages of the proceedings (in other words, before plea). Of importance, however, is that the accused may insist that the state goes ahead with the second prosecution within 35 days. If this does not occur, the accused may raise the plea of former jeopardy.

3.3 CANADIAN LAW

3.3.1 General

Section 11(h) of the Canadian Charter of Rights and Freedoms provides

Any person charged with an offence has the right if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.⁶¹

Soon after the Charter's inception in 1982 the eminent Canadian lawyer, Martin Friedland, predicted that "[t]he language of the provision [being a very narrow expression of the principles of double

⁶¹Part 1 of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK) 1982 C II. See Beaudoin GA & Ratushny E *The Canadian Charter of Rights and Freedoms* 2nd ed 1989 538.

jeopardy] will not, without stretching the natural meaning of the words, cover the rule against multiple convictions, the rule against unreasonably splitting a case, issue estoppel, termination before a final verdict, or even prosecution for similar, although not identical offences".⁶² He also pointed out that the word *finally* makes it clear that the state may not be prevented from appealing (in certain cases) against acquittals. Friedland envisaged however, that the "due process" clause of the Canadian Charter which provides that

[e]veryone has a right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,

may also be invoked on a subsidiary basis by an accused who alleges that his double jeopardy rights have been violated.⁶³ The extent to which the Canadian due process provision may assist the accused in this particular aspect, has, however, not as yet been delineated by the Canadian Supreme Court.

Friedland's predictions with regard to the interpretation of the double jeopardy provision have become true in most respects. The Supreme Court interpreted the provision as allowing for prosecution appeals, albeit on a point of law only.⁶⁴ In the field of successive prosecutions for the same offence, the Supreme Court's interpretation

⁶²See Friedland ML "Legal rights under the Charter" *Criminal Law Quarterly* Vol 24 1981-1982 430, 449 (hereinafter referred to as Friedland *Legal rights*). See also *infra* chapter four under 4.3 for a discussion of these principles of double jeopardy as developed in the common law of Canada.

⁶³*Id.*

⁶⁴See chapter six *infra* under 6.3 for a discussion of the recognition of the crown's right to appeal against an acquittal on a point of law in Canadian law.

of the double jeopardy clause has offered less protection to the accused than the principles evolved by the courts in the common law and those recognised in the Code of Criminal Procedure.⁶⁵

However, in the field addressed in this chapter (namely at which stage in the proceedings jeopardy attaches), the court, in certain respects, has been more progressive. The traditional understanding of a previous trial on the merits has been rejected on the basis that an accused is considered in jeopardy on plea.⁶⁶ The common law notion that an acquittal based on a defective indictment does not bring about protection against a subsequent prosecution for the same offence, even if the indictment could have been amended at the first trial, has been found to be inconsistent with contemporary rules of criminal procedure, namely those rules which vest extensive powers in the courts to allow an amendment of the charge.⁶⁷ However, the courts have been reluctant to interfere with the traditional rights of the Attorney-General to stay proceedings (the *nolle prosequi* rights at common law). These seem to have been retained on the basis that public policy requires that the Attorney-General's powers in this particular field remain unfettered.⁶⁸ These different types of terminations of proceedings and their effect in terms of the rule against double jeopardy will be discussed in detail in the paragraphs below.

⁶⁵See chapter four *infra* under 4.3 for a detailed discussion of these principles.

⁶⁶*Regina v Riddle* (1980) 48 CCC (2d) 365 (SCC).

⁶⁷See *R v Moore* (1988) 41 CCC (3d) 289 (SCC).

⁶⁸See *Regina v Tateham* (1982) 70 CCC (2d) 565 (BCCA).

3.3.2 The attachment of jeopardy

As indicated above, an accused may plead former jeopardy if charged with an offence of which he has previously been finally acquitted or finally convicted and punished.⁶⁹ The Supreme Court of Canada held that section 11(h) is limited to criminal or quasi-criminal proceedings, or proceedings giving rise to penal consequences. The criterion seems to be that protection is only afforded for offences of a public nature, the punishment of which is deemed to promote public order and welfare.⁷⁰

A final conviction or acquittal in a jury trial does not present any difficulty. A final adjudication occurs when the jury returns its verdict.⁷¹ The position is somewhat more complex in cases tried by a judge. As indicated above, the basic premise is that an accused must have been placed in jeopardy - that is, in peril of a conviction at the earlier proceeding. In *Regina v Riddle*⁷² the Supreme Court held that a person is in jeopardy as soon as he had been arraigned and pleaded to a charge before a court of competent jurisdiction. The facts in *Riddle* were the following. The accused was charged with common assault. He pleaded not guilty and the matter was adjourned for trial. On the trial date, the case was dismissed in the following circumstances. The informant failed to appear, the court refused to adjourn the matter and the crown subsequently called no evidence. A week later, the accused was once again charged with the same

⁶⁹See section 11(h) of the Charter set out *supra*, text at note 61.

⁷⁰See *Regina v Wigglesworth* (1988) 37 CCC (3d) 385 (SCC). In *Regina v Shubley* (1990) 52 CCC (3d) 481 (SCC) it was held that prison disciplinary proceedings do not satisfy this criterion.

⁷¹See Salhany RE *Canadian Criminal Procedure* 6th ed 1995 6-58.

⁷²*Supra*.

offence. He pleaded *autrefois acquit* to the charge which was upheld by the court. The state then appealed on a point of law, arguing that the dismissal was not tantamount to an acquittal because it did not amount to a disposition on the merits.⁷³

The Supreme Court rejected this argument. First of all, the court (per Dickson J), considered the historical meaning of the "unfortunate" phrase - "on the merits".⁷⁴ The court explained that in nineteenth century England, justices were given power to issue "certificates of dismissal" with respect to common assaults and batteries. In terms of a particular statute, these certificates served to "release the accused of all further proceedings (civil or criminal) for the same cause".⁷⁵ In a number of cases, the prosecutor dropped a criminal proceeding in favour of a civil suit. However, in terms of the statute, the certificate barred a further suit. In order to make provision for such cases, the legislature then amended the particular Act, adding that the termination of the criminal proceeding should be on the merits for the prohibition to operate.⁷⁶

According to Justice Dickson, a particular case in which the court (at the time) considered the meaning of the concept "on the merits", was *Haynes v Davis*.⁷⁷ As indicated above,⁷⁸ the accused in *Haynes* successfully raised the plea of *autrefois acquit* in the

⁷³At 376.

⁷⁴At 378.

⁷⁵*Id.*

⁷⁶At 378 of the *Riddle* decision, referring to Friedland *supra* 57-59 and a number of English cases on the point.

⁷⁷This case is discussed *supra*, text at note 35.

⁷⁸*Id.*

subsequent proceedings for the same offence, despite the fact that a previous summons was dismissed without considering the merits of the case. Justice Dickson referred to the following *dicta* of Ridley J, in the *Haynes* case⁷⁹

The appellant was thus in peril. It is not quite correct to say, although it is rather an attractive phrase, that there must have been an acquittal upon the merits in order that there may be a good plea of *autrefois acquit*. In whatever way a person obtains an acquittal, whether it be by the verdict of a jury on the merits or by some ruling on a point of law without the case going to the jury, he is entitled to protection from further proceedings.

Justice Dickson also observed (in the *Riddle* case) that Avroy J (in a concurring opinion in the *Haynes* case) added the following remarks⁸⁰

I prefer to rest my judgment upon the one ground that the plea of *res judicata* or *autrefois acquit* depends for its validity upon this one question, whether the accused on the former occasion was in peril of being convicted of the same offence. If he was, the plea of *autrefois* is good.

and

The question whether the one or the other is in peril is to be ascertained by enquiring whether the Magistrate had jurisdiction to deal with the offences.

On the basis of these *dicta*, Justice Dickson concluded in the Canadian case of *Riddle* that an accused is in jeopardy from the moment he has

⁷⁹At 335, of the *Haynes* case. See 379 of the judgment of Dickson J, in the *Riddle* case.

⁸⁰At 337.

pleaded to a charge before a judge with jurisdiction.⁸¹ He added that the accused continues to be in jeopardy until final determination of the matter by the rendering of a verdict. In his view, "[t]he term on the merits does nothing to further the test for the application of the *bis vexari maxim*".⁸² He concluded that the phrase merely serves to emphasise the general requirement that the previous dismissal must have been made by a court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge.⁸³

The effect of *Riddle* is, *inter alia*, that no actual evidence need have been heard at the previous trial to sustain an otherwise valid plea of *autrefois acquit*.⁸⁴ In *Petersen v The Queen*⁸⁵ the Supreme Court once again confirmed the *Riddle* principle, albeit in a different factual context. In that case, the trial judge dismissed the charge after a plea had been entered but before the hearing of any evidence. The basis of dismissal was that he had no jurisdiction to hear the matter because the accused had not previously consented to an adjournment of the case in excess of eight days as was required in terms of the Code. It appeared however, that the charge had been dismissed erroneously. The loss of jurisdiction could have been cured in terms of the Code

⁸¹At 379. Unlike the position taken in the English case of *Williams* (discussed *supra*, text at note 28), the court in *Riddle* did not distinguish the facts of *Haynes* on the basis that the summons was dismissed in that case because of a mere procedural error which would *not* necessarily have prevented a conviction of the accused at the first trial.

⁸²At 380.

⁸³*Id.*

⁸⁴See Ewaschuk EG *Criminal pleadings and practice in Canada* Vol 1 2nd ed 1996 14-14.

⁸⁵(1982) 69 CCC (2d) 385 (SCC).

and therefore dismissal was not necessary in the particular case. Nevertheless, instead of appealing the dismissal, the state proceeded on a new charge for the same offence. A plea of *autrefois acquit* was upheld by the trial court as well as the Supreme Court.

McIntyre J, who delivered the judgment of the Supreme Court, reasoned as follows. In terms of the *Riddle* principle, a person may succeed with the plea of *autrefois acquit* if he can show that he had been placed in jeopardy on the same matter on an earlier occasion before a court of competent jurisdiction, and that there had been a disposition in his favour resulting in an acquittal or dismissal of the charges.⁸⁶ The court concluded that the fact that in reality the trial judge (in the case at hand) had been vested from the outset with jurisdiction and never lost it, meant that the court qualified as one with competent jurisdiction.⁸⁷ The court also found that the accused had been in jeopardy at the previous trial. In the court's view, this was not a case where the previous trial could be regarded as a nullity. The court explained that a jurisdictional error which renders a trial a nullity is "one which leads the court to exceed its jurisdiction by exercising, or purporting to exercise, a jurisdiction it does not possess".⁸⁸ In the case at hand, however, the judge, in *deciding* that he lacked jurisdiction, simply made an error in law in the disposition of the case which was properly before him and within his jurisdiction.⁸⁹ Therefore, the crown should rather have appealed on a point of law

⁸⁶At 390.

⁸⁷At 391. The court pointed out that the crown should, rather than instituting new charges, have appealed against the dismissal on the basis of an error of law. However, when it instituted new charges, the court found that it had foregone its remedy.

⁸⁸At 392.

⁸⁹*Id.*

than proceed on new charges. The court pointed out that by following this approach (instituting new charges), the crown had foregone its remedy inasmuch as a plea of *autrefois acquit* could be raised successfully in such circumstances.⁹⁰

Consistent with this approach, the Supreme Court laid down the principle in *Regina v Moore*⁹¹ that the quashing or dismissal of an indictment after arraignment and plea is tantamount to an acquittal which brings into effect protection against a successive prosecution for the same offence.⁹² The facts were as follows. The trial judge dismissed a charge on the basis that it failed to allege an essential element of the offence. Subsequently, the accused was again charged with the same offence on a charge which set out all the essential elements of the offence. The accused then raised the plea of *autrefois acquit*. The issue before the Supreme Court was whether the dismissal of the charge amounted to an acquittal. The Supreme Court approached the problem on the principles of attachment of jeopardy and lack of jurisdiction to acquit or convict. The judgment of Lamer, J can be summarised in three principles

- (a) If a charge is merely voidable as opposed to void, it follows that the judge has the necessary jurisdiction to amend the charge.⁹³ The court explained that in the absence of absolute nullity, a court has wide powers in terms of the Code to amend a charge.⁹⁴ If a trial court could have amended a charge in

⁹⁰At 393.

⁹¹(1988) 41 CCC (3d) 289 (SCC).

⁹²In *Regina v D* (1990) 60 CCC (3d) 407 (Ont CA) the court held that this principle only applies where the indictment is quashed after a plea has been taken, and not before plea.

⁹³At 312.

⁹⁴These powers are set out in section 529 of the Code.

terms of the provisions of the Code, but instead (erroneously) dismissed the charge, the accused may, until that decision is reversed by a court of appeal, not be tried again for the same offence. The Supreme Court explained that if a charge could have been amended, it means that, in reality, the accused was in jeopardy of a conviction and the court had the necessary jurisdiction to deal with the case.⁹⁵

- (b) However, if no amendment could have been made because it would have prejudiced the accused "irreparably", the dismissal of the charge would then be tantamount to an acquittal which brings into effect double jeopardy.⁹⁶
- (c) If, on the other hand, the charge is an absolute nullity, the accused may be charged again in a new trial because he "never was in jeopardy and the disposition of the charge through quashing was for lack of jurisdiction".⁹⁷

Applying these principles to the case at hand, the court found that whereas the trial judge could in fact have amended the charge, the plea of *autrefois acquit* should have been upheld to prevent further proceedings.

The decision in *Moore* can be described as a long-awaited departure from archaic principles which had become irreconcilable with modern practices of criminal procedure. Being consistent with present rules of criminal procedure which allow for extensive powers to amend indictments, the decision can be viewed as an important breakthrough

⁹⁵At 311-312.

⁹⁶At 312. The term "irreparable prejudice" is advanced in the case law as the criterion to determine whether a defective charge should be dismissed. This means that the amendment cannot be cured by an adjournment of the proceedings, or in any other way. (*Id*).

⁹⁷At 311.

in the law of double jeopardy.⁹⁸

However, as indicated above, Canadian courts have not adopted the same approach in the field of prosecutorial discretion to withdraw charges. In fact, the courts have been reluctant to interfere on the grounds of double jeopardy with the prosecutor's discretion to institute new proceedings after withdrawal of charges. At present there are three ways for the crown to terminate proceedings

- (a) The prosecutor may withdraw the charges. This is not provided for in the Code but the (traditional) practice continues nevertheless.⁹⁹
- (b) The Attorney-General or "counsel instructed by him for that purpose" may stay proceedings in terms of the Code.¹⁰⁰
- (c) The prosecutor may offer no evidence with respect to the charge which, in terms of the *Riddle* principle, leads to an acquittal.¹⁰¹

As regards the withdrawal of a charge in terms of the common law, the following principles prevail. A withdrawal before plea does not bring into effect double jeopardy protection. After a plea has been entered, a charge may only be withdrawn with the consent of the

⁹⁸Bolton PM *Criminal Procedure in Canada* 10th ed 1991 112 remarks that the decision also has the effect of forcing the crown to amend an indictment or information when it is appropriate rather than bringing a new indictment.

⁹⁹See in general Law Reform Commission of Canada: Working Paper 62 1990 *Controlling criminal prosecutions: the Attorney-General and the Crown Prosecutor* 99 (hereinafter referred to as Working Paper 62).

¹⁰⁰This is done in terms of section 579 of the Code.

¹⁰¹See *supra*, text at note 72 for a discussion of the *Riddle* case.

judge.¹⁰² The legal effect of such a withdrawal, however, is not perfectly clear. In *Regina v Selhi*¹⁰³ the court held that a withdrawal after plea, but before evidence is heard, does not justify a subsequent plea of *autrefois acquit*. The court was influenced in its decision by the fact that the withdrawal was based on technical aspects at the very beginning of the trial before evidence was led.¹⁰⁴ However, the Supreme Court has not as yet specifically ruled on the issue of whether a withdrawal subsequent to the hearing of evidence may be allowed in terms of double jeopardy principles.

A stay of proceedings by the Attorney-General as provided for in the Act does not require the consent of the court and may be entered at any stage before judgment is delivered. It was held in *R v Tateham*¹⁰⁵ that a stay of proceedings by the Attorney-General does not operate as an acquittal but merely suspends proceedings. In *Tateham*, a plea of *autrefois acquit* was rejected in the following circumstances. The crown entered a stay of proceedings in the middle of the trial after the trial judge refused to allow the prosecution to read in a particular piece of evidence delivered by a witness at the preliminary hearing. The crown was allegedly unable to present oral evidence because the witness was, at the time, absent from Canada. Subsequent proceedings for the same offence were allowed, despite reliance by the defence on the *Riddle* principle.¹⁰⁶ However, the court refused to interfere with the power of the Attorney-General and allowed the subsequent prosecution, apparently on the basis that the

¹⁰²See Working Paper 62, 99-100.

¹⁰³(1990) 53 CCC (3d) 576 (SCC).

¹⁰⁴At 576.

¹⁰⁵(1982) 70 CCC (2d) 565 (BCCA).

¹⁰⁶At 568.

Attorney-General is not answerable to the court for the exercise of his powers to stay proceedings.¹⁰⁷

The Law Commission of Canada also recently expressed itself in favour of the retention of the principle that the Attorney-General may, at his discretion, discontinue proceedings temporarily.¹⁰⁸ However, certain limits to this power are suggested. These are, *inter alia*, that there should be some judicial control over the stage in the proceedings at which a stay may be entered, as is the case with withdrawals. The Commission expressed the view that since there are many legitimate reasons for which the crown may want to delay proceedings, the crown should retain the right to discontinue proceedings temporarily, as long as it takes into account the accused's right to an expeditious trial.¹⁰⁹ The Commission consequently suggested that certain time limits should be attached to a temporary discontinuance, and that the accused should be informed from the outset whether a discontinuance will be of a permanent or merely temporary nature.¹¹⁰

Other "premature" terminations or proceedings which do not bring into effect protection against double jeopardy, are

- where the trial has been declared a nullity, for

¹⁰⁷See in general Gauthier A "The power of the Crown to reinstitute proceedings after the withdrawal or dismissal of charges" *Criminal Law Quarterly* Vol 22 1979-1980 463-483 and Cohen S *Due process of law - The Canadian system of justice* 1977 150-160 for criticisms of the unfettered powers of the Attorney-General to stay proceedings. The basic concern raised by both these writers is the potential for abuse of power and consequential harrassment of the accused.

¹⁰⁸See *supra* note 99.

¹⁰⁹Working Paper 62, 110-111.

¹¹⁰*Id.*

example where no plea was taken¹¹¹

- where a jury is unable to agree on a verdict (a so-called "hung-jury")¹¹²
- a discharge at a preliminary enquiry
- where an appeal has been taken and a new trial ordered.¹¹³

However, a stay of proceedings *by the court* in terms of its inherent discretionary powers to prevent an abuse of the process is regarded as an acquittal which brings into effect protection against double jeopardy. This was recognised in the landmark decision of *Regina v Jewitt* which held that a trial judge may stay proceedings in terms of these powers on the basis that the accused was unlawfully entrapped.¹¹⁴ In *Conway v the Queen*¹¹⁵ the Supreme Court held that a trial judge has a discretion to stay proceedings in order to remedy an abuse of the court's process where unfair or oppressive treatment of an accused disentitles the crown to carry on with the prosecution of the charge. The court held that abuse of process is not limited to cases where there is evidence of prosecutorial misconduct. Instead, the court laid down the guideline that "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of

¹¹¹See *R v Pallen* (1960) 127 CCC 272 (BCSC). *Cf supra*, text at notes 93-97 for a discussion of the difference between a void and a voidable charge.

¹¹²*Regina v Misra* (1985) 44 CR (3d) 179 (Sask QB).

¹¹³*Regina v Purcell* (1933) 61 CCC 261 (NSSC).

¹¹⁴(1985) 21 CCC (3d) 7 (SCC). See also *Regina v Mack* (1988) 44 CCC (3d) 513 (SCC).

¹¹⁵(1989) 49 CCC (3d) 289 (SCC).

justice is best served by staying the proceedings".¹¹⁶ Instances where a stay had been granted are the following

- where the accused was arbitrarily detained in contravention of section 9 of the Charter¹¹⁷
- where the accused's right to a speedy trial was violated.¹¹⁸

However, a judicial stay of proceedings, so far, has not been granted where the crown exercised its right in terms of the Code to enter a stay of proceedings after it was refused an adjournment, on the basis that the Attorney-General is not ordinarily answerable to the courts for the exercise of his powers to stay proceedings.¹¹⁹

3.3.3 Summary

* Regarding a successful double jeopardy plea, the Supreme Court of Canada rejected the notion that an acquittal be "on the merits"; in other words, a termination of proceedings in favour of the accused need not be based on a finding of fact that the accused is innocent before a plea of former jeopardy may be raised successfully. Instead, the court suggested that it should be investigated whether a previous dismissal was made by a court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge. The consequences of this approach (as opposed to the traditional approach followed in English law) are the

¹¹⁶At 302.

¹¹⁷*Regina v Pithart* (1987) 34 CCC (3d) 150 (BC Co Ct).

¹¹⁸*Regina v Askov* (1991) 59 CCC (3d) 449 (SCC).

¹¹⁹*Regina v Bjorklund* (1977) 37 CCC (2d) 5 (BCSC).

following

- (a) If a court dismissed a charge because it was under the erroneous belief that it lacked jurisdiction, the accused may at a subsequent trial raise the plea of former jeopardy. The reason is that the court (vested from the outset with jurisdiction) qualified as one with competent jurisdiction. Therefore, the accused was, in reality, in jeopardy of a conviction. In such instances the crown should rather appeal on a point of law than proceed on new charges.

- (b) If an accused is charged on the basis of a defective indictment, he may not be charged again if the indictment could have been amended. The accused was in jeopardy of a conviction because the court had the necessary jurisdiction to deal with the matter. However, if no amendment could have been made because it would have prejudiced the accused, a second trial is also prohibited. In such cases, a discharge of the accused is regarded as tantamount to an acquittal. If, on the other hand, the charge was an absolute nullity, the accused may be charged again because he never was in jeopardy and the quashing of the charge was a result of lack of jurisdiction.

- (c) A stay of proceedings by the court in terms of inherent discretionary powers to prevent an abuse of process, is regarded as an acquittal which brings into effect protection against double jeopardy.

* Canadian courts are not inclined to interfere with the prosecutor's discretion to withdraw charges. In terms of the common law, a case may be withdrawn after plea with the consent of the court, but before evidence is heard. It is an open question whether a case may be

withdrawn after this stage. However, in terms of statutory law, the Attorney-General may withdraw charges at any stage before judgment is delivered. Moreover, there is no judicial control over the stage in the proceedings at which a stay may be entered. The Law Commission of Canada expressed certain reservations in this regard. The Commission suggested certain limitations to these powers. It is suggested, *inter alia*, that the accused be informed from the outset whether a discontinuance will be of a mere temporary nature. Jurists point out that the wide powers of the Attorney-General in this regard create the possibility of abuse of power and consequential harassment of the accused.

3.4 INDIAN LAW

3.4.1 General

The common law principle of *res judicata* formed part of Indian jurisprudence from as early as 1793.¹²⁰ Judges in British India applied the common law rule that a court cannot entertain any cause in civil as well as in criminal matters which has previously been heard and determined by a judge.¹²¹

In 1861, the principle found recognition in the first Code of Criminal Procedure enacted in India.¹²² Section 55 of that Code provided

¹²⁰See Singh RP *Double Jeopardy - constitutional and statutory protection* 1991 24. This author suggests that the idea of a prohibition against double jeopardy can be traced back as far as ancient Hindu law (at 8-18).

¹²¹See Singh 24.

¹²²Act 25 of 1861.

that

[a] person who has once been tried of an offence and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence.¹²³

At present, the pleas of *autrefois acquit* and *autrefois convict* are contained in section 300 of the current Code of Criminal Procedure.¹²⁴ This is an exhaustive provision which will be discussed in detail in chapter four.

With the adoption of the Constitution of India in 1949, the common law rule against double jeopardy also acquired the status of a fundamental right in that country. Article 20(2) of the Constitution of India provides that

[no] person shall be prosecuted and punished for the same offence more than once.

Soon after its inception, the Supreme Court of India had an opportunity to interpret the words "prosecuted and punished" as they appear in the provision. The court held in *Venkataram v Union of India*¹²⁵ that both these factors must exist before the clause may be invoked. Therefore, protection in terms of the constitutional prohibition would only be available if the previous prosecution ended

¹²³This provision was re-enacted (in more detail) in its successor, section 403 of the Code of Criminal Procedure 1898.

¹²⁴Code of Criminal Procedure, 1973 (Act 2 of 1974).

¹²⁵AIR 1954 SC 375, 377.

in a conviction, and not if it ended merely in an acquittal.¹²⁶

The principle of *autrefois acquit* has however been retained in the ordinary law of the land.¹²⁷ Discussion of the ordinary law as well as the constitutional law on the topic addressed in this chapter is consequently essential.

3.4.2 The attachment of jeopardy

The Indian Code of Criminal Procedure provides that a person, once tried and convicted or acquitted of an offence, may not be tried again for the same offence.¹²⁸ A person may only rely on the defences of previous jeopardy if previously convicted or acquitted by a court of law which had the necessary jurisdiction to try him for the offence.¹²⁹ For jurisdiction to be present, it is also required that the

¹²⁶See Singh 98-104 for a discussion of the history of the enactment of this provision. He explains that the first drafts of this provision (submitted by the sub-committee on fundamental rights), were based on the American model, and provided that no person should be "tried" more than once for the same offence. However, for no apparent reason the Constitutional advisor substituted the word "punished" for the word "tried". This modified version was eventually adopted by the Constitutional Assembly without much debate, despite the fact that there is a marked difference between the words "punished" and "tried".

¹²⁷Section 300 of the Code of Criminal Procedure 1973 (Act No 2 of 1974) contains both the pleas of *autrefois acquit* and *autrefois convict*.

¹²⁸Section 300(1).

¹²⁹See *Maqbool Hussain v State of Bombay* AIR 1953 SC 325. The necessary jurisdiction would be absent if certain conditions for the exercise of jurisdiction had not been complied with, for example where previous sanction for the prosecution of particular offences (as required in terms of the Code) had not been obtained from the

court believed that it had such jurisdiction. If it believed, erroneously, that it had no such jurisdiction, the trial is regarded as a nullity and the pleas of former jeopardy cannot be raised successfully.¹³⁰

A distinction is maintained in the Act between a discharge and an acquittal; only an acquittal brings into effect double jeopardy protection. The classic example of an acquittal in Indian law is the following. The judge, after taking the evidence for the prosecution, and hearing the defence on the case, concludes that there is not sufficient evidence to find the accused guilty of the crime charged and accordingly enters an acquittal.¹³¹ However, an acquittal on the merits of the case at the conclusion of the trial is not necessarily required. An acquittal may also be entered at a stage *before* a verdict is delivered on the factual merits of a case. This occurs in the following instances

- (a) where the proceedings have been instituted upon a complaint and the complainant is absent on the day fixed for the hearing¹³²

Government. (See *infra* note 140 for an explanation of this feature of the criminal prosecution in India).

¹³⁰See *Mohammad Safi v State of West Bengal* 1966 1 Cri LJ 75. *Contra* the position taken in Canadian law in the case of *Petersen* (discussed *infra* under 3.3.2, text at note 85).

¹³¹Section 232 of the Act.

¹³²Section 249 of the Act. A private citizen intending to initiate criminal proceedings in respect of an offence has two courses open to him. He may lodge a first information report before the police if the offence is a cognizable one (that is one for which the police may arrest without a warrant), or he may lodge a complaint before a competent judicial magistrate irrespective of whether the offence is cognizable or non-cognizable. (Non-cognizable offences are offences for which the police have no authority to arrest without warrant). See Kelkar RV *Outlines of Criminal Procedure* 1977 105 & 159. The author points out that the object of the Indian Code is to ensure the freedom and the safety of the subject in that it gives him the right to come to court if

- (b) where a complaint is withdrawn at any time before a final order is passed¹³³
- (c) where the case is withdrawn by the public prosecutor at a stage after the charge has been framed¹³⁴
- (d) the termination of proceedings by the magistrate in summons cases¹³⁵ instituted otherwise than on a complaint, before pronouncement of judgment if such stoppage is made at a stage

he considers that a wrong has been done to him or to the Republic, and to be a check upon police vagaries. Where a complaint is filed before a magistrate, he may then order an investigation by the police.

¹³³Section 257 of the Code. The magistrate permits the withdrawal if he is satisfied that there are sufficient grounds for withdrawing the complaint. The Supreme Court of India held in *Cricket Association of Bengal v State of West Bengal* AIR 1971 SC 1925, 1930 that once the magistrate permits the complaint to be withdrawn, he must acquit the accused.

¹³⁴Section 321 of the Code. The court must grant permission for withdrawal on the guiding consideration of the interest of the administration of justice (*State of Punjab v Union of India* 1987 Cri LJ SC 151, 152). A prosecution of a case may be withdrawn not merely on the ground of paucity of evidence, but also to further the broad ends of public justice which may include appropriate social, economic and political purposes. (See *State of Punjab v Union of India* 152).

¹³⁵The Code has adopted four distinct modes of trial. These are: (i) trial before a court of sessions; (ii) trial of warrant cases; (iii) trial of summons cases and (iv) summary trials. For the purpose of determining the mode of trial, all criminal cases are divided into two categories: offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years form one category and are called "warrant cases". The first two trial modes are adopted in such cases. The other criminal cases (relatively of a less serious nature) form the second category and are termed "summons cases". The last two modes of trials are applicable to such cases. Less elaborate procedures are employed in these particular modes of trial. (See Kelkar 280).

after the evidence of the principal witnesses has been recorded.¹³⁶

The following terminations of criminal proceedings have, however, not been regarded as acquittals

- (a) the stopping of proceedings before evidence is given¹³⁷
- (b) withdrawal by a public prosecutor before a charge has been framed¹³⁸
- (c) dismissal of a complaint¹³⁹

¹³⁶Section 258 of the Code. These are cases where there exist, in the court's view, no *prima facie* evidence against the accused (*Mangalprasad Jethalal Upadhyay v Thakkar Ananji Rachhoddas* 1983 Cri LJ 309, 314 (Guj)).

¹³⁷Section 258 of the Code. This is regarded as a mere discharge which does not bring into effect protection against double jeopardy.

¹³⁸Section 321 of the Code.

¹³⁹In terms of section 203 of the Act a magistrate may, after considering the statement of the complainant and witnesses and the result of the police investigation (if any), dismiss the complaint if he is of the opinion that there is not sufficient ground for proceeding with the case. In *Chandra Deo Singh v Prokash Chandra Bose* 1963 2 Cri LJ 397, 400 the court held that the test is whether a *prima facie* case is made out, and not whether there is insufficient ground for conviction. A dismissal of a complaint occurs at a very preliminary stage in the proceedings; in fact, it can be compared with the preliminary inquiry stage of proceedings in our own law. Although the pleas of *autrefois acquit* and *autrefois convict* may not be raised on the mere ground of a dismissal of a complaint, it is pointed out that the possibility of a successive prosecution is unlikely in such instances. (See Kelkar 191). The author expresses the view that only exceptional circumstances may warrant a new proceeding. These are: (i) where the previous order of dismissal was passed on an incomplete record; (ii) where the dismissal was based on a misunderstanding, or could be regarded as manifestly unjust or absurd, or (iii) where new facts were adduced in the second complaint which could not, with reasonable diligence, have been brought on the record in the previous

- (d) an order of acquittal by a magistrate on the ground that he had no jurisdiction to hear the case for want of valid sanction¹⁴⁰
- (e) dismissal of a defective indictment.¹⁴¹

proceeding. The author concludes that it would depend on the facts of each case whether entertaining a second complaint on the same facts after the dismissal of the first ought to be regarded as an abuse of the process of the court, or a step in furtherance of justice. (*Id*). See chapter four *infra* under 4.4.5 for a discussion of the exercise of discretionary powers by Indian courts to prevent an abuse of process in the field of double jeopardy.

¹⁴⁰*Noorbhoy v The King* AIR 1949 PC 264. For prosecution of certain offences against the state, sanction or permission must be obtained from the government (state or central government). Kelkar explains (at 170) that the object of the section is to ensure that unauthorised persons do not interfere in state matters. He also points out that absence in sanction is regarded by Indian courts as a basic defect in jurisdiction and therefore not curable. (*Cf* also *Abdul Mian v The King* AIR 1951 Pat 513). Jain MP *Indian Constitutional Law* 4th ed repr 1993 points out (at 566) that when a trial has for some reason become abortive either because of some inherent defect or illegality affecting the validity of the trial itself, a second trial is not barred by section 20(2) (*Mohd Sati v West Bengal* AIR 1960 Bom 225).

¹⁴¹In terms of the Code, wide powers are conferred on Indian courts to amend or alter a charge at any time before judgment is pronounced. (See section 216(a)). The basic premise is that no errors in stating either the offence or the particulars required to be stated in the charge should be regarded (at any stage) as being material, unless the accused has in fact been misled by such an error and it has occasioned a failure of justice. (See section 215 of the Code). The practice adopted in India is the following. In the event of prejudice to the accused, the court may either adjourn the trial for such period as may be necessary, or, direct a new trial. (This is provided for in section 216(4)). The result of these wide powers, namely that the court may adjourn the trial or direct a new trial at any stage of the proceedings, is that an acquittal based on a defective indictment almost never occurs. In fact, no such reported case could be traced. (See in general Kelkar 276-279). *Cf* however the decision in *Bishan Singh v State of Rajasthan* 1973 Cri LJ 1079 (discussed in chapter eight *infra* under 8.4.2, text at note 147) where a conviction on a defective indictment was set aside on appeal and the question of the permissibility of a new trial considered on the basis of double jeopardy principles.

3.4.3 Summary

* The Supreme Court of India held that an accused may only rely on the constitutional guarantee against double jeopardy if he has previously been convicted and punished for an offence. This means that the plea of *autrefois acquit* did not attain constitutional status in India. However, the plea of former acquittal may be raised in the ordinary law of the land. It follows that greater protection against double jeopardy is afforded the accused in terms of the ordinary law of the land than in terms of the Constitution.

* A distinction is maintained in Indian law of criminal procedure between an acquittal on the one hand, and a discharge on the other hand. Only an acquittal effects protection against double jeopardy. An acquittal does not necessarily mean a termination of proceedings at the conclusion of the case based on a finding of fact that the accused is innocent. Terminations of proceedings on other grounds may also qualify as an "acquittal". These grounds are

- a) Absence of a complainant in proceedings instituted on complaint. These are proceedings initiated by the complainant himself instead of the state before a competent judicial magistrate.
 - (b) The withdrawal of a complaint.
 - (c) The withdrawal by a public prosecutor *after* a charge has been framed.
 - (d) The termination of a case by the magistrate in summons cases (proceedings for less serious offences) at a stage after the evidence has been given.
-

Dismissal of a complaint in proceedings described in (a) above does not *per se* offer the accused protection against double jeopardy. The reason advanced is that proceedings on complaint amount merely to preliminary proceedings; a second prosecution is therefore justified. However, this will only be allowed in exceptional circumstances, for instance where the dismissal was based on a misunderstanding, or is manifestly unjust or absurd. Similar to the position in English law regarding the effect of a finding of no case to answer at a preliminary enquiry, a second prosecution on dismissal of a complaint may be prohibited if it amounts to an abuse of process.

* Unlike the position in Canadian law, the common law principle still applies in Indian law that a dismissal based on a defective indictment does not bar a second trial. However, a dismissal on this basis is very rare. An indictment is only regarded as being defective if the accused was in fact misled by the error and it has resulted in a failure of justice. Moreover, Indian courts have wide powers to adjourn matters in order to avoid prejudice to the accused (in allowing amendment of an indictment).

* Finally, a trial is regarded as a nullity and a second trial allowed for the same offence if the court discharged the accused in the erroneous belief that it lacked jurisdiction to hear the matter.

3.5 THE LAW OF THE UNITED STATES OF AMERICA

3.5.1 General

The first Congress of the Federal Government of the United States adopted the common law guarantee against double jeopardy as part

of the Bill of Rights in 1789.¹⁴² The prohibition was included as part of the Fifth Amendment of the United States Constitution.¹⁴³ This provision provides, *inter alia*, that

[No] person [shall] be subject for the same offense [*sic*] to be twice put in jeopardy of life or limb.¹⁴⁴

In an early decision,¹⁴⁵ the Supreme Court emphasised that the double jeopardy clause in the Fifth Amendment is to be read broadly and applied "to all cases where a second punishment is attempted to be inflicted for the same offense [*sic*] by a judicial sentence".¹⁴⁶ Almost a hundred years later the court made clear, however, that the clause was a bar not only against successive punishments for the same offence, but also against being twice put in *jeopardy*. The court stated in *Price v Georgia*¹⁴⁷ that

[t]he "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused

¹⁴² Recognition of the concept of double jeopardy originated in the new nation in the colony of Massachusetts. Sigler *Double Jeopardy* 22-23 expresses the view that the significance of double jeopardy in Massachusetts law explains why the doctrine was elevated to constitutional dignity (as early as the eighteenth century), instead of being treated as just another common law concept. See in general Sigler *Double Jeopardy* 21-34 and Singer S and Hartman MJ *Constitutional Criminal Procedure handbook* 1986 540 for a discussion of the adoption process of the rule in American law.

¹⁴³The Bill of Rights was introduced by James Madison in 1789 as the first ten amendments to the United States Constitution.

¹⁴⁴US Const amend V.

¹⁴⁵ *Ex parte Lange* 85 US (18 Wall) 163 (1873).

¹⁴⁶At 173.

¹⁴⁷398 US 323, 326 (1970).

for a second time will be convicted of the "same offense" (*sic*) for which he was initially tried.

The Court recognised that the clause offers the defendant in a criminal trial three distinct constitutional protections.¹⁴⁸ Protection against a second prosecution for the same offence after acquittal; protection against a second prosecution for the same offence after conviction and, protection against multiple punishment for the same offence.

However, the double jeopardy clause was not obligatory in the states until 1969. In that year, the United States Supreme Court made federal double jeopardy standards applicable to the states by incorporation of the guarantee through the Fourteenth Amendment.¹⁴⁹

The rationale of the constitutional safeguard was articulated by the

¹⁴⁸*North Carolina v Pearce* 395 US 711, 717 (1969). It has also long been recognised that the protection is applicable to both felonies and misdemeanours (*Ex parte Lange supra*).

¹⁴⁹See *Benton v Maryland* 395 US 784 (1969). Prior to *Benton*, the Court held that the clause operated as a limitation on the federal government only. (See *Palko v Connecticut* 302 US 319 (1937)). The double jeopardy jurisprudence of the different states of America will not be fully canvassed in this thesis. Suffice it to say (at this stage) that most of the states provide for greater protection against double jeopardy than that provided by the federal constitutional provision (as interpreted by the United States Supreme Court). All states, except Connecticut, Maryland, Massachusetts, North Carolina and Vermont also provide for double jeopardy protection in their own constitutions. The five states that do not, consider double jeopardy as part of their common law. See Singer & Hartman 540-541 and Notes and Comments: "Twice in Jeopardy" *Yale Law Journal* Vol 75 1965 262, 262-263 (hereinafter referred to as "Comment: twice in jeopardy").

United States Supreme Court in *Green v US*¹⁵⁰

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense [*sic*] 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, [*sic*] 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.

The Supreme Court repeated these values (set out in *Green*) in almost every single case dealing with double jeopardy issues. However, confirmation of these values has not prevented the court from moving towards a less defendant-oriented philosophy in recent decisions. Although the court laid down the rule that jeopardy attaches at the commencement of the trial (in a jury trial, when the jury is sworn, and in a bench trial, when the first witness is called),¹⁵¹ it interpreted the double jeopardy provision of the Constitution on the basis that it operates primarily to protect the sanctity of acquittals on the merits, rather than to protect the individual from repeated attempts by the state to secure a conviction.¹⁵² The court's decisions reflecting this trend involve cases which attempt to determine whether the double jeopardy clause should prohibit retrials after mistrials, dismissals, appeals by the

¹⁵⁰355 US 184, 187-188 (1957).

¹⁵¹See *Crist v Bretz* 437 US 28 (1978).

¹⁵²See in particular the approach adopted in *US v Scott* 437 US 82 (1978) discussed in detail in chapter six *infra* under 6.5.5, text at note 193.

defendant and appeals by the state. The principles laid down by the Supreme Court in these different procedural contexts will be considered on a separate basis in the following paragraphs.

3.5.2 The attachment of jeopardy

The United States Supreme Court held that jeopardy attaches in a bench trial (a non-jury trial) when the court begins to hear evidence, and this standard now applies in state as well as federal prosecutions.¹⁵³ In the 1978 Term, however, the Supreme Court in *Crist v Bretz*¹⁵⁴ laid down as a constitutional principle the rule that jeopardy attaches in a jury trial at the impanelling and swearing in of the jury. In *Crist*, the Supreme Court focused on the values which underlie the prohibition against double jeopardy. It is therefore essential to give a detailed discussion of that case. The facts were the following. The defendants objected to errors in the criminal charge against them (relating to a count of obtaining money and property by false pretences), at a stage immediately after the jury was impanelled and sworn, but before the state's first witness was sworn. The trial judge, rejecting a motion by the prosecution to amend the charge, dismissed the entire charge against the defendants. However, it allowed the state to proceed with the case in a new trial on a new charge. After a second jury had been selected and sworn, the defendants moved to dismiss the new charge, claiming that the double jeopardy clause of the United States as well as the double jeopardy clause of the state of Montana Constitution barred a second prosecution. Since the state law fixed attachment of jeopardy at the

¹⁵³See *Lee v US* 432 US 23 (1977) & *Serfass v US* 420 US 377 (1974).

¹⁵⁴*Supra*.

swearing of the first witness, the motion was denied.¹⁵⁵ However, the Supreme Court ruled that the subsequent convictions based on the charges in the second proceeding had to be reversed because, as a matter of constitutional law, jeopardy had attached when the first jury was impanelled and sworn. The court held that, through the Fourteenth Amendment, this rule also applied to the state of Montana.¹⁵⁶

Mr Justice Stewart stated that "the relatively simple rule" laid down in English common law, namely that a defendant is regarded as having been in jeopardy only when there has been a conviction or acquittal after a complete trial, also formed part of early American constitutional law.¹⁵⁷ However, he pointed out that unlike the position in English law, this rule did not survive constitutional scrutiny in the United States of America. From the end of the nineteenth century, it became firmly established that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal.¹⁵⁸

The court explained that although it has long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial was, until

¹⁵⁵Until the decision in *Crist*, the federal rule of attachment of jeopardy (in jury trials) was not considered a constitutionally essential element of state procedure.

¹⁵⁶At 32.

¹⁵⁷At 33.

¹⁵⁸At 33. The court referred to a number of cases which dealt with the issue whether a subsequent prosecution may follow on a declaration of a so-called mistrial. The mistrial cases are discussed in detail under the following sub-heading.

the court's decision in 1963 in *Downum v US*,¹⁵⁹ open to argument. It was only in that case that the Supreme Court pinpointed the stage in a jury trial when jeopardy attaches, namely when the jury is impanelled and sworn. Mr Justice Stewart explained that *Downum* and other decisions of the Supreme Court indicate that the reason for holding that jeopardy attaches when the jury is impanelled and sworn, is that the defendant "[has a] valued right to have his trial completed by a particular tribunal".¹⁶⁰ In other words, the attachment rule protects the interest of an accused in retaining a chosen jury.¹⁶¹ The court emphasised that the right of the accused to have his trial completed by the first tribunal he encounters, "lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled [*sic*] and sworn".¹⁶²

In a concurring opinion, Justice Blackmun chose not to rest his conclusion (namely that jeopardy attaches at the time when the jury is impanelled and sworn), solely on the above grounds. He pointed out that the argument that jeopardy attaches at that particular stage of the proceedings for the *sole* reason that the accused has a valued right to have his trial completed by a particular tribunal, would also support a conclusion that jeopardy attaches at the very beginning of the jury selection process.¹⁶³ In his view, other interests are also involved: repetitive stress upon the defendant; continuing

¹⁵⁹372 US 734 (1963). See *infra* text at note 179 for a discussion of that decision.

¹⁶⁰At 36, relying on the court's previous holding in *Wade v Hunter* 336 US 684 689 (1949). The court also referred to the *dicta* in *Green* cited *supra*, text at note 150.

¹⁶¹At 35.

¹⁶²At 36.

¹⁶³At 38.

embarrassment for him; and the possibility of prosecutorial overreaching in the opening statement.¹⁶⁴ In Justice Blacmun's view, although each of these interests could also be used to support an argument that jeopardy attaches at some point before the jury is sworn, they become particularly acute at the commencement of trial (in other words, when the jury is sworn). The judge explained that it is then that the accused begins to run the risk of conviction and, the greatest opportunity exists for prosecutorial overreaching.¹⁶⁵

However, the important interests of the accused highlighted in the *Crist* case did not result in a permanent discontinuance of criminal proceedings for the same offence in *all* circumstances where the discontinuance occurred at a stage after jeopardy had attached. In deciding whether the double jeopardy ban applies after jeopardy has attached, the court balanced these interests of the accused against the public's interest to bring an offender to justice. This balancing of interests becomes particularly apparent from decisions of the Supreme Court handed down in the so-called "mistrial" cases. It is therefore expedient to discuss these cases first.

3.5.2.1 Mistrials

In the federal law of the United States a trial may be terminated by a trial court at a stage after jeopardy had attached but before a final verdict is rendered by declaring the trial a so-called "mistrial". The declaration of the trial court of a mistrial means that a trial is

¹⁶⁴*Id.*

¹⁶⁵The judge stated (at 38) that "it is then and there that the defendant's interest in the jury reaches its highest plateau, because the opportunity for prosecutorial overreaching thereafter increases substantially, and ... stress and possible harassment for the defendant from then on is sustained".

discontinued on the basis that it has become inappropriate or impossible to continue with the trial.¹⁶⁶ Improper conduct by counsel, the presiding judge, members of the jury or witnesses, *inter alia*, constitutes grounds for a mistrial and a motion on these grounds may be made by either the prosecution or the defence prior to jury deliberations. Mistrials may also be declared *suo sponte* by a judge either at a stage prior to jury deliberations or, at a stage after jury deliberations if the jury failed to reach a verdict. The last-mentioned instance is known as a "hung-jury" mistrial.¹⁶⁷ The judge who orders a mistrial usually assumes that a re prosecution can be brought. However, as the following discussion of Supreme Court decisions on the issue demonstrates, this is not always the case.

In dealing with the question whether re prosecution of an accused on declaration of a mistrial is constitutionally permissible, the Supreme Court has demonstrated two primary concerns. Protection of the accused from prosecutorial overreaching or harassment and preservation of the accused's interest in finality.¹⁶⁸ The accused's interest in finality has been more clearly defined by the court in mistrial cases as a "valued right to have his trial completed before the first tribunal he confronts".¹⁶⁹ An accused has a valued right to have his

¹⁶⁶See Israel JH Kamisar Y and LaFave WR *Criminal Procedure and the Constitution* 1989 673-674.

¹⁶⁷See Del Carmen R *Criminal Procedure - Law and Practice* 2nd ed 1991 43.

¹⁶⁸See Comments "Double jeopardy and re prosecution after mistrial: Is the Manifest Necessity Test manifestly necessary?" *Northwestern University Law Review* Vol 69 1975 887, 888 (hereinafter referred to as "Comment: manifest necessity test").

¹⁶⁹*US v Jorn* 400 US 470, 486 (1971). An accused's valued right to have his trial completed by a particular tribunal was first formulated in these terms by Justice Black in *Wade v Hunter supra* at 689. Mr Justice Black recognised in *Hunter* that the protection of an accused's

trial completed by a particular tribunal because he has an interest in being able "to conclude his confrontation with society" once it has begun.¹⁷⁰ It follows that he has an interest in continuing with the first jury impanelled, because changing the jury means interrupting the trial. Therefore, the defendant's interest in retaining the particular tribunal with which he began is viewed as "merely an incident of his primary interest in being able to complete the trial itself".¹⁷¹ In other words, this "valued" interest of the accused is merely part of the accused's larger interest in finality.

However, the United States Supreme Court was faced with a dilemma in the mistrial cases. If the accused's right to obtain a verdict from the first tribunal he confronts was to be regarded as absolute, a declaration of a mistrial after jeopardy attached but before a final verdict is rendered would bar a retrial and subsequently result in the release of the accused where no true adjudication of the factual issues occurred. As this result was regarded as a violation of concepts of justice, the court recognised that re prosecution subsequent to a trial terminated prior to verdict involves "the competing equities of bringing the guilty to justice while securing to the defendant his first jury right and protecting him from harassment

interest in a particular forum is a necessary result of the attachment of double jeopardy protection at a stage *before* a final verdict; a distinctive feature of the American justice system that "displays a much greater sensitivity for the individual rights of the criminal defendant" (at 689).

¹⁷⁰See *US v Jorn* 486.

¹⁷¹See Westen P and Drubel R "Toward a general theory of double jeopardy" 1978 *Supreme Court Review* 81, 90 (hereinafter referred to as *Westen General theory*).

and anxiety".¹⁷²

In order to reach a decision which balances these competing interests, the Supreme Court introduced early in the previous century the "manifest necessity" test in *US v Perez*.¹⁷³ In *Perez* the jury, unable to agree upon a verdict (a so-called hung-jury), was discharged by the judge without the consent of the accused. The accused was thereupon re-prosecuted over his objection and appealed against his subsequent conviction on grounds of former jeopardy. The Supreme Court ruled that the Fifth Amendment double jeopardy provision does not bar retrial when a mistrial had been declared due to the inability of the jury to agree upon a verdict. Mr Justice Story stated that courts have

authority to discharge a jury from giving a verdict, whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated".¹⁷⁴

However, the opinion of the court in *Perez* contained neither reasoning nor explanation to indicate how the stated standard was applied to the

¹⁷²See "Comment: manifest necessity test" 889. In *Wade v Hunter* the court stated (at 978) that "[A] defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public interest in fair trials designed to end in just judgments".

¹⁷³22 US 9 (Wheat) 579 (1824).

¹⁷⁴At 580. The approach adopted in *US v Perez* namely that when there is a hung-jury and the accused is neither convicted or acquitted, the double jeopardy clause does not prohibit re-prosecution, was confirmed by the Supreme Court in *Richardson v US* 468 US 317 (1984). This case is discussed *infra*, text at note 198.

facts in the case and how the test justified the conclusion reached. Moreover, subsequent cases of the Supreme Court on the issue of reprosecution on declaration of a mistrial for reasons *other* than a hung-jury (for instance, where prosecutorial error contaminated the trial), were inconsistent inasmuch as some required a "scrupulous exercise of judicial discretion"¹⁷⁵ before depriving an accused of his first jury right, and others ruled that, because the trial judge has a broad discretion to declare a mistrial in terms of the manifest necessity test, "no mechanical formula could be applied in reviewing the propriety of a mistrial declaration".¹⁷⁶

However, during the 1977 Term, the Supreme Court considered the scope of a trial judge's discretion in declaring mistrials in the landmark decision of *Arizona v Washington*.¹⁷⁷ The court ruled that, although mistrials based on the factfinder's inability to reach a verdict (so-called hung-jury mistrials), deserved minimal scrutiny by a

¹⁷⁵See *US v Jorn* 485. In that case, the court barred reprosecution when, over the accused's objection, a trial judge *suo sponte* declared a mistrial because he was persuaded that several prosecution witnesses had not been warned of their constitutional rights. Although there had been no question of prosecutorial overreach in that case, the court nevertheless attached paramount importance to the accused's first jury right. The court stated (at 487) that there was no "manifest necessity" to declare a mistrial since the trial judge had failed to consider less drastic measures (for instance, the granting of a continuance).

¹⁷⁶See *Illinois v Somerville* 410 US 458, 462 (1973). See also Klarman MJ "Mistrials arising from prosecutorial error: Double jeopardy protection" *Stanford Law Review* Vol 34 1982 1061-1069.

¹⁷⁷343 US 497 (1978). In that case, a mistrial was declared on a prosecution motion as a result of improper behaviour of the defence. The court concluded that, in those circumstances, the accused may be tried again in a new trial because the public interest in fair trials must prevail over the defendant's right to have his trial concluded before the first jury impanelled.

reviewing court,

the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or where there is reason to believe that the prosecutor is using superior resources of the state to harass or to achieve a tactical advantage over the accused.¹⁷⁸

Although decided long before *Washington*, the Supreme Court's decision in *Downum v US*¹⁷⁹ is a good illustration of the application of this standard by the court. In that case, the court ruled that where a mistrial had been granted at the prosecution's request because one of the prosecution's key witnesses failed to appear for trial, a retrial of the accused would be barred in terms of the double jeopardy clause. The court expressed the view that once a proceeding had begun, and once the defendant had an interest in "having his trial completed by the particular tribunal summoned to sit in judgment of him", the state could not abort the proceedings simply by showing that it had a legitimate prosecutorial interest in starting over.¹⁸⁰

On the strength of the court's decision in, *inter alia*, *Downum* and *Washington*, the legal commentators Westen and Drubel submit that a combination of the accused's interest in finalising proceedings before the first tribunal he confronts and his interest in being protected from manipulation explains why he cannot be re-prosecuted on declaration of a mistrial.¹⁸¹

¹⁷⁸At 509.

¹⁷⁹*Supra*.

¹⁸⁰At 736.

¹⁸¹At 91.

Although this explanation is valid in cases where a mistrial is declared *without* the consent of the accused, different considerations come into play in cases where the accused moves for a mistrial. One legal commentator points out that where the accused's motion is made as a result of prosecutorial misconduct or judicial error, the interest of the accused in proceeding before the first forum is in potential conflict with his interest in avoiding governmental harassment.¹⁸² Thus, continuing in the first forum does not protect the defendant from governmental harassment in such cases.

In *US v Dinitz*¹⁸³ the court explored the potential conflict between these considerations. The court held that when a defendant, faced with prejudicial error, moves for a mistrial, it may be in his own interest to choose an immediate retrial following the mistrial instead of proceeding to a tainted conviction followed by an appeal, reversal and eventual retrial.¹⁸⁴ The court explained that

[i]n such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause - the avoidance of anxiety, expense and delay occasioned by multiple prosecutions.¹⁸⁵

¹⁸²See Ponsoldt JF "When guilt should be irrelevant: Government overreaching as a bar to re prosecution under the double jeopardy clause after *Oregon v Kennedy*" *Cornell Law Review* Vol 69 1983, 76, 87. The commentator explains that often, where the accused's motion for a mistrial is made in the face of prejudicial prosecutorial conduct or judicial error, the prosecution does not seek to provoke a mistrial, but rather prefers the opportunity to prevail in the first forum based on its prejudicial activities.

¹⁸³424 US 600 (1976).

¹⁸⁴At 610.

¹⁸⁵At 608.

Given these possible objectives, the court expressed the view that the important consideration for purposes of the double jeopardy clause is that

...the defendant retains primary control over the course to be followed in the event of [prosecutorial or judicial] error.¹⁸⁶

However, as regards the above premise, the court added an important qualification. It emphasised that

[t]he Double Jeopardy Clause does protect a defendant against governmental action intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor", threatens the "[h]arassment of an accused by several successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favourable opportunity to convict" the defendant.¹⁸⁷

The court emphasised that regardless of an accused's choice, some level of prosecutorial or judicial misconduct should always bar retrial following a mistrial. In *Arizona v Washington*¹⁸⁸ the Supreme Court endorsed the approach adopted in *Dinitz*. It stated that retrial would be barred "where there is *reason to believe* that the prosecutor is using superior resources of the State to harass or to achieve a tactical advantage over the accused".¹⁸⁹ Therefore the Supreme Court's

¹⁸⁶At 609.

¹⁸⁷At 611 quoting *Jorn* 470 and 485.

¹⁸⁸*Supra*.

¹⁸⁹At 508. (My emphasis).

decision in both *Dinitz* and *Washington* manifested a concern to protect citizens against governmental abuse of power; the fundamental idea that underlies the accused's constitutional right against double jeopardy.

However, the court subsequently retreated from the principle it laid down in *Dinitz* in the case of *Oregon v Kennedy*.¹⁹⁰ In that case, Mr Justice Rehnquist rephrased the test to be applied in order to determine whether a retrial is barred in terms of the double jeopardy clause on a declaration of a mistrial granted on defence request as a result of prosecutorial misconduct.¹⁹¹ In what has been described as an "Animal Farm-like opinion",¹⁹² the court stated that

[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause ...Only where the governmental conduct in question is *intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy.*¹⁹³

The decision has been criticised severely by legal commentators in that it would be almost impossible for a defendant to show that the prosecution "intended to goad" the defendant into moving for a

¹⁹⁰456 US 667 (1982).

¹⁹¹*In casu*, the prosecution asked a question of a witness which was a direct personal attack on the general character of the accused and which clearly prejudiced the accused's case.

¹⁹²See Singer and Hartman 556.

¹⁹³At 675-676. (My emphasis).

mistrial.¹⁹⁴ It is suggested that the criterion should rather be whether the misconduct or government error was engaged in with the purpose of improperly seeking a conviction rather than a mistrial.¹⁹⁵ The view is expressed that defendants should not lose their double jeopardy protection simply because a prosecutor intends to seek a conviction rather than provoke a mistrial through conduct that could accomplish either result.¹⁹⁶ Despite these valid criticisms of the restrictive approach adopted in *Oregon*, the decision has as yet not been overruled.

At the beginning of this discussion it was pointed out that the Supreme Court held in *US v Perez*¹⁹⁷ that an accused may be tried again on declaration of a "hung-jury" mistrial. In 1984, in the case of *Richardson v US*,¹⁹⁸ the Supreme Court affirmed the *Perez* rule. Counsel for the defence in *Richardson* argued that if the prosecutor failed to introduce sufficient evidence to prove the guilt of the accused beyond reasonable doubt, he could not be tried again following the declaration of a mistrial based on a "hung-jury".¹⁹⁹ The majority of

¹⁹⁴Singer and Hartman 556.

¹⁹⁵See Ponsoldt 78.

¹⁹⁶See Ponsoldt 100.

¹⁹⁷Discussed *supra*, text at note 173.

¹⁹⁸468 *US* 317 (1984).

¹⁹⁹Defence counsel relied upon a previous decision of the Supreme Court, *Burks v US* 437 *US* 1 (1978). In that case, (discussed in detail in chapter eight *infra* under 8.5.2, text at note 181) the Supreme Court held that a reversal of a conviction on appeal due to insufficiency of evidence as opposed to a reversal due to procedural error, brings into effect protection against double jeopardy. In other words, an accused whose conviction is set aside on appeal on the basis of insufficiency of evidence, may not be tried again in a new trial.

the court (per Mr Justice Rehnquist) rejected this argument, ruling that if neither the appellate court nor the trial court had actually declared that the state's evidence was insufficient to convict, retrial was not barred by the prohibition against double jeopardy.²⁰⁰ The court also invoked the "continuous jeopardy" theory in order to justify its conclusion.²⁰¹ It stated that retrial does not involve the double jeopardy clause unless the accused's initial jeopardy has terminated; so long as the accused's original jeopardy continues he is only once in jeopardy.²⁰² The conclusion of the court was that the declaration of a "hung-jury" mistrial is *not* an event which terminates jeopardy.

The court's reasoning in this case has been described as "sparse and reduce[d] ultimately to a statement of historical fact".²⁰³ This comment was aimed more particularly at the attempt by the court to justify its decision by arguing that "...for 160 years, a failure of the jury to agree on a verdict [has posed no bar to retrial]".²⁰⁴ The court's argument in *Richardson* is also questioned on the basis that it

²⁰⁰At 324.

²⁰¹At 325-326. See chapter six *infra* under 6.5.2, text at note 144 and chapter eight under 8.5.2, text at note 177 for a discussion of the "continuous jeopardy" theory.

²⁰²At 325. The court based this reasoning upon a previous holding, *Justices of Boston Municipal Court v Lydon* 466 US 294 (1984). However, that case dealt with a completely different issue: Whether a two-tiered trial system (applied in the state of Massachusetts) which provided for a right of the accused to a *de novo* trial before a jury in the event of conviction before a judge in a bench trial, could be challenged in terms of the double jeopardy clause of the Constitution. The Court (in the *Lydon* case) answered this question in the negative on the basis that it amounted merely to a single continuous process.

²⁰³See Wang SO "Insufficient attention to insufficient evidence: Some double jeopardy implications" *Virginia Law Review* Vol 79 1993 1381, 1390.

²⁰⁴At 323-324.

does not necessarily rest upon "airtight logic":²⁰⁵ When the jury fails to agree on a verdict the accused may be retried, even if the vote was 11-1 for acquittal.²⁰⁶ Johnson argues that if the prosecution cannot convince 12 jurors beyond a reasonable doubt that the defendant is guilty, then why should it have a second chance with another twelve?²⁰⁷ Despite these valid criticisms, the rule that a "hung-jury" mistrial declaration does not bar a second trial still prevails in American law.

3.5.2.2 Dismissals

The double jeopardy clause clearly bars retrial after a verdict of acquittal by the trial court (either by a judge or by a jury).²⁰⁸ Likewise, a directed verdict of acquittal by a judge in a jury trial amounts to a termination of proceedings which brings into effect double jeopardy.²⁰⁹ According to the Supreme Court in the case of *United States v Martin Linen Supply Co*,²¹⁰ the double jeopardy

²⁰⁵See Johnson PE *Criminal Procedure* 2nd ed 1994 937.

²⁰⁶In federal and most state trials, the jury vote for conviction or acquittal must be unanimous. See Del Carmen 43.

²⁰⁷See Johnson 937.

²⁰⁸See *Fong Foo v United States* 369 US 141 (1962) discussed in detail in chapter six *infra* under 6.5.3, text at note 151.

²⁰⁹A directed verdict of acquittal by a judge follows on a request by defence counsel that the trial judge render a verdict of not guilty without the case going to the jury. Counsel is alleging that even if all the evidence presented by the prosecution is true, it is still not sufficient to sustain a conviction. See Schiffman JD *Fundamentals of the Criminal Justice Process* 1986 196.

²¹⁰430 US 564 97 (1977). This case, dealt with the issue of whether an acquittal, entered by a trial judge in terms of a rule which provided that a court could enter an acquittal after a deadlocked jury had been discharged by the court was appealable by the prosecution. The

clause may also prohibit retrial after a dismissal that is not an outright acquittal, if that dismissal can be regarded as the equivalent of an acquittal.²¹¹

Before explaining what is meant by the concept "equivalent of an acquittal", it is necessary first of all to explain the difference between a mistrial type termination of proceedings and a termination of proceedings labelled a dismissal. As indicated above, a mistrial is declared if the court finds that it would be inappropriate or impossible to continue with the present trial. The trial is terminated on the assumption that the prosecution will proceed in a new trial. In contrast to mistrial declarations (which order a termination of the present trial without ending the prosecution), a dismissal is based on a flaw in the prosecution's case that presents a bar to conviction of the offence charged.²¹² Reprosecution cannot follow on a dismissal type of termination unless the prosecution is allowed to appeal the dismissal, and it is set aside by a higher tribunal.²¹³

In the *Martin Linen* case, the court held that a dismissal ("whatever its label"),²¹⁴ amounts to the equivalent of an acquittal, "[if it] actually represents a resolution, correct or not, of some or all of the

case is discussed in detail in the chapter six *infra* under 6.5.5, text at note 174.

²¹¹At 579.

²¹²See Israel, Kamisar & La Fave 673-674.

²¹³The circumstances in which the prosecution may appeal against a dismissal is discussed in detail in chapter six *infra* under 6.5.5.

²¹⁴At 571.

factual elements of the offense [*sic*] charged".²¹⁵ In other words, a dismissal amounts to an acquittal which brings into effect protection against double jeopardy if it amounts to an adjudication on the factual merits of the case. The approach adopted in the *Martin Linen* case was confirmed by the Supreme Court three years later in *United States v Scott*.²¹⁶ In *Scott*, the defendant moved successfully for a mid-trial dismissal of two counts in his indictment, on the grounds of prejudicial delay. The jury acquitted the defendant on the third count. The Supreme Court permitted retrial on the first two counts, because the defendant himself sought dismissal on grounds "unrelated to [his] factual guilt or innocence".²¹⁷ The Court in *Scott* could find no functional distinction between a dismissal *not* on the merits and a

²¹⁵*Id.* The court found that that the dismissal granted by the court of first instance in fact amounted to an acquittal (for double jeopardy purposes), because that court recorded that the state had failed to prove beyond a reasonable doubt the material allegations necessary for a conviction of the crime. The defendant therefore had to be found not guilty of the offence charged. It is necessary to explain the difference between the *Martin Linen* case and that of *Richardson* (discussed *supra*, text at note 198). In both these cases the jury was deadlocked (a "hung-jury"). However, in the *Martin Linen* case, the defendants filed a motion for judgment of acquittal in terms of a federal rule of criminal procedure which allows the district court to enter such a judgment of acquittal where the jury is discharged without reaching a verdict. The court granted this motion, stating that the accused should be acquitted *because the prosecution had failed to state its case beyond reasonable doubt*. Under these circumstances, the Supreme Court held that the prohibition against double jeopardy barred an appeal by the state from a judgment of acquittal. In the *Richardson* case no such statement was made by the court. See chapter six *infra* under 6.5.5, text at note 174 for a detailed discussion of the *Martin Linen* case.

²¹⁶437 US 82 (1978). See *infra* chapter six under 6.5.5, text at note 193 for a detailed discussion of this case.

²¹⁷At 87.

mistrial and therefore found the mistrial analysis applicable.²¹⁸ The court argued that by obtaining a premature dismissal on grounds unrelated to his factual guilt or innocence, the defendant had not permitted the state "one complete opportunity to convict those who have violated its laws".²¹⁹

The mistrial analysis (or standards) were also applied in *Lee v United States*.²²⁰ In that case, the Supreme Court held that the dismissal of a defective indictment (it did not allege the necessary specific intent required for theft), at a stage during trial after jeopardy had attached, did not prevent a subsequent prosecution on a new (corrected) indictment. The court allowed the second prosecution on the basis of standards applied in mistrial cases.²²¹ It held that there was no prosecutorial bad faith, only negligence.²²² Secondly, that the proceedings were terminated at the defendant's request and with his consent.²²³ A subsequent trial could accordingly not be viewed as

²¹⁸In two previous decisions, *United States v Wilson* 420 US 332 (1975) & *United States v Jenkins* 420 US 358 (1975) the Supreme Court made no distinction between dismissals on the merits and those on procedural grounds. According to these cases, the double jeopardy clauses would automatically apply to *any* dismissal if a reversal of such a dismissal would require additional proceedings (in a new trial) to resolve the case. Therefore the court distinguished in these cases between mistrials (which amounts merely to a ruling by the trial court that the present trial cannot proceed and that a new one must be held), and dismissals (which, like an acquittal, involve a finding favouring the defendant). See chapter six *infra* under 6.5.4 for a detailed discussion of the approach adopted in these cases.

²¹⁹At 100.

²²⁰432 US 23 (1977).

²²¹The court viewed the dismissal as "functionally indistinguishable from a declaration of a mistrial" (at 31).

²²²At 34.

²²³At 33.

a violation of the constitutional guarantee against double jeopardy.

To summarise. A dismissal as opposed to an acquittal does not bring into effect protection against double jeopardy, except if it can be regarded as the equivalent of an acquittal. The equivalent of an acquittal is a factual determination of the guilt or innocence of the accused. The defendant who successfully seeks to halt the prosecution against him without demanding a factual determination of his guilt or innocence, and, without being able to prove prosecutorial or judicial bad faith (as opposed to mere negligence), may be tried again, even though as a theoretical matter, jeopardy has already attached.

3.5.2.3 Reprosecution following an appeal by the accused

Generally, the state is not barred from reprosecuting the defendant who had his conviction set aside on appeal. The early decision of the Supreme Court in *Ball v United States*²²⁴ set the standard that retrial on appellate reversal does not amount to a violation of the double jeopardy clause. The court has reasoned in subsequent decisions that when an appeal is successful, the appellant has either "waived" his plea of former jeopardy, or that the original jeopardy is "continued" since the first conviction is not final.²²⁵

However, in the 1978 term, the Supreme Court recognised an

²²⁴163 US 662 (1896). This case is discussed in detail in chapter six *infra* under 6.5.2, text at note 131.

²²⁵See *Trono v US* 199 US 521 (1905) discussed in chapter eight *infra* under 8.5.2, text at note 169 and *Green v US* discussed in chapter six *infra* under 6.5.3, text at note 147.

important exception to this approach in the case of *Burks v US*.²²⁶ In that case, the court distinguished between reversals due to insufficiency of evidence and reversal due to procedural errors at trial. In the court's view, reversals due to insufficiency of evidence brings into effect protection against double jeopardy. It argued that a reversal based on insufficiency amounts to an acquittal on the factual merits of the case.²²⁷ The court argued that when a defendant's conviction has been overturned due to a failure of proof at trial, the prosecution cannot complain, "for it has been given one fair opportunity to offer whatever proof it could assemble".²²⁸ In such circumstances, a second trial would violate the prohibition against double jeopardy because, the prosecution is afforded "another opportunity to supply evidence which it failed to muster in the first proceedings".²²⁹

A second exception to the general rule that retrial upon appellate

²²⁶*Supra*.

²²⁷At 15.

²²⁸*Id*.

²²⁹At 11. See chapter eight *infra* under 8.5.2, text at note 181 for a detailed discussion of this case. In two subsequent decisions *Tibbs v Florida* 457 US 31 (1982) and *Lockhart v Nelson* 109 SC 285 (1988) the Supreme Court limited the scope of the exception recognised in *Burks*. In *Tibbs* the Supreme Court ruled that a reversal of a conviction by an appellate court based on the weight of the evidence as opposed to its sufficiency, does not invoke double jeopardy protection. In *Lockhart*, the Supreme Court held that a reversal of an accused's conviction based upon erroneous admission of evidence against him amounts to a reversal based upon trial error, even if the court of appeal concluded that without such evidence, the remaining evidence was insufficient to sustain a conviction. These cases are discussed in detail in chapter eight *infra* under 8.5.2, text at notes 196 and 197.

reversal of a conviction does not implicate double jeopardy principles, is the following. Where the original trial is for a given offence, but results in conviction of the defendant for only one of its lesser included offences, the defendant is implicitly acquitted of the greater crime. In *Green v US*²³⁰ the defendant was charged of first-degree murder but convicted of the lesser included offence of second-degree murder. After his successful appeal, retrial on the greater charge was held to violate the double jeopardy clause of the Constitution on the ground that jeopardy continues only for the lesser included offence.

3.5.2.4 Appeals by the prosecution

The right of the state to appeal against a termination of proceedings favourable to the accused is discussed in detail in chapter six. However, for the sake of clarity it is essential to discuss a few basic principles relevant to the issue of attachment of jeopardy. As indicated above, the double jeopardy clause has been interpreted by the Supreme Court as prohibiting a state appeal against an acquittal, or a dismissal which is the equivalent of an acquittal.²³¹ Therefore, any dismissal of a case at a stage after jeopardy has attached which is not the equivalent of an acquittal, may be appealed against by the state.²³²

Generally, appeals by the state against pre-trial rulings in favour of the accused (for example a pre-trial ruling to suppress evidence), are permitted because jeopardy has not yet attached. Therefore, if such

²³⁰*Supra*.

²³¹See *supra*, text at notes 215 and 216.

²³²See again the decision of the Supreme Court in *US v Scott* discussed briefly *supra*, text at note 216 and in detail in chapter six *infra* under 6.5.5, text at note 193.

an appeal is successful and results in new proceedings, the accused cannot rely on the rule against double jeopardy to prevent a subsequent trial. There is, however, an exception to this rule. In *US v Brewster*²³³ the Supreme Court held that if a preliminary dismissal in favour of the accused involves findings which "would constitute a defense [*sic*] on the merits at trial", jeopardy is said to attach constructively.²³⁴ This is merely an application of the rule that an acquittal (or the equivalent thereof) brings into effect double jeopardy, albeit in the context of preliminary proceedings. In other words, if an adjudication occurs which deals with the factual merits of the case at a stage before jeopardy is said to attach formally, it may also effect protection against double jeopardy.

3.5.2.5 Discontinuance of prosecution by Attorney-General

Although the Attorney-General is accorded a broad discretion to decide whether to institute a prosecution,²³⁵ his decision to terminate a prosecution is (in terms of the Federal Law) subject to judicial review. The Federal Rules of Criminal Procedure require consent of the court

²³³408 US 501, 506 (1972).

²³⁴An example of application of this principle is the following. In a prosecution for depositing obscene matter in the mail, jeopardy attached when the trial judge, after arraignment and entry of not guilty pleas "heard" written evidence at a pretrial hearing and determined that the materials forming the basis of the indictment were not obscene as a matter of law. See *US v Hill* (CA9) 473 F2d 759, referred to in *American Jurisprudence: A modern comprehensive text statement of American law, State and Federal* 2nd ed 1981 Vol 21 456 (hereinafter referred to as *American Jurisprudence*).

²³⁵The basic premise is that under constitutional separation of powers, the judicial branch is precluded from unwarranted interference with the prosecutor's discretionary power over the control of criminal prosecutions. Thus the prosecutor remains free to exercise his judgment in determining what prosecutions will best serve the public interest. See *American Jurisprudence* 862 note 53.

to withdraw a criminal prosecution,²³⁶ and vest in the courts the power to exercise their judicial discretion to determine whether a motion should be granted.²³⁷ Rule 48(a) provides

The Attorney General of the United States may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

The rules itself do not provide guidelines of how the courts should exercise their discretion. The basic approach seems to be that the courts should exercise their judicial discretion to grant a discontinuance in such a manner as to assure that the public interest is protected and that the interests of justice are served.²³⁸ In *Rinaldi v US*²³⁹ the Supreme Court stated that

[t]he principal object of the "leave of court" requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing and re-charging, when the government moves to dismiss an indictment over the defendants objection.

Accordingly, the courts have exercised their discretion to allow a discontinuance of proceedings by the prosecutor in terms of these guidelines.²⁴⁰

²³⁶1964 18 USC, Rule 48.

²³⁷*Rinaldi v US* 434 US 22 (1977).

²³⁸See *American Jurisprudence* 863.

²³⁹At 29 note 15.

²⁴⁰Many federal courts have required that the prosecutor reveals the basis which supports the motion to dismiss. In other words, that the prosecutor gives reasons for his motion to discontinue the

However, a withdrawal of charges by the prosecution at a stage before jeopardy attaches does not operate as an acquittal or prevent further prosecution for the same offence.²⁴¹ The entry of a *nolle prosequi* after jeopardy has attached on the other hand, requires the consent of the accused.²⁴² If the *nolle prosequi* is entered without the accused's consent, it operates as an acquittal and precludes further prosecution for the same offence.²⁴³ A *nolle prosequi* with the defendant's consent, however, even if it is entered after evidence is led, apparently does not bar a subsequent prosecution for the same offence.²⁴⁴

3.5.2.6 Jurisdiction

It cannot be said that a person was in jeopardy unless the court in which he was acquitted or convicted had jurisdiction to try him for the offence charged.²⁴⁵ The double jeopardy clause has been held to apply to criminal proceedings only; prison disciplinary measures or administrative sanctions imposed upon a prisoner for violation of a prison rule of conduct do not raise the bar of double jeopardy to his

proceedings. See in general *American Jurisprudence* 862-864 for further examples of exercise of discretionary powers by the courts in this particular context.

²⁴¹*Bassing v Cady* 208 US 386 (1907).

²⁴²See Rule 48(a) *supra* and *American Jurisprudence* 462-463.

²⁴³*American Jurisprudence* 463, referring to a number of decisions by federal courts holding that a dismissal at that stage of the proceedings without the consent of the defendant amounts to an acquittal and bars further prosecution for the same crime.

²⁴⁴See *American Jurisprudence* 463.

²⁴⁵ See *Serfass v US* (*supra*).

prosecution for a statutory offence arising from the same act that was the basis of the prison discipline.²⁴⁶

A related issue addressed in American law is the following. Can an accused, convicted or acquitted of a lesser crime by a court of competent jurisdiction, be charged subsequently for a greater crime (arising from the same facts) in another court (competent to hear that charge) if the first court lacked jurisdiction to determine culpability of the greater offence? The basic approach seems to be that despite the difference in jurisdiction (and the fact that the accused was never in jeopardy of conviction of the greater offence in the first trial), a prosecution of the greater offence will be barred.²⁴⁷ The rationale which apparently underlies this rule is that the double jeopardy prohibition requires that the state should proceed first on the greater offence; a trial for the lesser offence first may be regarded as a "dummy run" in order to obtain a conviction for the greater offence. This gives an unfair advantage to the state and enhances the potential for state abuse of power.

3.5.2.7 Collusive conviction or acquittal

It is generally recognised that a plea of former jeopardy is not supported by a conviction (for a minor offence, for instance to avoid an anticipated prosecution on a more serious charge based on the same facts) or an acquittal obtained by collusive or fraudulent activities.²⁴⁸

²⁴⁶See *American Jurisprudence* 444.

²⁴⁷See *American Jurisprudence* 450.

²⁴⁸See *American Jurisprudence* 452-453. A number of decisions is cited in support of this rule.

3.5.3 Summary

Mistrials

* The law which prevails today is that the prohibition against double jeopardy will bar retrial after a mistrial has been declared unless there was a manifest necessity to declare the mistrial in the first place.

* If the defence makes the motion for mistrial, retrial will not be barred unless the prosecution "intended to goad" the accused into moving for a mistrial.²⁴⁹

* If the prosecution moves for a mistrial on the ground of improper defence behaviour, retrial will be permitted unless the trial judge has clearly abused his discretion in granting the mistrial.²⁵⁰ However, if a mistrial is declared *sua sponte* in bad faith by the judge, or, on a prosecution motion which can be viewed as prosecutorial overreach or an attempt to manipulate the trial, retrial will be barred.²⁵¹

* A hung-jury mistrial declaration is not regarded as a termination of proceedings which invokes protection against double jeopardy.²⁵²

Dismissals

* A dismissal as opposed to an acquittal does not trigger protection

²⁴⁹See *Oregon v Kennedy* discussed *supra* text at note 190.

²⁵⁰See *Arizona v Washington* discussed *supra* text at note 188.

²⁵¹See *Downum v US* discussed *supra* text at note 179 and *Arizona v Washington* discussed *supra* under 3.5.3, text at note 177.

²⁵²See *Richardson* discussed *supra*, text at note 198.

against double jeopardy, except if it can be regarded as the equivalent of an acquittal. The equivalent of an acquittal is a factual determination of the guilt or innocence of the accused.

* The defendant who successfully seeks to halt the prosecution against him *without* demanding a factual determination of his guilt or innocence, and, without being able to prove prosecutorial or judicial bad faith (as opposed to mere negligence), may be tried again, even though as a theoretical matter, jeopardy has already attached.

Reprosecution following an appeal by the accused

* Reversal of a conviction based on insufficiency of evidence brings into effect protection against double jeopardy. The rationale underlying this rule is the following. The state, having already had one opportunity in an error-free trial to offer whatever proof it could assemble, may not get another opportunity to supply evidence which it failed to muster in the first proceedings. Reversal of a conviction on trial error, on the other hand, does not operate as a bar to a second trial.

* A conviction of a lesser offence operates as an acquittal of the greater offence of which the accused could have been convicted at trial. Thus on reversal of conviction of the lesser offence, the accused may not be tried again in a new trial for the greater offence. This is referred to as the "implied acquittal" doctrine.

Discontinuance of prosecution by Attorney--General

* The federal rules of criminal procedure provide for judicial review of the Attorney-General's decision to withdraw a charge at a stage after jeopardy has attached. In deciding whether a withdrawal may

occur, the courts take into account the public interest, as well as the broader interests of justice; for instance, protection of a defendant against prosecutorial harassment by charging, dismissing and re-charging for the same offence.

* If a discontinuance of proceedings entered after jeopardy had attached is allowed by the court, the accused may be tried again *if he also consented to the discontinuance*. If the accused did not consent, it operates as an acquittal and precludes further prosecution for the same offence.

3.6 SOUTH AFRICAN LAW

3.6.1 General

The special pleas of former jeopardy were first introduced in colonial courts towards the end of the nineteenth century.²⁵³ In dealing with these pleas (raised in the courts under their Norman-French labels of *autrefois acquit* and *autrefois convict*), the courts relied exclusively on English common law.²⁵⁴ This was the position even though Roman-Dutch law still formed the basis of criminal procedure during this period, and until the establishment of the Union of South Africa in 1910.²⁵⁵ It was only in 1933, in the decision of *R v*

²⁵³The pleas were raised in *inter alia*, the following early cases: *R v Stuurmans* (1863) 1 R 83; *Regina v Umbambeni* (1895) 16 NLR 61; *R v Nkani* (1903) 24 NLR 255; *R v Twalatunga* (1903) 20 SC 425; *R v Samoosing* (1905) 26 NLR 145; *Kerr v Rex* 1907 EDL 324.

²⁵⁴This is clear from a consideration of the cases cited in note 253.

²⁵⁵Roman-Dutch law was introduced at the Cape during the Occupation of the Dutch East India Company (1652-1795). This system of criminal procedure survived the first British Occupation and was also applied during the subsequent reign of the Batavian Republic (1803-1806). See Dugard J *South African Criminal Law and*

Manasewitz,²⁵⁶ that the Appellate Division of the Supreme Court explained the basis and ambit of the pleas in terms of Roman and Roman-Dutch principles, namely the doctrine of *res judicata*. In *Manasewitz*, the court emphasised that considerations of reasonableness and fairness underlie the rule against double jeopardy.²⁵⁷

At present, the pleas of former jeopardy are recognised in the Criminal Procedure Act.²⁵⁸ Section 106(l) provides (*inter alia*), as follows

When an accused pleads to a charge he may plead -

- (c) that he has already been convicted of the offence with which he is charged; or
- (d) that he has already been acquitted of the offence with which he is charged[.]

The common law right of the accused against double jeopardy also recently acquired the status of a fundamental human right in South African law. Section 35(3)(m) of the Constitution of the Republic of

Procedure Vol IV 1977 18.

²⁵⁶1933 AD 165. This case is discussed in detail in chapter four *supra* under 4.6.3, text at note 437.

²⁵⁷See the judgment of Beyers JA discussed in detail in chapter four *infra* under 4.6.3, text at note 448. This rationale of the rule has been reiterated in a number of subsequent decisions. See for instance *S v Vermeulen supra* discussed in chapter four *infra* under 4.6.9, text at note 581.

²⁵⁸Act 51 of 1977.

South Africa²⁵⁹ provides that every accused person has the right to a fair trial, which includes the right

not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

At the time of writing of this thesis, the Constitutional Court has not as yet considered the ambit of this particular fundamental human right. In the ordinary law of the land the rule has been considered in a number of procedural contexts. The most important development that occurred during this century is the expansion by the courts of protection against double jeopardy in the field of successive prosecutions for offences arising from the same facts.²⁶⁰ However, in the field of attachment of jeopardy, the courts have been less inclined to re-evaluate common law principles in the light of modern developments. This is discussed in more detail below.

3.6.2 The attachment of jeopardy

It is generally recognised that an accused is in jeopardy from the moment that he pleads to a charge before a court competent to try him for the offence(s) set out in the charge.²⁶¹ Therefore, it may be said that jeopardy attaches at this particular stage of criminal

²⁵⁹Act 108 of 1996.

²⁶⁰These developments are discussed in detail in chapter four.

²⁶¹Section 106(4) of the Criminal Procedure Act provides: An accused who pleads to a charge other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.

proceedings. However, South African courts have also required (in most cases) that an accused be acquitted or convicted on a valid indictment after a trial "on the merits" before he may succeed with a plea of former jeopardy.

In an early reported case, *R v Twalatunga*,²⁶² the Supreme Court of the Cape Colony was confronted with the question whether an accused, convicted on an indictment in which it was set out that he had stolen certain articles, the property of A, could be tried again in a new trial after appellate reversal of his conviction on the ground that the articles were the property of B.²⁶³ The court answered this question in the affirmative. It relied upon the common law decision of *Green*,²⁶⁴ and held that an accused convicted or acquitted on a defective indictment may, absent amendment of the indictment at the first trial, be tried again in a new trial upon a corrected indictment.²⁶⁵ The court justified its ruling by reference²⁶⁶ to the *dicta* in the mid-nineteenth century English case of *Drury*²⁶⁷ where Coleridge J is quoted as saying that

[i]t would be shocking to both justice and commonsense that individuals, who object only that they have been

²⁶²*Supra*.

²⁶³The permissibility of retrials on appellate reversals of convictions are considered in detail in chapter eight *infra*. This chapter focuses instead on the permissibility of new trials after a discharge (or acquittal) of the accused.

²⁶⁴This case is discussed in chapter two *supra* under 2.3.1, text at note 71.

²⁶⁵At 428-429.

²⁶⁶At 429.

²⁶⁷See chapter two *supra* under 2.3.1, text at note 68 for a discussion of this case.

regularly found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has on that ground been reversed, and can never be carried into effect, should therefore remain exempt from all punishment.

In a subsequent decision, *R v Koegelenberg*,²⁶⁸ the Transvaal Provincial Division followed the principle laid down in *Twalatunga*. In that case, the accused was acquitted on a charge of attempting to supply intoxicating liquor to a person S. At the trial, the magistrate refused to allow an amendment of the charge to the effect that a person J had been supplied with intoxicating liquor instead of person S. The accused was subsequently brought to trial on a charge of attempting to supply the same liquor on the same occasion to J. The court concluded that a plea of *autrefois acquit* could not be sustained on the ground that the accused had not been in jeopardy of a conviction at the first trial. The court argued as follows²⁶⁹

The fact that the magistrate upheld the objection of the defence and refused to allow the amendment does not seem to me to alter the position. Even assuming that he might well have allowed the amendment, the fact that he did not allow the amendment left the charge as it wasUnder the circumstances, I do not think the plea of *autrefois acquit* can be sustained

In *R v Bekker*²⁷⁰ the court allowed a second trial even though it found that the magistrate (in the first trial) should have amended the charge instead of discharging the accused. In that case, the accused was charged with selling liquor contrary to the conditions of his

²⁶⁸1924 TPD 594.

²⁶⁹At 597.

²⁷⁰1926 CPD 410.

licence. The licence provided that no liquor should be sold after six o'clock in the evening. However, it was not averred in the charge that the accused sold the liquor after six o'clock. The accused pleaded not guilty and the court discharged him on the basis that the charge disclosed no offence. On the very same day he was arraigned on a new charge in which it was averred that the sale took place after six o'clock. The accused's plea of *autrefois acquit* was rejected by the magistrate. On appeal Gardiner JP stated that according to the English author Russell, an accused may rely on the plea of *autrefois acquit* if he can show that he was previously in jeopardy of conviction of the same offence.²⁷¹ He continued by stating that Russell regards a person as being formerly in jeopardy of a conviction in the following circumstances²⁷²

- (a) if the court was competent to try him for the offence
- (b) the trial was upon a good indictment on which a valid conviction could be entered and
- (c) the acquittal was on the merits.

The court stated that in the case at hand, the first and the second requirements were complied with. Gardiner JP argued that although an indictment may have a defect "it may not be fatal to its validity".²⁷³ In his view, the original indictment did in fact disclose an offence. Therefore the magistrate should not have discharged the accused but, instead, have amended the indictment. In the court's view even "if the case had been tried upon the indictment *without*

²⁷¹The court referred to Russell on *Crimes* 7th ed at 1982.

²⁷²*Id.*

²⁷³At 413.

amendment, the Court would [not] have quashed the proceedings on appeal or review on the ground that the indictment disclosed no offence".²⁷⁴ In other words, the court found that the defect in the first indictment was not of such a nature or magnitude that it invalidated the proceedings. The court then considered whether the first trial complied with the third requirement, namely that the trial be concluded on the merits. However, it pointed out that this requirement was not insisted on by the English legal commentator Archbold, and, that it was criticised by Ridley J in the *Haynes* decision.²⁷⁵ In the court's view, the need for this requirement can only be ascertained by considering the basis for the plea of *autrefois*.²⁷⁶

The court explained that the principle underlying the plea is expressed in the maxim *Nemo debet bis vexari pro una et eadem causa*. It must therefore be ascertained when, and in what circumstances a person can be said to be twice vexed (*bis vexari*). The court then explained its understanding of the concept "vexed" in the following terms²⁷⁷

Vexari in this maxim cannot mean simply "to be annoyed". *Autrefois acquit* is of no avail when the first indictment was bad, and yet the accused is twice arraigned, he has had to attend Court twice, and to answer twice to an indictment. And I do not think that it can be said that a man was vexed, because he was in danger of being punished under the first indictment. A man is in this danger even when the indictment is bad;

²⁷⁴At 414. (My emphasis).

²⁷⁵At 414. See *supra* under 3.2.2, text at note 35 for a discussion of the judgment of Ridley J in the *Haynes* case.

²⁷⁶At 415.

²⁷⁷At 415-416.

he may, without taking any exception, plead guilty to it, the matter may never come up on review or appeal, and he may suffer his punishment. In a sense every person who pleads generally to an indictment is in a position of danger, for he may plead guilty.

The court referred to an English decision as illustration for the above contention, and then continued as follows²⁷⁸

It seems to me therefore that it is not merely the objection to annoying twice the person accused, nor the fact that he has previously been in danger, which is the whole basis of the plea of *autrefois acquit*. We need not treat the maxim *nemo debet bis vexari* as an original principle. It is really a branch of a wider principle - *Interest republicae ut sit finis litium*, which has as its corollary *res iudicata pro veritate accipitur*. Where the proper tribunal has given a final decision, that decision, unless reversed on appeal, is binding as to the matter actually decided. If it be a decision that the facts adduced do not establish the prisoner's guilt, then he cannot be tried again. In the same way, if the Court decides that upon the law he cannot be found guilty, then no fresh trial can take place. *It seems to me that the test is whether the Court has given what it intends to be a final decision as to the prisoner's guilt.*

The court applied these considerations to the case at hand and concluded that since the magistrate in the first trial never intended to give a final decision on the merits (because he was under the wrong impression that the charge disclosed no offence), the accused could not rely on the plea of *autrefois acquit*.²⁷⁹

The decision in *Bekker* was relied on in a number of subsequent

²⁷⁸At 416. (My emphasis).

²⁷⁹At 419. *Contra* the position in Canadian law discussed *supra* under 3.3.2, text at note 82.

decisions. In *R v Kaplan*²⁸⁰ the court justified the acceptance of the rule that the trial be on the merits on the basis that it was also recognised by Roman-Dutch writers. It observed that²⁸¹

[t]he same requirement is insisted upon by *Carpzovius* in a passage (*Prac. Rerum Crim.*, 3, 104, 60) which seems singularly apposite to modern criminal procedure and is referred to in a reporter's note in the report of the case of *The Queen v. Myers* ([1883] 2 S.C. 219). *Carpzovius* says that the accused must have been "definitely absolved from the crime" (*definitive a delicto absolutus*) or "declared not guilty" (*pro innocenti habitus*), and not merely "discharged from the purview of the prosecution" by reason of some technical defect therein, such as "a faulty framing of the charge-sheet or want of capacity on the part of the prosecutor" (*ab observatione iudicii absolutus, puta forsan ob libelli ineptitudinem, aut accusatoris inhabilitatem*).

In *Manasewitz*, Chief Justice Wessels reiterated the requirements for a successful plea of former jeopardy as set out in *Bekker*, *inter alia*, the requirement that the trial be on the merits.²⁸² Twenty two years later, in *R v Long*,²⁸³ the Appellate Division confirmed the principle advanced first in the English case of *Green* and applied in early South African decisions namely, that the fact that an indictment could have been amended is irrelevant as regards the question of whether a person was in jeopardy at a previous trial.

²⁸⁰1927 EDL 178.

²⁸¹At 181.

²⁸²At 168. This case is discussed in detail in chapter four *supra* under 4.6.3, text at note 437.

²⁸³1958 (I) SA (A) 115.

Schreiner JA made the following comment in this regard²⁸⁴

[I]t is contended ... that the charge might have been amended ... and in that event the appellant might have been convicted of theft of the cheque or the money [the offence charged in the second trial]. That is true, but, not I think, relevant, for it is the offence with which she was actually charged that must be looked at, not any offence with which she might have been charged in an amended indictment.

A subsequent decision which deserves consideration is *S v Vorster*,²⁸⁵ a decision of a provincial division of the Supreme Court. The facts were as follows. X was charged with drunken driving. In the charge sheet it was alleged that he had driven a vehicle with the registration number OP 181 on a public road, on a particular day, under the influence of liquor. At the trial it appeared that he had driven a vehicle with a different registration number on that particular day. The prosecution applied for an amendment of the charge, which was rejected by the court. The prosecution then requested a postponement of the case which was also rejected by the court. The prosecution then withdrew their case. The accused was subsequently found not guilty and discharged. He was then charged for the same offence in a new trial. This time the prosecution made sure that they inserted the correct registration number in the charge sheet. The question before the court was whether the accused could have raised the plea of *autrefois acquit*. Eksteen AJ answered this question in the affirmative. He based his decision on the following arguments. The issue is whether the accused was in jeopardy of a conviction at the first trial. The mere fact that the charge could have been amended at the first trial does not mean that the accused was in

²⁸⁴At 118.

²⁸⁵1961 (4) SA 863 (O).

jeopardy.²⁸⁶ However, the registration number of the car was not an essential element of the offence charged. It follows that the accused could have been convicted at the first trial despite this error in the indictment. He was therefore in jeopardy of a conviction which afforded him a plea of *autrefois acquit*.

Of importance is that the court did not base its conclusion (that the accused may rely on the plea of *autrefois acquit*) on the ground that the state had withdrawn its case at a stage after plea. The court based its decision purely on the ground that the accused *could have been convicted* on the charge in the first trial. Unlike the approach adopted in *Bekker*, the court in *Vorster* sustained the plea despite the fact that there was no real factual adjudication of the guilt or innocence of the accused in this case. In other words, the court did not investigate also whether there had been an acquittal on the merits. In fact, the approach adopted in *Vorster* is similar to that adopted by the Supreme Court of Canada in the case of *Moore*.²⁸⁷

In *S v Mthetwa*²⁸⁸ the court held that a failure of the prosecution to present evidence, as opposed to a procedural irregularity or a defective charge sheet, could be regarded as an acquittal upon the merits. The court equated the situation where the prosecution offered insufficient evidence with a situation where it offered no evidence at all.²⁸⁹

²⁸⁶At 868D-E. The court referred to the *dicta* of Schreiner JA in the *Long* case.

²⁸⁷See *supra* under 3.3.2, text at note 91 for a discussion of this case.

²⁸⁸1970 (2) SA 310 (N).

²⁸⁹See 315D-F. The court relied on the case of *R v Sikupela* 1935 CPD 266 in which Gardiner JP explained the thesis on the basis that a failure of the prosecution to offer evidence amounts to an acquittal

At this stage, it is important to point out that the common law rule adopted in early cases such as *Twalatunga* and *Bekker* namely, that an acquittal on a defective indictment does not bar a second trial, has largely become irrelevant in South African law. For the last few decades, South African courts have been vested with extensive powers to allow amendments of defective charge sheets. In terms of the present Criminal Procedure Act, courts are empowered to remedy any defect imaginable. For instance, a charge may be remedied if it fails to set out an essential element of the offence(s) charged, or where there appears to be variance between what is alleged in the charge and the evidence adduced in proof of such averment. Moreover, it may be remedied "where there is any other error in the charge ... whether it discloses an offence or not".²⁹⁰ Even if a charge is not amended, it may be cured by evidence presented at the trial.²⁹¹ The only restriction is that a charge may not be amended or cured by evidence rendered at the trial if it will cause prejudice to the accused in his defence.²⁹² Because South African courts have such extensive powers to allow amendments of indictments, it has in

on the merits.

²⁹⁰See the provisions of section 86(1) of Act 51 of 1977. However, in *S v Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A) the court held that the section does not authorise the substitution of one charge by another. The concept "amendment" implies some degree of retention of that which is to be amended. In other words, if a proposed amendment is in no way identifiable with the original charge, then there can be no suggestion of an amendment but rather a substitution. See Du Toit E *et al Commentary on the Criminal Procedure Act* 14-24 Service 13, 1994.

²⁹¹See the provisions of sections 86(4) and 88 of Act 51 of 1977.

²⁹²See section 86(1) which provides that the court may refuse an amendment if it considers that it will prejudice the accused in his defence. This is also a condition for the validation of the proceedings by evidence in terms of section 86(4). (See *S v Coetzer* 1976 (2) SA 769 (A)).

actual fact become highly unlikely for an accused to be discharged on the basis that the charge was an absolute nullity. In other words, that it was so defective that it could not be amended.

The effect of current rules of criminal procedure on amendment of charges is that an accused will only be acquitted on a defective indictment if the court refused to remedy the charge because it would prejudice the accused in his defence. As indicated in the discussion of Canadian law, the Supreme Court of Canada held in *Moore* that a discharge on this basis is tantamount to an acquittal which bars a second trial for the same offence. This is not the position in South African law. Because it is still required that an acquittal be on the merits, an accused can ostensibly be tried again in these circumstances.

It remains to consider whether the plea of *autrefois acquit* may be raised on the ground that the Attorney-General discontinued proceedings. The rule which applies in South African law is that an acquittal or a discharge which follows on the stopping of a prosecution by the Attorney-General at any stage *after* the accused had pleaded is regarded as a discontinuance which bars a second trial.²⁹³ A

²⁹³See *S v Ndou* 1971 (1) SA 668 (A) 671H. This principle was subsequently applied in *S v Teele* 1979 (4) (BSC) 610. In *S v Lubbe* 1989 (3) SA 245 (T) the court held that this rule does not apply to proceedings in terms of sections 119-122 of the Criminal Procedure Act. In these sections, provision is made for a shortened form of preparatory examination according to which the accused pleads in a lower court to a charge justiciable in a superior court. The court ruled that only a termination of a prosecution at a stage after the accused had pleaded *in a court which is to try him on that particular charge* brings into effect protection against double jeopardy. This means that an accused who has already pleaded in the court holding the preparatory examination, must again plead in the court competent to try his case before he can rely upon the pleas of former jeopardy.

withdrawal of a charge at a stage before plea does not bring into effect protection against double jeopardy. However, there is one exception to this rule. If the Attorney-General declines to prosecute after the completion of a preparatory examination (preliminary proceedings), the accused may rely on the plea of former jeopardy.²⁹⁴

3.6.3 Summary

* The South African rules of attachment of jeopardy are basically the same as those that prevail in English law. Although it is said that jeopardy attaches on plea, the basic premise is that a plea of former jeopardy may only be raised if the accused had previously been convicted or acquitted (a) by a competent court (b) on a valid indictment (c) after a trial on the merits. A trial on the merits denotes a decision by the court which it (the court) intends to be a final decision as to the accused's guilt. (*Bekker*).

* The common law rule that an accused person may only rely on the plea of former jeopardy if he has previously been acquitted on a valid indictment, has largely become irrelevant in South African law. This is because South African courts have wide powers to amend indictments. The only restriction on the courts is that an amendment may not prejudice the accused. However (unlike the position in Canadian law), an accused acquitted on the basis that the amendment of a defective indictment would have been prejudicial to him, cannot raise the plea of former jeopardy; the trial was not concluded on the merits.

* Similar to English law, the "in jeopardy" investigation does not

²⁹⁴This is specifically provided for in section 142 of the Act.

involve the question whether an indictment could have been amended at trial (*Long*).

* The failure of the prosecution to present evidence amounts to an acquittal on the merits; a situation where the prosecution offers *insufficient* evidence is equated with a situation where it offers *no* evidence.

* There is an exception to the rule that a termination of proceedings in favour of the accused needs to be one on the merits: a discharge of an accused which follows upon a discontinuance of proceedings by the Attorney-General at a stage after the accused has pleaded, operates as a bar to a new trial.

* In one situation jeopardy may even attach at a stage *before* the accused has pleaded. If the Attorney-General declines to prosecute after the completion of a preparatory examination, the accused may raise the plea of *autrefois acquit*. The rationale which apparently underlies this rule is that a discharge after a preparatory examination is equated to an acquittal on the merits; because the state failed to offer sufficient evidence to prove its case against the accused, it is prohibited from re-trying the accused for the same subject-matter.

CHAPTER FOUR

SUCCESSIVE PROSECUTIONS FOR OFFENCES ARISING FROM THE SAME FACTS: A COMPARATIVE ANALYSIS OF THE DEFINITIONAL ISSUE OF "SAME OFFENCE"

4.1 INTRODUCTION

It is a universal principle that the rule against double jeopardy prohibits multiple prosecutions for the "same offence". The boundaries of the concept "same offence" can, however, be described as one of the most complicated issues encountered by courts in modern times. As demonstrated in the historical overview, the concept "same offence" presented very little (if any) difficulty in medieval law of criminal procedure. Because there were only a small number of legal categories of offences during this time, and the scope of each offence was comparatively large, a subsequent prosecution for the "same offence" meant a subsequent prosecution for the entire criminal transaction (or factual situation).¹ Therefore, "same offence" merely denoted "same facts" during this period.

The problem that presents itself in present times is that a single act or a single factual situation may give rise to a number of substantive legal offences. Consider the following examples: X, a 21 year old male person, has one encounter of sexual intercourse with his sister without her consent. In terms of South African law, he may be charged with at least three offences: Rape, indecent assault and incest. One act may also comply with the definition of one substantive offence more than once. The following is an example. X

¹See *supra* chapter two under 2.3.2 for a discussion of the concept "same offence" in medieval law.

fires a single shot and injures two victims. X may be charged with assault with the intent to do grievous bodily harm and attempted murder in respect of both these victims. A single factual situation may also result in the following scenario. X breaks into a house, holds the inhabitants at gunpoint, rapes a woman and robs the other inhabitants of the house. In this example, X commits at least four substantive offences; Housebreaking with the intent to commit a crime, rape, robbery and assault.

It is recognised in all the legal systems considered in this comparative study that X may be charged with all of the offences relating to each set of facts in one single trial; injustices which might arise from manipulation of a single act or transactional situation in order to obtain several convictions based on separate substantive offences may be remedied during the sentencing stage of proceedings.² However, the issue addressed in this chapter is whether X may be charged of the offences relevant to each set of facts in *successive* prosecutions. In other words, can the prosecution in the first example initially charge X with assault and then in a subsequent prosecution with incest and rape or vice versa? In the second example, can X be prosecuted first for attempted murder of one victim and in a subsequent prosecution for attempted murder of the other victim? In the third example, can X initially be prosecuted for housebreaking, subsequently for rape and in a third trial for robbery?

The question (posed differently) is whether the principles which

²The judge may, for instance, prevent the imposition of excessive punishment for the same conduct or transaction by ordering that respective sentences of imprisonment run concurrently. However, it must be pointed out that there remains the injustice of a criminal record which contains two offences instead of one.

underlie the rule against double jeopardy require that the prosecutor be prohibited from charging an accused for offences in successive prosecutions if all of those offences could have been charged in one single trial.

In general, courts in Anglo-American legal systems have not determined the permissibility of successive prosecutions in terms of the question posed above.³ Instead, the courts attempted to give definitional content to the concept "same offence". Several criteria have been advanced to determine the sameness of offences. Some of these criteria amount to a mere repetition of old formulas developed at a time when different historical considerations prevailed. An example of such a formula or theory is the same evidence or *Vandercomb* test which focuses on the identity of the legal elements of different substantive offences.

As indicated in the historical overview, the same evidence test was devised initially, not to protect the accused against double jeopardy, but to compensate the prosecution for undue advantages given to the accused by highly technical rules of pleading and proof which

³See however the judgment of Lord Devlin in the English case of *Connelly* (discussed *infra* under 4.2.1). His Lordship expressed the view that it is in the inherent power of the courts to declare that the prosecution must as a general rule join in the same indictment charges that are founded on the same facts, or which form or are part of a series of offences of the same or a similar character. He added that a court may stay proceedings (in other words, order the discontinuance of proceedings on a permanent basis) if it is satisfied that the subject matter of the second indictment ought to have been included in the first indictment. Also, in the Canadian decision of *Regina v B* (1986) 29 CCC (3d) 365, the Ontario Court of Appeal recognised that the splitting of a case may amount to an abuse of process which would justify a stay of proceedings, albeit only in certain defined circumstances. This case is discussed *infra* under 4.3.4. See also (in the same vein) the recent South African decision of *S v Khoza* 1989 (3) SA 60 (T) discussed *infra* under 4.6.8.

prevailed during the eighteenth century. Despite the inadequacies of the test as a tool to protect the accused against double jeopardy, it has nevertheless been approved and applied in current English and South African law. Furthermore, a modified version of the test, which has been accepted in American law and elevated to a constitutional principle and which had subsequently been rejected, has recently been reinstated by the Supreme Court of the United States as an exclusive criterion to determine the sameness of offences.⁴

Other theories or tests proposed to give meaning to the concept "same offence" can be described as laudable attempts by the courts to give effect to equitable considerations underlying the rule against double jeopardy. Examples of these are the traditional in peril test, and the recently proposed same conduct and same transaction tests.⁵ Although the application of the in peril test⁶ has not presented major difficulties in the majority of legal systems under consideration,⁷ the same conduct and same transaction tests have been less easy to apply in practice. In fact, the application of these tests has given rise to a considerable amount of confusion in the law of double jeopardy, particularly in the United States of America.

⁴See *infra* under 4.5.8.

⁵A same conduct test has been introduced in the law of the United States and South African law. See *infra* under 4.5.6 and 4.6.6 for a discussion of the respective decisions in which a same conduct test was applied.

⁶This test is referred to in constitutional jurisprudence of the United States and Canada as the "lesser included offence" doctrine.

⁷Except in the constitutional jurisprudence of the United States of America. The "lesser included offence" doctrine advanced by Justice Scalia in the recent United States Supreme Court case of *US v Dixon* 113 S Ct 2849 (1993) has been utterly confusing. See *infra* under 4.5.8 for a detailed discussion of this case.

In the last few decades, courts in the Indian, Canadian and English legal systems have exercised inherent discretionary powers to stay proceedings as an abuse of process on double jeopardy grounds. The exercise of the courts' discretion in this particular field of law expanded protection against double jeopardy in the field of successive prosecutions. As will become clear from a discussion of the case law, the exercise of discretionary powers to stay proceedings on this basis, has been more effective in achieving the objectives of the double jeopardy rule than the tests proposed to give meaning to the concept "same offence". Moreover, in exercising a discretion in this particular field of law, the courts have laid down guidelines for prosecutors as to what amounts to oppressive and vexatious prosecutorial conduct in this particular field of law.

Finally, in the majority of legal systems under consideration, courts have given a broad interpretation to the concept "same offence" so as to include the broader principle of *res judicata* which prevents the prosecution from re-opening a particular issue of fact which has been decided in favour of the accused at an earlier trial ending in an acquittal. This is known as the doctrine of issue estoppel and is recognised and applied in Canadian, Indian and American constitutional double jeopardy jurisprudence.

Although the topic addressed in this chapter is referred to in the heading as "the definitional issue of same offence", it is clear that it in fact covers a much wider field. The recognition of a residual discretionary power to stay proceedings as an abuse of process, and the broader doctrine of *res judicata* (prohibiting *inter alia* the relitigation of issues) is not strictly part of the definitional issue of same offence. The exercise of discretionary powers, for instance, rather implies a departure from the notion that unless it appears that the second prosecution is technically for the same offence, the accused may be

tried anew. In fact, it offers protection against a subsequent prosecution precisely when the criteria for same offence have *not* been satisfied. Likewise, the doctrine of issue estoppel offers protection against relitigation of issues as opposed to actions.

4.2 ENGLISH LAW

4.2.1 The *Connelly* decision

As indicated above,⁸ a majority of the House of Lords suggested in *Connelly v DPP*⁹ that double jeopardy protection is afforded not only by the pleas in bar (*autrefois acquit* and *autrefois convict*), but also by the judicial discretion to stay proceedings on the basis of an abuse of process.¹⁰ However, a further possible protection considered favourably in *Connelly*, the doctrine of issue estoppel, was in 1976 held to be unavailable in English criminal law by the House of Lords.¹¹

The facts of *Connelly* were as follows. The accused participated in an armed robbery in the course of which a man was shot and killed. Together with three others, he was indicted for murder. In this indictment, he was *not* also charged with robbery; at the time a rule prevailed that a second charge could not be combined in one indictment in which the crime of murder was charged.¹² *Connelly* and

⁸See chapter three *supra* under 3.2.1.

⁹*Supra*.

¹⁰See the opinions of Lord Reid 1295-1296; Lord Devlin 1338-1361 and Lord Pearce 1361-1368.

¹¹See *DPP v Humphrys* [1977] AC 1.

¹²Although rule 3 in Schedule 1 of the Indictments Act 1915 provided that "[c]harges for any offence, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on

his co-accused were convicted of murder. Conelly appealed against his conviction which was quashed and an acquittal entered on the ground that errors had occurred resulting from the manner in which the trial was conducted.¹³ Conelly could not be tried again for the crime of murder.¹⁴ The prosecution accordingly indicted him for robbery. On this charge Conelly pleaded *autrefois acquit* on the grounds that

- (a) he was, in law, entitled to the plea of *autrefois acquit*
- (b) the doctrine of issue estoppel operated in his favour
- (c) the judge has a discretion to stop the trial on the second indictment if he held that the further process would be unjust or oppressive
- (d) it was not permissible for the the crown in the second trial to adduce evidence (for the purpose of establishing robbery) of admissions (for example verbal statements admitting "going thieving" but denying having a gun or planning a murder) which were alleged to have been made by the appellant and which had been relied on at the first trial for the purpose of establishing murder.

the same facts or form or are a part of a series of offences of the same or a similar character", the judiciary held in *R v Jones* [1918] 1 KB 416 that the rule did not apply in a case of murder. The court justified this exception by stating that "[t]he charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment" (at 417). This rule was later abolished but still prevailed at the time *Conelly* was decided.

¹³In the trial court, Conelly relied on two defences: lack of intent and alibi. The Court of Appeal quashed his conviction on the ground that the judge, in his summing-up, did not direct the jury properly on the plea of alibi.

¹⁴See chapter seven *infra* under 7.3 for a discussion of the rules regarding the permissibility of new trials on reversals of convictions which prevailed at that time.

The trial court rejected these contentions and convicted Conelly of robbery. Conelly, once again, appealed to the Court of Criminal Appeal. Having considered all these grounds, that court dismissed the appeal, as subsequently did the House of Lords.

As regards the scope of the traditional plea of *autrefois*, the opinion of Lord Morris of Borth-y-Gest is generally treated as the foundation of modern English law on this topic.¹⁵ His Lordship summarised the "governing principles" of the doctrine of *autrefois* as borne out in English case law in a number of propositions. For the sake of clarity, these propositions will be set out and discussed on a separate basis in the text that follows.¹⁶

Proposition 1: A person cannot be tried for a crime in respect of which he has previously been convicted or acquitted. This is the straightforward application of the pleas of *autrefois*. If the accused is charged with an offence which is identical in law and on the facts to one which he has already been acquitted of, or, convicted of, the plea will bar any further proceedings for that offence.

Proposition 2: A person cannot be tried for a crime in respect of which he could have been convicted on some previous indictment. It is obvious that this proposition sets out the common law in peril test.¹⁷ Blackstone explains that this is the corollary of the power of a jury to return a verdict of not guilty as charged, but guilty of a lesser

¹⁵See Blackstone (1991 ed) 1127. The exhaustive opinion of Lord Morris appears at 1296-1330 of the judgment of the House of Lords.

¹⁶These propositions appear at 1305-1306 of his Lordship's opinion.

¹⁷See chapter two *supra* under 2.3.2, text at note 118 for a discussion of this test.

offence.¹⁸ Also, where the jury, on a certain count could find the accused guilty of a lesser offence, but chose simply to find the accused not guilty, the author explains that such a verdict amounts to an implied acquittal of both the principal and any lesser offences.¹⁹ Previously, an accused could not successfully rely on the in peril test if the lesser offence charged in the second indictment was not properly placed before the jury for consideration in the first trial.²⁰ However, in view of legislation enacted in 1967,²¹ it is suggested that an accused may now rely on this test to prevent subsequent proceedings for a lesser offence as long as a verdict on that offence was open to the jury as a matter of law, even if the judge did not draw their attention to it.²²

Although Lord Morris of Borth-y-Gest did not elucidate the issue whether the in peril test should be confined to cases where the accused was *in jeopardy* of a previous conviction for the *principal* offence charged in the second indictment, Lord Devlin preferred the

¹⁸At 1127.

¹⁹*Id.* See also *infra* chapters six and eight for a detailed discussion of the "implied acquittal" doctrine.

²⁰See the early twentieth century decision of *R v Barron* discussed in chapter two *supra* under 2.3.2.

²¹Section 6(3) of the Criminal Law Act 1967.

²²See Blackstone (1991 ed) 1127-1128. Section 6(3) of the Criminal Law Act 1967 enables a court to convict a person for a lesser offence on a charge for a more serious offence if the defendant is not found guilty of the more serious offence. It provides: "Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

narrow interpretation of the test. He stated

For the doctrine of *autrefois* to apply, it is necessary that the accused should have been put in peril of conviction for the same offence *of that with which he is then charged*.²³

Proposition 3: A person cannot be tried for a crime which is in effect the same, or is substantially the same as a crime of which he has previously been acquitted or convicted (or could have been convicted by way of an alternative verdict). As discussed in the historical overview, this vague criterion was applied in cases like *R v King* and *R v Kendrick and Smith*.²⁴ However, these cases were inconsistent in respect of establishing the degree of similarity required before it could be said that a subsequent charge was "substantially" the same as an earlier charge.

As indicated earlier, *King* focused on the same facts and seems to have introduced a broader principle beyond the traditional ambit of the *autrefois* plea. Moreover, *King* manifested a concern to prevent vexatious proceedings for different offences arising from the same facts. *Kendrick and Smith* on the other hand, focused purely on the similarity of the legal elements of the two offences in order to determine whether they were "substantially" the same. In *Conelly*, Lord Morris of Borth-y-Gest submitted that the *Vandercomb* test should be invoked to determine whether crimes are substantially the

²³At 1339 of his Lordship's opinion (my emphasis).

²⁴See chapter two *supra* under 2.3.2, text at notes 132 and 140 for a discussion of these cases.

same.²⁵ Consequently, his Lordship was not prepared to broaden protection against double jeopardy under this criterion on the strength of authority like *King*.²⁶

Propositions 4 and 5: One test of whether *autrefois* applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either in respect of the offence charged or in respect of an offence of which the jury could have convicted (proposition 4). However, this test must be subjected to the provision that the offence charged in the second indictment had in fact been committed at the time of the first charge (proposition 5). Lord Morris clearly adopted a broad version of the *Vandercomb* test in proposition 4.²⁷ Proposition 5 deals with the "intervening death" cases. This exception to the general principle contained in the *Vandercomb* test was discussed above and needs no further explanation.²⁸

²⁵In the series of propositions (at 1305-1306), Lord Morris merely described the *Vandercomb* test as a criterion to establish whether crimes are substantially the same. However, at 1310-1311, it appears as if his Lordship regarded the *Vandercomb* test as the exclusive criterion which should be applied to determine whether offences charged successively are substantially, or in effect the same.

²⁶See *supra* under 2.3.2, text at note 132 for a discussion of *King's* case.

²⁷As a matter of interest, Friedland points out (at 103), that a restricted version of the "in peril" test and an expanded version of the *Vandercomb* test have the same effect; the (restricted) in peril test becomes unnecessary if the expanded version of the *Vandercomb* test is applied. Lord Morris of Borth-y-Gest probably did not perceive the inverse relationship between the two - he held that both these tests should be applied to establish identity of offences.

²⁸See chapter two *supra* under 2.3.2, text at note 115.

Lord Morris did not regard *Elrington's* case²⁹ (which recognised the principle that a party convicted or acquitted of a minor offence should not be charged on the same facts in a more aggravated form), as authority which suggested broader protection against double jeopardy than that afforded by the *Vandercomb* test.³⁰ He expressed the view that re prosecution for a more aggravated form of conduct would only be prevented where the more serious offence charged in the second indictment included some legal elements of the offence charged in the first indictment, and not where there was simply factual similarity. As regards the *dicta* of Cockburn CJ in *Elrington*,³¹ Lord Morris commented

The chief justice must have been referring to the established principle of *autrefois acquit* - and equally the established principle of *autrefois convict*. He must have been referring to the well recognised test, that is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.³²

Proposition 6: Apart from circumstances under which there may be a plea of *autrefois acquit*, a person may be able to show that a *matter* has been decided by a court competent to decide it, and that consequently the principle of *res judicata* applies. In this proposition, Lord Morris expressed himself in favour of the application of the (civil law) doctrine of issue estoppel in criminal law. Lord Hodson and Lord

²⁹This case is discussed in detail in chapter two *supra* under 2.3.2, text at note 125.

³⁰At 1315.

³¹See chapter two *supra* under 2.3.2, text at note 126.

³²At 1315.

Pearce also endorsed the application of this doctrine in criminal cases.³³ As pointed out above, the House of Lords subsequently rejected the application of this doctrine in criminal cases, in *DPP v Humphrys*.³⁴ A detailed discussion of that case, and of the merits of the application of this doctrine in criminal cases, are undertaken at a later stage in this thesis.³⁵

Propositions 7 and 8: On a plea of *autrefois acquit* or *autrefois convict* a person is not restricted to a comparison between the earlier and some previous indictment or to the record of the court, but may prove by evidence all such questions as to the identity of persons, dates and facts which are necessary to enable him to show that he is being charged with an offence which is either the same or substantially the same as one in respect of which he had been convicted or acquitted or, as the one in respect of which he could have been convicted, and (proposition 8) it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in earlier proceedings.

Proposition 7 is clear and needs no further explanation. With regard to proposition 8, Lord Morris interpreted the English common law on the basis that there never had been a rule that the same facts might not form the basis of successive prosecutions.³⁶ In the same vein, he denied the existence of a residual judicial discretion to stay proceedings on grounds outside the ambit of the different propositions

³³At 1334 of Lord Hodson's opinion, and, at 1364, 1366 and 1368 of the opinion of Lord Pearce.

³⁴See chapter three *supra* note 7.

³⁵See *infra* under 4.2.3 note 89.

³⁶At 1301.

advanced above. Moreover, he rejected the argument advanced by defence counsel that the courts have an inherent power to stay proceedings in cases where evidence given in reference to one charge has been repeated in reference to another, different charge.³⁷ Lord Morris concluded that Conelly could not rely on the plea of *autrefois acquit* because the essential elements of the robbery charge would not suffice to prove a charge of murder or manslaughter.

In a separate opinion, Lord Hodson agreed with Lord Morris that there was no residual judicial discretion to stay proceedings on the basis of abuse of process in cases where the pleas in bar cannot be applied.³⁸ However, his judgment supplemented that of Lord Morris in one important respect: Lord Hodson gave a detailed discussion of *Elrington's* case, describing the principle introduced in that case, namely that a person could not be charged with a more aggravated form of an offence of which he had previously been convicted or acquitted, as the "ascending scale" principle.³⁹ The exception to this principle, the so-called "intervening death" cases, is explained by Lord Hodson on the basis that it presents "a new fact which necessitates a trial in the interests of justice".⁴⁰ Lord Hodson expressed the view that *Elrington* introduced "an extension of the

³⁷At 1302. At 1330 his Lordship reiterated this point of view, observing that there was no authority to support such a submission and, furthermore, that "principles of fairness or requirements of justice does not compel its acceptance".

³⁸At 1335 and 1338.

³⁹At 1332. Choo also refers to this principle in these terms (at 22-23). He also advances a logical explanation of the "ascending scale" principle. See chapter two *supra* under 2.3.2 note 127.

⁴⁰At 1332.

narrow principle of *autrefois*⁴¹ and implied that it did not merely amount to an application of the *Vandercomb* test (as submitted by Lord Morris). However, Lord Hodson was not prepared to regard *Elrington* as authority for the proposition that a court has inherent judicial powers to stay vexatious proceedings.⁴²

The remaining three Lords, Lord Devlin, Lord Pearce and Lord Reid, all recognised that a court has a residual discretion to stay proceedings in order to protect its process from abuse. Lord Pearce submitted that the pleas of *autrefois* in fact evolved from the inherent power of the court to prevent the abuse of its process by the prosecution through repetition of charges after an acquittal or conviction.⁴³ He submitted that cases like *Elrington*, *Hopkins* and *King*⁴⁴ demonstrate sufficiently that

a narrow view of the doctrine of *autrefois* acquit and *autrefois* convict, which has at times prevailed, does not comprehend the whole of the power on which the court acts in considering whether a second trial can properly follow an acquittal or conviction.⁴⁵

Lord Devlin also interpreted the decision in *Elrington* as being one that

⁴¹*Id.*

⁴²At 1335 and 1337.

⁴³At 1362. Lord Devlin agreed with this thesis, commenting (at 1347) that "nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused. The doctrine of *autrefois* was itself doubtless evolved in that way".

⁴⁴See chapter two *supra* under 2.3.2 for a discussion of these cases.

⁴⁵At 1364.

went beyond the plea of *autrefois*. He based his conclusion on the fact that, in that particular case, the crimes had distinctive legal elements.⁴⁶ However, in view of the rule that prevailed at the time that *Connelly* was decided, namely that a person cannot be charged with another crime in the same indictment on which he is charged with murder, none of these judges was prepared to find that *Connelly* presented a case in which this discretion should be exercised in favour of the accused.⁴⁷

Nevertheless, in an instructive opinion, Lord Devlin rejected the proposition advanced by Lord Morris that the criterion of "substantial identity" of offences fell within the ambit of the traditional pleas of *autrefois*. Instead, Lord Devlin used the same authorities cited by Lord Morris in support of this category (for instance *King's case*)⁴⁸ to conclude that these cases more probably supported the notion that the court has inherent discretionary powers to stop vexatious proceedings.

Lord Devlin explained that traditionally for the doctrine of *autrefois* to apply, the accused should have been put in peril of a conviction for the same offence as that with which he was subsequently charged.⁴⁹ In his view, the word "offence" embraces both the facts which constitute the crime and the legal characteristics which makes it an offence. Therefore, for the doctrine to apply, his Lordship argued that

⁴⁶At 1358.

⁴⁷Although the court unanimously expressed the view that this rule is inherently unfair to the accused, they concluded that "it cannot be oppressive for the prosecution to do what the court has told it that it must do" (per Lord Devlin at 1346). The other judges expressed themselves in the same vein.

⁴⁸See chapter two *supra* under 2.3.2, text at note 132 for a discussion of this case.

⁴⁹At 1339.

"it must be the same both in fact and in law".⁵⁰ Extending this premise, Lord Devlin rejected the proposition advanced by Lord Morris that the criterion of "substantial identity" of offences forms part of the doctrine of *autrefois*. In this regard, Lord Devlin made the following comment

I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But as that is not my view, I am inclined to favour keeping it within limits that are precise.⁵¹

The value of Lord Devlin's judgment lies in the fact that he indicated in which circumstances a court should exercise its discretionary powers to stay proceedings in favour of the accused. His Lordship stated the following premise

I consider it to be within this [inherent] 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"⁵².....andto 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.⁵³

⁵⁰At 1340.

⁵¹*Id.*

⁵²At 1347, citing in part rule 3, Schedule 1 of the Indictments Act, 1915, which provides that the court *may* join in the same indictment charges to this effect.

⁵³At 1347.

Lord Devlin continued in this vein by observing that issues of *fact* that are substantially the same, should, whenever practicable, be tried by the same tribunal at the same time.⁵⁴ He accordingly suggested that

as a general rule, a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charges in the previous indictment.⁵⁵

In his Lordship's view, it would be oppressive for an accused if the prosecution failed to join charges in the same indictment, where it could properly be done.⁵⁶ However, he indicated that a second trial on the same or similar facts would not always and of necessity be oppressive; certain circumstances in a particular case could, in his view, make a second trial "just and convenient", for instance, where the judge exercises his discretion to order separate trials for offences charged in one indictment, or, where the accused himself obtains a separate trial, or, where the defence accepts the choice exercised by the prosecution to prefer two or more indictments.⁵⁷

Lord Devlin also pointed out by way of analogy, that the civil law doctrine of *res judicata* has been expanded to give protection to defendants against a multiplicity of actions, not only in respect of issues that have previously been raised, but also in respect of issues

⁵⁴At 1353.

⁵⁵At 1359-1360.

⁵⁶*Id.*

⁵⁷At 1360.

that *could* have been raised but were not.⁵⁸ In this regard, he referred to the classic judgment on this point, *Henderson v Henderson*⁵⁹ where it was observed that

[t]he plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.⁶⁰

In *Conelly*, Lord Devlin submitted that the principle stated by Cockburn CJ in *Elrington*, namely that

....a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form⁶¹

expanded the doctrine of *autrefois* in much the same way as the court in the above case of *Henderson* expanded the doctrine of *res judicata*. According to his interpretation of *Elrington*, the "true principle" to be extracted from Cockburn CJ's statement is "the inherent power of the court to stop vexatious process".⁶² Lord Devlin also emphasised the

⁵⁸At 1356.

⁵⁹(1843) 3 Hare 100.

⁶⁰At 114-115 of the judgment. See the opinion of Lord Devlin in *Conelly* at 1356.

⁶¹At 873. See chapter two *supra* under 2.3.2, text at note 125 for a detailed discussion of this decision.

⁶²At 1358. His Lordship rejected the thesis advanced by Lord Morris that *Elrington* amounted to a mere application of the *Vandercomb* test. He argued (at 1357-1358) that the principle enunciated by

desirability of distinguishing between grounds on which the pleas of *autrefois* may be raised, and grounds whereupon a judge may exercise his powers to stop vexatious proceedings: the one (*autrefois* plea) gives the defendant an absolute right to relief, and the other only a qualified right.⁶³

As indicated above, the specialised facts of *Connelly* resulted in a refusal by the court to exercise its inherent discretionary powers to stay proceedings in favour of the accused.⁶⁴ However, since the decision of the House of Lords in *Connelly*, there has been a plethora of cases in which applications for a stay of proceedings on grounds of double jeopardy and subsequent abuse of process were raised successfully. The most important of these decisions will be discussed in the text that follows.

4.2.2 Subsequent cases which dealt with applications for a stay of proceedings on double jeopardy grounds

The basic principle which may be extracted from cases which followed on *Connelly*, is that a prosecution for an offence will most probably be stayed if it relates to an activity, transaction or course of conduct which has already formed the basis of a previous charge on which the accused had been convicted or acquitted. *R v Roberts*⁶⁵ presents a straightforward example. Roberts was charged in 1978 with stealing

Cockburn CJ in *Elrington* goes beyond the principle of *autrefois*, because the particular offences in that case had distinct elements, and, the pleas of *autrefois* could traditionally be raised only where crimes had the same legal elements.

⁶³At 1358.

⁶⁴See *supra* text at note 47.

⁶⁵[1979] Crim LR 44.

an outboard motor from his landlord between May 1975 and May 1976. However, he had previously (in 1976) been charged with stealing some hydraulic jacks from the landlord during the same period. He was acquitted during the 1976 trial on the basis that the owner consented to the taking of the goods. In the second trial, the court stayed the prosecution since the matter was stale and that any conviction would be inconsistent with the earlier acquittal. In *Dewhurst v Foster & Foster*⁶⁶ the court stayed a private prosecution for the same activity (theft) of which the accused had previously been acquitted.⁶⁷

A number of other cases involved more complex issues inasmuch as the offences charged successively, contained different legal elements. In *R v Cwmbran Justices, ex parte Pope*⁶⁸ the applicant was charged in the magistrate's court with the crime of driving without due care and attention after he had been acquitted by a jury in the Crown Court of driving with excess alcohol. The Divisional Court held that the proceedings should be stayed because

...it would be a little, at least, unfair to require him to stand his trial before the justices upon what does involve the self-same issue, and because also it would not be entirely in the interests of public policy that one tribunal might be in a situation in which it feels itself driven to a decision directly in conflict with what was the finding of a jury, who after all form the basis of our administration of common law justice⁶⁹

⁶⁶[1982] Crim LR 582.

⁶⁷See also *R (Smith) v Birch & Harrington* [1983] Crim LR 193. In that case, a private prosecution for criminal damage to a fence was stayed in circumstances where the accused had previously been acquitted of damage to a roof and laundry (on a washing line) during the same course of conduct.

⁶⁸(1979) 143 JPR 638.

⁶⁹At 640.

In two other road-traffic cases, *R v Moxon-Tritsch*⁷⁰ and *R v Forest of Dean JJ Ex parte Farley*,⁷¹ the courts seem to have followed the thesis advanced by Lord Devlin, namely that a subsequent prosecution for a more aggravated form of criminal conduct arising from the same factual transaction previously adjudicated on, should be stayed in terms of inherent powers of the court.⁷² The facts of the first case were as follows. Mrs Leona Moxon-Tritsch pleaded guilty in the magistrate's court on the following charges: driving without due care and attention and driving with excess alcohol. It transpired at the trial that she had transported five children in the back of her car, lost control of the vehicle which consequently landed in an upturned position in the field. As a result of the accident, one child, aged four died instantly. At the material time, the accused's blood-alcohol was well in excess of its limit. However, the Director of Public Prosecutions decided not to charge her with causing death by reckless driving. Nevertheless, she was convicted of the offences charged, namely driving without due attention and driving with excess blood-alcohol. Pursuant to those proceedings, the parents of the deceased child instituted a private prosecution against Mrs Moxon-Tritsch for causing the death of their daughter as a result of reckless driving. At the hearing, the defence pleaded *autrefois convict* and, alternatively, that the court had an inherent jurisdiction to stay proceedings because the private prosecution arose out of the same facts which brought Mrs Moxon-Tritsch before the magistrates. This application was successful. Mr Justice Faulks expressed the view that the offences were substantially

⁷⁰[1988] Crim LR 46.

⁷¹[1990] Crim LR 568.

⁷²See *supra* text at note 61 for a discussion of Lord Devlin's interpretation of the principle in *Elrington's* case.

similar.⁷³ Exercising his inherent discretion, he accordingly ruled that it would be an abuse of the process of the court to allow the private prosecution to continue. The reasoning of Mr Justice Faulks was summarised in the following terms⁷⁴

It was a fundamental principle of the English criminal law that no one should be twice put in jeopardy of conviction and punishment for the same offence arising out of the same set of facts. *The proposed prosecution arose from the same facts as those upon which she had been convicted* It would be oppressive to let her face a second trial for a more aggravated form of the same offence to which she had already pleaded guilty.

However, the judgment as reported is unclear in the following respect: the defendant was convicted of two offences, but the judge failed to explain which of these two offences were substantially the same as the crime subsequently charged (causing death by reckless driving). The case has, however, been analysed as follows.⁷⁵ Driving without due care and attention is a lesser included offence of causing death by reckless driving. This is so because reckless driving is necessarily careless. Therefore, in respect of this offence, the accused could succeed with the defence of *autrefois convict* by invoking the *Vandercomb* or same evidence test. However, driving with excess alcohol is not a lesser offence of causing death by reckless driving: neither the in peril or the same evidence test would prevent a subsequent charge of causing death by reckless driving. Therefore, it follows that protection against a subsequent charge for the greater offence in this case could only have been granted in terms of the

⁷³At 47.

⁷⁴At 46 - 47. (My emphasis.)

⁷⁵See the explanation of the case by Smith JC in 1988 *Criminal Law Review* 47-48.

inherent power of the court to prevent an abuse of the process; the abuse being that the accused *could have been* charged with the greater (albeit different) offence at the first trial.

In *R v Forest of Dean JJ, ex parte Farley*⁷⁶ the court apparently confirmed this analysis of the decision in *Moxon-Tritsch*. It held that a prosecution for causing death by reckless driving following a summary acquittal or conviction for driving with excess alcohol would constitute an abuse of the process.⁷⁷ However, the fact that the evidence of alcohol consumption in this case constituted the only basis for the charge of causing death by reckless driving, seems to have been the overriding factor taken into account by the court in reaching its decision to stay proceedings for the more serious offence.⁷⁸

*R v Norman Griffiths & Others*⁷⁹ presents another example in this context. The defendant was tried for (a) conspiracy to supply cocaine and (b) possession of cocaine with intent to supply (before January 1988) in one indictment. He was acquitted as no evidence was offered by the crown. However, later he was charged with conspiracy to *import* cocaine (between November 1987 and February 1988). The court held that the plea of *autrefois acquit* was inapplicable,⁸⁰ but stayed proceedings in terms of its inherent powers to prevent abuse

⁷⁶*Supra*.

⁷⁷At 568-569.

⁷⁸At 569.

⁷⁹[1990] *Crim LR* 181.

⁸⁰The offences had different legal elements - neither the "in peril" or the *Vandercomb* test could save the accused from a subsequent prosecution (see 182 of the report).

of process. The court (per Humphries J), remarked that the plea of abuse of process would be well-founded in this case. The crown was seeking to introduce evidence which they could have offered at the first trial.⁸¹ The court argued that in these circumstances, it would be oppressive and unjust to the defendant to allow the case to proceed and the indictment was accordingly stayed.

4.2.3 The rejection of the doctrine of issue estoppel in *DPP v Humphrys*⁸²

It has been argued that, once it is accepted that the *verdict* of a tribunal of fact in a criminal case ought to be protected from challenge (by the prosecution) in a later case between the same parties, there is a good *prima facie* case to also protect from challenge the decision of the tribunal of fact on a particular *issue* in such a case.⁸³ This may be achieved by applying the civil law doctrine of issue estoppel in criminal proceedings.⁸⁴ In the context of criminal proceedings, the

⁸¹The court explained (at 182) that when specifically asked, the crown could not point to any new evidence discovered since the acquittal. The material or evidence available before the court in the second trial had in fact been available to the crown on the day that no evidence had been offered in the first trial.

⁸²*Supra*.

⁸³See Mirfield P "Shedding a tear for issue estoppel" 1980 *Criminal Law Review* 336, 338.

⁸⁴The most widely accepted definition of this doctrine is that advanced by Turner AK and Bower SG *The doctrine of res judicata* 2nd ed (1969) at 152F: "If the earlier case necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be *res judicata* in any subsequent action between the same parties in respect of the same subject matter".

doctrine of issue estoppel may be described as that aspect of the broader principle of *res judicata* which prevents (or estops) the prosecution from re-opening a particular issue of fact which has been decided in favour of the accused at an earlier trial ending in his acquittal.⁸⁵

Friedland suggests that the main rationale behind the application of estoppel in criminal cases is that it prevents inconsistent results.⁸⁶ A further reason advanced by Friedland for the application of the doctrine in criminal proceedings is that "it conserves judicial resources as it tends to force the prosecutor to exercise care in the preparation and presentation of his case because if he loses he may not be able to raise again the issues involved".⁸⁷ In this sense, the principle of issue estoppel serves the purpose of preventing the improper harassment of the accused by a multiplicity of proceedings. The values underlying it are the same as those underlying the double jeopardy prohibition.

In the past, opportunities to test the validity of the suggestion that the doctrine forms part of English criminal procedure were rare because nearly all criminal trials involve more than one issue. Consequently, if the jury simply finds the accused not guilty it is impossible to know on which issue the prosecution failed to satisfy

⁸⁵See Sprack 98. In *Connelly*, Lord Devlin explained (at 1343-1344) the difference between issue estoppel and the *autrefois* principle as follows: "[The] latter prevents the prosecution from impugning the validity of the reversal as a whole, [while] the former prevents it from raising again any of the separate issues of fact which the jury have decided, or are presumed to have decided in reaching their verdict in the accused's favour".

⁸⁶At 117.

⁸⁷*Id.*

them; juries do not give reasons for their verdicts. As indicated above, a majority of the House of Lords expressed themselves in favour of the application of the doctrine of issue estoppel in the *Conelly* decision.⁸⁸

However, in *DPP v Humphrys*,⁸⁹ the House of Lords categorically rejected its previous point of view. The facts that gave rise to that decision were as follows. H was acquitted of driving a vehicle on a public road on a particular day in 1972 while he was disqualified. At the trial, the only issue before the court was whether a constable was correct in identifying H as the rider of a motorcycle on that particular day. H also gave evidence, denying that he drove on that particular day or any other day during 1972. The jury acquitted him, and, it was obvious that the jury acquitted him on the basis that the state could not prove beyond reasonable doubt that he drove any vehicle on a public road on that particular day. Eighteen months later, he was charged with perjury at the first trial in that he had sworn that he had not driven any vehicle on a public road during 1972. At this trial, the prosecution adduced the evidence of several witnesses who had seen H driving on several occasions during 1972. The prosecution also again called the policeman (who had testified in the previous trial) to testify as to the specific incident for which H was charged in the first indictment. H was subsequently convicted by the court of perjury. He appealed against his conviction on the ground that the only issue

⁸⁸Lord Morris of Borth-y-Gest (at 1321), Lord Hodson (at 1334) and Lord Pearce (at 1366) expressed the point of view that issue estoppel applied in criminal cases, but that it did not apply in that case as it was not possible to identify from the jury's verdict of guilty of murder (which was quashed on appeal), any finding on the issue of robbery with which Conelly was charged after his conviction for murder had been quashed. See *supra* under 4.2.1 for a discussion of the *Conelly* decision.

⁸⁹*Supra*.

before the first jury was whether he was the rider of the motorcycle stopped by the policeman. Since he had been acquitted by that jury, the prosecution at the second trial was estopped from calling any evidence to the effect that he had been that rider and, in particular, the evidence of the policeman to that effect. The Court of Appeal reversed his conviction on the ground that the doctrine of issue estoppel barred a subsequent trial for perjury. However, the crown appealed to the House of Lords on a point of law, couched in the following terms

Where in a trial on indictment there is a single issue between prosecution and defence and the defendant is acquitted, is evidence tending to show that the defendant was guilty of that offence admissible in a subsequent prosecution of the defendant for perjury committed during the first trial?⁹⁰

The House of Lords answered this question in the affirmative, ruling that the civil doctrine of issue estoppel has no application in criminal law. Apart from the fact that the court could find very little historical justification for the application of the doctrine in criminal proceedings, a number of arguments were also raised against the introduction of the doctrine in criminal law. It was argued, for instance, that if the doctrine were to apply in criminal cases, it must be applicable equally to both parties (the crown and the defendant) as is the case in civil proceedings.⁹¹ The court was not prepared to accept that issue estoppel could be available to the crown. Lord Hailsham of St Marylebone explained⁹² that the rule of issue estoppel in civil cases springs from a rule of public policy, namely the need for finality in

⁹⁰At 14.

⁹¹Per Lord Dilhorne at 20.

⁹²At 32-33.

litigation summarised in the maxim *ut finis sit litium*. He explained that in civil proceedings, this principle is applicable to both parties because the litigants are on equal footing. However, his Lordship observed that in criminal proceedings, "[t]he subject requires to be protected against oppression by the executive, and in particular by the maxim *nemo debet bis vexari pro una et eadem causa*".⁹³ Therefore, to apply the doctrine of issue estoppel to both parties in criminal proceedings would (in his view) be against the policies which prevail in the criminal law context, namely that of state versus subject.⁹⁴

Another argument raised was that, in contrast to civil proceedings, it may be extremely difficult or even impossible to identify and isolate an "issue" in criminal litigation.⁹⁵ Lord Salmon for example, observed that application of the doctrine would be inappropriate because "there are no pleadings [in criminal litigation] defining the issues and no judgments explaining how the issues (even if identifiable) were decided".⁹⁶ His Lordship explained that since juries give general verdicts of guilty or not guilty, it is most of the time impossible to do more than guess how they have decided any identifiable issue.

Furthermore, Lord Salmon argued that even in the rare cases in which an issue could be identified and isolated, the application of issue estoppel (in criminal cases) would often be artificial and unfair. His Lordship explained that where the jury decided an issue in the accused's favour, not because they were satisfied that their solution

⁹³*Id.*

⁹⁴See to the same effect the judgment of Lord Edmund-Davis (at 51-52).

⁹⁵This argument was advanced by Lord Hailsham at 34, Lord Salmon at 43 and Lord Edmund-Davis at 49.

⁹⁶At 43.

was correct but because they were left in doubt as to whether the contrary had been proved, it would be unjust if the accused (who enjoys many advantages), "should be given the added bonus that that issue should thereafter be presumed for ever to have been irrevocably decided in his favour as between himself and the Crown".⁹⁷

However, the majority of the House of Lords also ruled that, in certain cases, an attempt (by the prosecution) to raise again an issue that has in effect been decided in favour of the accused in a previous criminal trial may amount to an abuse of process and may be stayed, even though it does not fall within the ambit of the principle of *res judicata* as applied in criminal law (in other words, within the ambit of the pleas of *autrefois*).⁹⁸ The subsequent perjury charge (in *Humphrys*) was not regarded by the House of Lords as an attempt to abuse the process; apparently, because the prosecution did not rely solely on evidence previously adduced and the fact that the evidence of perjury related mainly to the accused's evidence that he had not driven at all during 1972. Lord Hailsham observed that

[i]n 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

⁹⁷At 43. His Lordship expressed the view that the doctrine of *autrefois* amply protects the accused against double jeopardy and that no need exists to introduce issue estoppel into the field of criminal law.

⁹⁸Per Lord Hailsham at 34, Lord Salmon at 46 and Lord Edmund-Davies at 52-53.

(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.⁹⁹

The rejection of the doctrine of issue estoppel in *Humphrys* as being unnecessary and undesirable in criminal litigation has received a fair amount of criticism.¹⁰⁰ However, in view of the explicit recognition by the court of the abuse of process discretion in this context, the application of the doctrine has largely become unnecessary. Therefore, it is most unlikely that the availability of the doctrine in criminal litigation will be reconsidered by English courts in the near future.

⁹⁹At 40. The conclusion of Lord Salmon (at 47) reflects the same approach. *Cf* also Smith's comment on the *Griffith's* case [1990] *Criminal Law Journal* 182-183 discussed *supra*, text at note 79. The commentator suggests that the difference between *Griffiths* (where the court stayed proceedings on the basis that to allow the case to proceed would be unjust and oppressive) and *Humphrys* (where the court refused to stay proceedings) was that in the latter case the prosecution relied on fresh evidence to prove facts which the jury had not found to be proved at the first trial.

¹⁰⁰See, *inter alia*, Mirfield (337-349) who raises a number of valid points why the doctrine should find application in English criminal procedure, and Choo (28-31) who criticises the "not especially persuasive" arguments advanced by the House of Lords against the doctrine (at 31). *Contra* Lanham D "Issue estoppel in the English criminal law" *Criminal Law Review* 1971 428 who expresses the view (at 445) that "issue estoppel is neither appropriate nor necessary in the criminal law" because (*inter alia*), of the immense difficulties of isolating issues, and the fact that recognition of the doctrine would undermine the "interest [of the state] that the innocent are acquitted and the guilty convicted".

4.2.4 Summary

* In English law, the accused is protected against double jeopardy not only by the traditional pleas of *autrefois*, but also by the judicial discretion to stay proceedings on the basis of abuse of process. The effect of this broader protection is that a second prosecution may be prohibited even if the offence charged in the second trial does not qualify in terms of its *legal elements* as a lesser or greater included offence of the one charged in the first trial.

* A study of the case law reveals that the courts are willing to exercise their residuary discretionary powers in favour of the accused if the subsequent prosecution relates to an activity, transaction or course of conduct which has already been the basis of a previous charge on which the accused has been convicted or acquitted. An important (if not decisive) consideration is whether it was possible for the prosecution to bring all the charges in one trial. If this is so, the general premise is that it will be oppressive to have a second trial. However, as Lord Devlin pointed out in the *Connelly* decision, there may be certain instances where a second trial will be justified. These are, *inter alia*, where the judge (in the first trial) considered it expedient to order separate trials for offences charged in one indictment, or, where the accused has himself obtained a separate trial or where the defence accepts the choice exercised by the prosecution to prefer two or more indictments.

* The broader principle of *res judicata* generally referred to as issue estoppel, has been found to be inapplicable in English criminal law. The main objection to the application of the principle of issue estoppel is that it is difficult for a court to identify and isolate an issue decided previously in favour of the accused; juries need not give reasons for their verdicts.

* The House of Lords nevertheless recognised that an attempt by the prosecution to raise again an issue that had in effect been decided previously in favour of the accused, may be viewed as an abuse of process which justifies a stay of proceedings in terms of residual discretionary powers. In *Humphrys*, a perjury charge following on an acquittal for a minor traffic offence was not regarded by the court as an instance which warranted exercise of broader discretionary powers in favour of the accused. The court based its conclusion on the fact that the prosecution, in the subsequent trial for perjury, called additional evidence (which it could not have had available using reasonable diligence at the time of the first trial) to prove an offence allegedly committed *during* the first trial; therefore, it was impossible for the prosecution to charge the accused at the first trial with the offence of perjury. However, the court did not imply by this decision that subsequent perjury charges may never justify a stay of proceedings on double jeopardy grounds. It expressed the view (per Lord Hailsham) that where the prosecution brings a perjury charge with the sole motive of "getting behind the original verdict by re-trying the *same evidence*",¹⁰¹ it is the duty of the court to stay proceedings, not as a matter of discretion but as a matter of law.

4.3 CANADIAN LAW

4.3.1 General

The Law Reform Commission of Canada has remarked that¹⁰²

¹⁰¹See the judgment of Lord Hailsham in *Humphrys* 34.

¹⁰²Law Reform Commission of Canada "Double jeopardy, pleas and verdicts" *Working Paper 63* 1991 43, hereinafter referred to as *Working Paper 63*.

[t]he existing Code regime governing double jeopardy, pleas and verdicts is characterised by an occasional lack of comprehensiveness, confusing procedures and the existence of anachronisms - three characteristics that offend the principle of clarity.

This is particularly true of the criteria applied in Canadian law to determine identity of offences. Some of these rules, for instance those pertaining to the special pleas of *autrefois acquit* and *autrefois convict*, are contained in the Code itself. Others, for instance the rule of issue estoppel and the rule against multiple convictions, were developed by the courts.¹⁰³ Moreover, the Canadian Charter of Rights also offers the accused protection, albeit not as expansive as in terms of the ordinary law, against a successive prosecution for the "same offence".

The Canadian Law Reform Commission recently suggested that all these rules be codified.¹⁰⁴ This has not as yet taken place. For the sake of clarity, each of the different criteria applied in Canadian law for determining identity of offences will be considered separately in the paragraphs that follow.

4.3.2 The pleas of *autrefois acquit* and *autrefois convict*

The Canadian Code of Criminal Procedure permits a person charged with an offence to plead *autrefois acquit* and *autrefois convict*.¹⁰⁵

¹⁰³In *Regina v Van Rassel* (1990) 1 (SCR) 225 the Supreme Court of Canada recently held that the double jeopardy concept is one of general application which is expressed in the form of more specific rules which, despite their common origin, differ in the way they are applied.

¹⁰⁴See *Working Paper 63* at 46.

¹⁰⁵Section 607 of the Code, RSC 1985, C-46.

To succeed with the defence, the defendant must establish that

- (1) (a) there was a final verdict in the first charge¹⁰⁶
- (b) the "matter" of the earlier charge is the same "in whole or in part" as the later charge¹⁰⁷ *and*
- (c) that at the former trial, if all proper amendments had been made that might then have been made, the accused might have been convicted of all the offences of which he may be convicted before the court to which *autrefois acquit* or *autrefois convict* is pleaded.¹⁰⁸

It is furthermore provided in the Code that

- (2) where it appears that the accused might at the former trial have been convicted of an offence of which he may be convicted on the count [in respect of which the plea of former jeopardy is raised], the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted at the former trial.¹⁰⁹

The basic idea underlying all these provisions are that the accused must have been in peril of a conviction at the previous trial of the offence subsequently charged.¹¹⁰

The rule under point (b) above is discussed first. The definitions of

¹⁰⁶See chapter three *supra* under 3.3.2 for a discussion of this requirement.

¹⁰⁷Section 609(1).

¹⁰⁸Section 609(2).

¹⁰⁹Section 609(2)(a).

¹¹⁰See *Regina v Ko and Yip* (1977) 36 CCC (2d) (BCCA) 32, 36 and *Regina v Van Rassel supra* 235.

the crimes ought to be considered in order to determine whether the matter is the same "in whole or in part" as in the previous proceeding. The relevant inquiry is whether the offence subsequently charged can be viewed as identical to the offence charged in the first proceeding, or as being "lesser included" to that particular offence.

The "lesser included offence" criterion as applied in Canadian law is explained as follows.¹¹¹ In the first place, a lesser included offence is one which by the wording of its definition is an offence which is essentially the same as the more serious offence minus one of the aggravating elements. For example, ordinary assault is a lesser included offence of assault with a weapon. In the second place, a lesser included offence may also be one which is generally part and parcel of the more serious offence; for example, attempt. Since some time along the way to the commission of the offence the accused must have been in the process of trying to complete it, it necessarily follows that the attempt is an included offence of the completed crime. In the third place, lesser offences may also be specifically provided for by statute. These are known as lesser offences indicated by law.¹¹² Furthermore, an included offence may be recognised (in the fourth place) not by the wording of the statute (the definition of the crime), but by the wording of the count charged in the indictment. This means that by looking at the actual words used in the indictment, one can tell whether an offence is included in the charge for another offence. For example: the indictment sets out that X, on day Y, attempted to murder Z by hitting him with a stick over his head. X is charged with attempted murder. However, by the mere words used in the indictment, one can tell that an assault or an assault to do

¹¹¹See Mewett AW *An introduction to the criminal process in Canada* 2nd ed 1992 106-109.

¹¹²See *Regina v Rinnie* (1970) CCC 3 218 (Alta SC App Div).

grievous bodily harm is a lesser included offence of the crime charged.

As indicated in (c) above, the Code also prohibits a subsequent prosecution for offences of which the accused might have been convicted on the previous charge, had all proper amendments been made. In *Regina v Van Rassel*¹¹³ the Supreme Court explained this principle as follows

The new count must be the same as at the first trial [for a plea of previous jeopardy to succeed], or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at that time to make the necessary amendments".¹¹⁴

An example is the following. A is charged with stealing something on May 4th. The evidence, however, shows that the offence was committed on May 5th. If the accused is acquitted because of this error in the indictment, he may not be charged again with theft on either May 4th or May 5th. The reason is that the court could have allowed an amendment of the indictment - it was merely voidable and not void.¹¹⁵ Therefore, a plea of former jeopardy not only lies in Canadian law if the accused can show that he was actually acquitted or convicted of an offence, but also if he can show that he could have been convicted of the offence, had all the proper amendments been made.¹¹⁶

¹¹³*Supra*.

¹¹⁴At 226.

¹¹⁵See chapter three *supra* under 3.3.2 for a discussion of the *Moore* decision.

¹¹⁶See Mewett 108.

The last provision (set out in (2) above)¹¹⁷ means that the plea of *autrefois* applies if the accused in the later charge could be convicted of any offence of which he might have been convicted in the earlier charge. This principle is explained as follows.¹¹⁸ If a person is charged with the offence X, and the court finds that X is an offence included in a count Y of which the accused had been or might have been acquitted or convicted on a previous occasion, then a plea of *autrefois* would apply. The relevant question in deciding whether the plea of *autrefois* applies, is whether the conviction or acquittal *on the whole of the earlier charge* necessarily involves a conviction or acquittal *on every part* of the later charge. If it does, the plea will apply; otherwise, it will not.¹¹⁹ It is, however, not clear from the section whether the accused may nevertheless be tried for the more serious crime which only includes the *included* crime in the first charge. In other words, it is not clear from the section whether the broader or the restricted version of the "in peril" test applies.¹²⁰

The Code also prohibits subsequent charges for greater offences. Section 610 makes specific provision for barring of prosecutions for greater offences by providing for the following specific instances

- (i) a later charge substantially the same as a previous one of which the accused was acquitted or convicted, but

¹¹⁷Section 609(2)(a).

¹¹⁸See Salhany 6-62.

¹¹⁹*Id.*

¹²⁰See chapter two *supra* under 2.3.2, text at notes 121-122 for a discussion of these versions of the in peril test as identified by Friedland. In terms of the broader version of the in peril test. a subsequent charge is barred if the accused has been in peril of a lesser offence (on the first indictment) for which he is again in peril on the second indictment for a greater offence.

adding a statement of intention or circumstances of aggravation tending to increase the punishment, is barred by the previous charge

- (ii) a conviction or acquittal of murder bars a subsequent charge of manslaughter or infanticide
- (iii) a conviction or acquittal of first degree murder bars a subsequent charge of second degree murder or vice versa.
- (iv) a conviction or acquittal of infanticide bars a later charge of manslaughter and vice versa.

An example in the case law of application of the provision in (i) is the following. A plea of *autrefois convict* was allowed to a charge of possession of narcotics for the purpose of trafficking in circumstances where the accused has previously been convicted of simple possession. However, it is not clear from the provisions in the Code itself, or from the case law pertaining to these provisions, whether a person, previously convicted of attempted murder (or a lesser included offence such as assault), may be charged in a second trial for murder if the victim died only after the first trial. As indicated above, these instances are referred to as the intervening death cases. However, certain other principles have been developed in the case law (for instance the *Kienapple* principle), which can be interpreted as allowing for subsequent prosecutions in intervening death cases.

The *common law* principles of double jeopardy, namely the rule against multiple convictions, the rule against splitting of charges and the rule of issue estoppel are all discussed separately in the paragraphs below.

4.3.3 The rule against multiple convictions

The criteria applied to determine the permissibility of multiple punishments in a single trial, have also been incorporated as a principle of double jeopardy in the context of successive prosecutions. These criteria were first introduced in the case of *Kienapple v The Queen*.¹²¹ The facts of that case were as follows. The accused had been convicted at trial of the offences of rape and unlawful carnal intercourse with a female under fourteen years of age. The Supreme Court held that the conviction on the latter charge could not stand, because it would amount to a violation of the rule against multiple convictions. The court did not reach this conclusion by applying the lesser included offence criterion. The crime of unlawful carnal intercourse with a female under fourteen years of age did not qualify as a lesser included offence of rape; it could be committed in respect of a female under the age of fourteen *with or without consent*. The crime of rape only embraced the offence of unlawful carnal intercourse if it occurred *without* consent of the female under fourteen years of age. In other words, it did not embrace the offence of unlawful carnal intercourse in all instances. The court (per Lamer J), accordingly based its conclusion upon the broader principle of *res judicata*.¹²² The court explained this principle as follows¹²³

The relevant inquiry as far as *res judicata* is concerned is whether the *same cause or matter* (rather than the same offence) is comprehended by two or more offences.

¹²¹(1974) 15 CCC (2d) 524 (SCC).

¹²²At 537.

¹²³At 538-539.

However, the court also added that¹²⁴

[i]f there is a verdict of guilty on the first count and the same or substantially the same *elements* make up the offence charged in a second count, the situation invites application of a rule against multiple convictions.

These contradictory statements (one following a same transaction approach, and the other one focusing on the elements of the particular offences), subsequently gave rise to different interpretations of the so-called *Kienapple* principle.¹²⁵

The *Kienapple* principle has however, been clarified subsequently by the Supreme Court in the case of *Regina v Prince*.¹²⁶ The facts were as follows. On January 1st 1981, Sandra Prince stabbed Bernice Daniels in the abdomen. At the time, Daniels was six months pregnant. On the 2nd of January 1981, Prince was charged with the attempted murder of Daniels. Only four days later (before the

¹²⁴At 539, relying upon the judgment of Lord Morris of Borth-y-Gest in the *Conelly* decision. See *supra* under 4.2.1 for a discussion of that case.

¹²⁵In *Regina v Hagenlocher* (1983) 65 CCC (2d) 101 the Manitoba Court of Appeal gave a wide meaning to the *Kienapple* principle. The court prohibited a subsequent charge of unlawfully setting fire where the accused had already been convicted of manslaughter for the death of a man asphyxiated by the smoke of the fire. (At 101-102). However, in *Krug v The Queen* (1985) 21 CCC (3d) 193 (SCC) (a multiple-punishment-single-trial case) the court favoured an approach which focuses on the elements of the offences, rather than on whether the offences are based on the same act. In that case the Supreme Court held that a conviction for attempted robbery described as attempted theft while armed with an offensive weapon did not preclude a conviction for using a firearm while attempting to commit an indictable offence.

¹²⁶(1986) 30 CCC (3d) 35 (SCC).

conclusion of the trial) Daniels gave birth to a child who lived for nineteen minutes and then died as a result of the stabbing. Prince was subsequently acquitted of the attempted murder of Daniels, but convicted of causing bodily harm to her. Following an inquiry into the death of the child, Prince was in the meantime in a different proceeding also charged with manslaughter of the child. Her lawyer then made a preliminary motion to the trial judge requesting him to enter a stay of proceedings on the basis of the *Kienapple* principle. The argument put forward was that the *Kienapple* principle prohibited a subsequent conviction for the same act.

The Supreme Court rejected this argument and convicted Prince of manslaughter of the child. The court held that the *Kienapple* principle requires that there has to be (i) a factual nexus between the two charges *as well as* (ii) a legal nexus.¹²⁷ Dickson CJ explained that the factual nexus could usually be found in a single act of the accused. He indicated that *other* situations such as continuing offences would have to be resolved on an individual case basis by examining such factors as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events, and whether the accused's actions were related to each other by a common objective.¹²⁸

The court then proceeded to clarify the requirement of a legal nexus. Mr Justice Dickson indicated that the requirement would not be satisfied if the offences merely shared a common element. Instead, he embraced the point of view that an "adequate legal nexus" would depend on the presence or absence of *additional, distinguishing*

¹²⁷At 44.

¹²⁸At 45.

elements.¹²⁹ In his view, *Kienapple* would only apply where there was no additional and distinguishing element contained in the offence for which a conviction was being sought to be precluded.¹³⁰

Justice Dickson explained that there are at least three ways in which the elements of a crime could be said to be *not* additional to or distinct from another. Firstly, where the element of one crime may be a particular instance of the other. An example would be the following. The crime of pointing a firearm is a particular instance of the crime of using a firearm inasmuch as the pointing of a gun is a manner of using it.¹³¹ Pointing therefore, can in terms of this rule, be regarded as a particularisation of use.¹³² Secondly, where there is more than one method in more than one crime of proving a single delict, a distinguishing element would be absent. The court demonstrated this by referring to the crime of "giving evidence in a judicial proceeding that was contrary to his own previous evidence" on the one hand, and the crime of perjury on the other hand.¹³³ The third situation envisaged by the court, is where Parliament deems a particular element of one crime to be satisfied by proof of a different nature because of social policies or the inherent difficulties of proof. Examples cited by the court are the crimes of driving while impaired and the crime of driving with a blood-alcohol level over 0,08 percentage.

¹²⁹At 47.

¹³⁰At 49.

¹³¹Both these are substantive statutory offences in Canadian law.

¹³²At 50.

¹³³*Id.* These are the equivalents in Canadian law of statutory and common law perjury as they exist in South African law.

On application of these guidelines, the court concluded that *Kienapple* did not afford the accused any protection against prosecution for the offence of manslaughter. While a factual nexus existed, a legal nexus was held to be absent; the one offence required proof of the death of the child of D, and the other, causing of bodily harm to D. In the court's view, it could not be said that the one is a particularisation of the other or designed to facilitate proof of the other.¹³⁴ Moreover, the court concluded that the principle clearly did not apply where the respective crimes resulted in injury or death to different persons.¹³⁵

It is clear that the court (in *Prince*) opted for an interpretation of the *Kienapple* principle which focuses primarily on the identity of legal elements of offences, instead of the identity of facts. The narrow ambit of the *Kienapple* principle as set forth in *Prince*, became particularly apparent in a subsequent decision, *Wigman v The Queen*.¹³⁶ In that case, the court held that an accused's previous conviction on his plea of guilty to a charge of breaking and entering and committing the indictable offence of robbery, did not prevent a subsequent trial and conviction for attempted murder arising out of the severe beating of the occupant of the house which was broken into. The court found that although there was a common element, namely violence, the additional element requirement was complied with inasmuch as the specific intent required for each offence was different.¹³⁷

¹³⁴At 53.

¹³⁵At 54.

¹³⁶(1987) 33 CCC (3d) 97 (SCC).

¹³⁷At 104.

4.3.4 The rule against splitting of charges

In the past, the general approach in Canadian law has always been that a prosecutor is free to exercise his discretion whether to pursue separate trials for crimes arising from the same transaction.¹³⁸ Canadian courts have only recently recognised the notion (advanced in the English case of *Connelly*) that the splitting up of charges arising from the same transaction may amount to an abuse of process which justifies a stay of proceedings. The leading case in this regard is *Regina v B*, a decision of the Ontario Court of Appeal.¹³⁹

The accused was charged with sexual assault on his daughter. This was done on the basis of films of his daughter in different sexual positions which were handed to the police by the accused's son. The daughter (twenty five years of age at the time of the trial), refused to be interviewed by the police. However, at the trial she decided to testify and told the court that she had had sexual intercourse with the accused for the last ten years. The accused then testified and admitted that he had sexual intercourse with his daughter during this time but that it occurred with her consent. He was acquitted of assault on the basis that a reasonable doubt existed as regards the issue of whether she had consented. Two days later, the accused was charged with incest. His counsel applied for a stay of these proceedings on the basis of an abuse of process. The arguments advanced by defence counsel were that a stay would be justified because the crown had an ulterior motive for laying the charge, and that the accused had been prejudiced in that he would have contested the sexual assault charge had he not assumed that the crown would not proceed with an incest charge. The trial judge granted the stay of

¹³⁸See Working Paper 63 at 9.

¹³⁹(1986) 29 CCC (3d) 365 (Ont CA).

proceedings, but the Court of Appeal reversed and directed that the trial for incest proceed.

In his judgment, Tarnopolsky JA discussed the English approach adopted in the *Conelly* decision.¹⁴⁰ On the basis of Lord Devlin's opinion in that case,¹⁴¹ the court reached the conclusion that a splitting of a case does not *per se* amount to an abuse of the process. The court argued that there are however, three criteria which can be regarded as indicative of an abuse of process which justifies a stay of proceedings. These are¹⁴²

- (i) where the second trial is such that it will, in fact, force the accused to answer for the same delinquency twice or
- (ii) where the second trial is such that it will in effect relitigate matters that have already been decided on the merits raising the spectre of inconsistent verdicts or
- (iii) where the second trial is brought because of malice or spite so as to harass the accused and not for any proper purpose.

A mandatory rule of joinder of all charges arising from the same transaction has, however, not as yet been favoured by the courts, or, introduced by Parliament.¹⁴³

¹⁴⁰At 374. See *supra* under 4.2.1 for a discussion of the decision.

¹⁴¹See *supra* under 4.2.1 for this and the other opinions in the *Conelly* case.

¹⁴²At 374.

¹⁴³See Working Paper 63 at 50 where it is recommended that a compulsory joinder rule be enacted in the Canadian Criminal Code as a matter of principle.

4.3.5 The rule of issue estoppel

The rule of issue estoppel is also referred to in Canadian law as the defence of *res judicata*.¹⁴⁴ It is not included in the Code of Criminal Procedure, but has been recognised in the common law from as early as 1905.¹⁴⁵ The ambit of the rule as applied in criminal proceedings has been considered in a number of cases. In some of these cases Canadian courts were confronted with complicated issues; an example is the question of whether the rule also prohibits subsequent perjury charges. The most important Canadian decisions on the application of the rule are considered in the following paragraphs.

In *Gushue v The Queen*¹⁴⁶ the Supreme Court was faced with resolution of the following facts. G was charged with murder of M in the course of a robbery. He was acquitted on the basis of his testimony that he had not been present when the murder took place. However, three years after his acquittal and while being investigated for other offences, he admitted to the police that he had in fact tried to rob M and had shot him when he resisted. He was consequently charged with robbery in respect of M, and the statutory offence of

¹⁴⁴See *Gushue v the Queen* (1980) 50 CCC (2d) 417 (SCC). Ewaschuk (14-20) explains that in addition to applying to a situation where the whole cause has previously been determined (namely *autrefois acquit* and *autrefois convict*), the doctrine of *res judicata* also includes the rule of issue estoppel by which a litigant is precluded from challenging a material fact or issue which has been adversely determined against him at the previous proceeding.

¹⁴⁵See Salhany 6-64. The author cites the early case of *Regina v Quinn* (1905) 10 CCC 412 (Ont CA). The Supreme Court subsequently recognised application of the principle in Canadian law in the case of *Feeley, Mc Dermott and Wright v The Queen* (1963) 3 CCC 201 (SCC).

¹⁴⁶*Supra*.

giving contradictory evidence (namely, at the trial of the murder of M and later before the police). On conviction of these offences, he appealed to the Supreme Court on the basis that the rule of issue estoppel prohibited the subsequent charges. He argued that, in acquitting him on the murder charge, the jury necessarily negated the commission by him of the robbery. Furthermore, he argued that the rule of issue estoppel also prohibited the charge of giving contradictory evidence.

The Supreme Court rejected these arguments, holding that issue estoppel did not apply to the charge of robbery. It argued that the finding of the jury that G did not kill M, did not necessarily determine that G was not a party to the robbery.¹⁴⁷ In respect of the offence of giving contradictory evidence, the court held that it did not invoke protection against double jeopardy. The court explained that G's admission under oath that he had lied at the murder trial added a *new* element and gave rise to a situation outside the ambit of the murder trial. The premise of the court was that, as a matter of policy, issue estoppel cannot be based upon false evidence where the evidence of the falsity was not available at the trial from which issue estoppel is alleged to have arisen.¹⁴⁸ The court also added that unless it could be said that the subsequent prosecution was an attempt by the crown to retry the accused, the preferable policy would be to exclude issue estoppel.¹⁴⁹

In *Grdic v The Queen*¹⁵⁰ G was charged with driving offences, but

¹⁴⁷At 423-424.

¹⁴⁸At 423.

¹⁴⁹*Id.*

¹⁵⁰(1985) 19 CCC (3d) 289 (SCC).

acquitted because of his testimony that he had been stopped earlier than the time given by the police-officer who arrested him, thereby casting doubt on the validity of the certificate of analysis of breath samples. In other words, Grdic relied on an alibi. He said that he had been stopped at noon by the police, and that the breathalyser tests taken that evening could not have been his because he was at home at the time. The judge acquitted him despite remarking that his story was in actual fact unbelievable. He was subsequently charged with perjury. The issue before the Supreme Court was whether the crown was estopped from raising or relitigating any or all of the issues raised in the first trial.

The Supreme Court stated that the basic premise is that issue estoppel cannot assist an accused if it is proven that the issue was determined in his favour by fraud such as, for instance, perjury.¹⁵¹ However, the court held that there are two exceptions to this rule

- (i) If to prove the allegation (of fraud) the crown is merely tendering the same evidence as that tendered previously, "then issue estoppel will survive the attack because the Crown's allegation is, in disguise, but a relitigation of the issue *as litigated previously*".¹⁵² However, if additional evidence is rendered to prove the allegation of fraud, (namely, evidence *not* put to the trier of fact in the previous proceeding), this may defeat issue estoppel.
- (ii) However, if the additional evidence was available to the crown using reasonable diligence at the time of the first trial and the crown failed to take it, then it is estopped from so doing later on. The court pointed out that this exception is recognised

¹⁵¹At 294-295.

¹⁵²Per Wilson J at 295. *Cf* the views of Lord Hailsham in the English case of *Humphrys* discussed *supra* under 4.2.3.

"not *per rem judicatam*, but for reasons of fairness to the accused who was in jeopardy of answering the full case had the Crown been diligent".¹⁵³

Applying these principles to the facts, the court concluded that because the new evidence of perjury (namely the evidence of witnesses) was available at the time of the first trial, the claim of issue estoppel had to be upheld.

Other principles of issue estoppel applied in Canadian law are the following

- * Issue estoppel does not apply where the parties in a subsequent prosecution are different to those in an earlier prosecution. An example is where a court (other than the Supreme Court of Canada) ruled that a video was not obscene, and a different distributor was subsequently charged with circulating the same material.¹⁵⁴
- * Issue estoppel is not available to the crown in subsequent proceedings notwithstanding that a previous verdict of guilty necessarily resolves all the facts in issue (including identity) in favour of the crown.¹⁵⁵ The basis of this premise is that issue estoppel is a defence which accrues only to a defendant. It is also suggested that issue estoppel recognised in favour of the crown in a criminal trial will amount to an infringement of section 11(d) of the Charter, namely the presumption of

¹⁵³At 295-296.

¹⁵⁴*Regina v Nichols* (1984) 43 CR (3d) 54 (Ont CA).

¹⁵⁵The basis of this premise is that issue estoppel is a defence which accrues only to a defendant.

innocence.¹⁵⁶

4.3.6 Constitutional protection against double jeopardy - interpretation of section 11(h) of the Charter

The extent to which subsection 11(h) of the Charter of Rights protects against double jeopardy in the context of successive prosecutions for the same offence, has not as yet been fully resolved by the courts.¹⁵⁷ So far, the Supreme Court has merely considered the issue of whether conduct giving rise to criminal proceedings falls within the meaning of the term "offence".¹⁵⁸ The court opted for a very narrow approach in this regard. In *Regina v Wigglesworth*¹⁵⁹ it held that a Royal Canadian Mounted Police officer who had been convicted of a service offence under the Royal Canadian Mounted Police Act because of his assault on the accused, could be tried again under the Criminal Code for assault. The court argued that the disciplinary offence was not criminal in nature.

In *Regina v Van Rassel*¹⁶⁰ the Supreme Court held that section 11(h) of the Charter applies only in circumstances where the two offences with which the accused is charged are the same.¹⁶¹ The court relied on its previous holding in *Regina v Wigglesworth*, namely

¹⁵⁶See Working Paper 63 at 14.

¹⁵⁷See Working Paper 63 at 16.

¹⁵⁸See *Regina v Wigglesworth* referred to in chapter three *supra* under 3.3.2.

¹⁵⁹*Supra*.

¹⁶⁰*Supra*.

¹⁶¹At 239.

that "the same act can give rise to different offences".¹⁶² In terms of the Supreme Court's holding in these cases, it may therefore be concluded (at this stage) that circumstances on which an accused may invoke double jeopardy protection on constitutional grounds are narrower and more onerous than those by which the Canadian criminal law admits recourse to the plea of *res judicata*.¹⁶³

4.3.7 Summary

* The accused in Canada is protected against successive prosecutions for the same offence by various statutory and common law rules. The Canadian Charter of Rights also guarantees the accused protection against successive prosecutions for the same offence. The present position is that the accused is afforded more protection in terms of the ordinary law than in terms of the constitutional guarantee.

* In terms of statutory law, the basic premise is that an accused may rely on the plea of *autrefois* if he has previously been in peril or in jeopardy of a conviction of the offence charged. The relevant investigation is whether the offences charged successively are identical, or whether the offence charged in the second proceeding can be regarded as a lesser included offence of the one charged in the first trial. A lesser included offence is determined by focusing on the definitional elements of the offences successively charged. However, it may also be determined by statutory prescription or by the inclusion in the charge of apt words of description cognate to the offence. A person is also regarded as having been in jeopardy at the first trial of

¹⁶²*Id.*

¹⁶³This is also the position in Indian law. See *infra* under 4.4.2 for a discussion of Indian law.

conviction of the offence subsequently charged, if (either in law or on account of the evidence presented) *it was legally possible in the first trial for the court to make the necessary amendments.*

* Subsequent charges for *greater* offences are also prohibited in terms of statutory law. An accused may rely on the plea of *autrefois* if he is charged with an offence which can be regarded as an aggravated form of the offence previously charged. Finally, the Code also provides that convictions or acquittals for certain specified crimes bar subsequent trials for other specified crimes. It is specified, for instance, that a conviction or acquittal for murder bars a second trial for manslaughter or infanticide, and a conviction or acquittal of first degree murder bars a second trial for second degree murder. These are crimes which do not necessarily qualify in terms of their definitions as lesser or greater included offences, but may be closely related provided they arise from the same act. All these statutory provisions are supplemented by common law principles developed in the case law.

* There are three rules which developed in the case law. These are: the rule against multiple convictions; the rule against splitting of charges and the rule of issue estoppel. The rationale of each rule is summarised below.

* The rule against multiple convictions relates to the issue of whether a person, tried and convicted of one crime, can also be convicted (in the same trial, or in successive trials) of another crime or other crimes. The Supreme Court of Canada clarified the rule by holding that for the rule to apply there must be both a factual nexus and a legal nexus between the charges. A factual nexus exists where the offences arise from the same transaction. This requirement will be satisfied usually if the same *act* of the accused forms the basis of each

of the charges. However, other situations will have to be resolved by taking into consideration factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events, etcetera. A legal nexus is satisfied only if there is no *additional, distinguishing* element in the crime charged for which the accused seeks to preclude a conviction. In the context of successive prosecutions, this means that the court will have to consider whether the crime charged in the *second* trial contains an additional, distinguishing element to the crime charged in the first trial. If not, a second trial will be barred.

The Supreme Court explained in which instances the elements of crimes will *not* be additional to, or distinct from another. These are (i) where the element of one crime may be a particular instance of another (pointing of a firearm is, for example a particular form of *using* a firearm); (ii) where there is more than one method in more than one crime of proving a single delict (for example "giving evidence in a judicial proceeding contrary to the accused's own previous evidence" and perjury); and (iii) where Parliament deems a particular element of one crime to be established by proof of a different nature because of social policies or the inherent difficulties of proof (for example, offences relating to drunken driving). Application of these requirements (a factual as well as a legal nexus) in subsequent cases has demonstrated that the rule against multiple convictions as explained in *Kienapple* and *Prince* does not honor the notion that the prosecution should bring all the charges arising from the same criminal transaction in *one* trial.

* Canadian law has nevertheless also developed to the extent of recognising the rule (proposed by Lord Devlin in the English case of *Connelly*) that the splitting up of charges (arising from the same transaction) may amount to an abuse of process. However, this

protection is limited (as the case of *R v B* illustrates) to situations where there is a second trial for the same offence (in terms of the criteria set out in statutory law); relitigation of matters which have been decided on the merits; or where a second trial is brought solely to harass the accused.

* Unlike the position in English law, the rule of issue estoppel is recognised as an independent doctrine in Canadian law. However, a study of the case law reveals that the rule has been difficult to apply in practice. Canadian courts (employing juries as adjudicators) have experienced the same problems encountered by English courts, namely the identification of issues decided by the jury in favour of the accused. Moreover, need for the application of the rule was questioned in cases where perjury charges followed on previous acquittals.

* The basic premise followed by Canadian courts is that issue estoppel cannot assist an accused if it is proven that the issue determined in his favour was brought about by fraud, for example perjury. The Supreme Court has reasoned, for instance, that *as a matter of policy*, issue estoppel cannot be based on false evidence where the evidence of the falsity was not available at the trial from which issue estoppel is alleged to arise. However, two exceptions are recognised in this regard: issue estoppel will apply if the crown, in order to prove the allegation of fraud, merely tenders the same evidence as that previously tendered. The application of issue estoppel is justified in this instance because it amounts merely to a relitigation of the issue *as litigated previously*. If *additional* evidence is rendered to prove the allegation of fraud, it may defeat issue estoppel, provided that the additional evidence was *not* available to the crown using reasonable diligence at the time of the first trial.

4.4. INDIAN LAW

4.4.1 General

As indicated in chapter three,¹⁶⁴ the Supreme Court of India interpreted the constitutional guarantee against double jeopardy as affording protection only against a subsequent prosecution for an offence in circumstances where the accused had previously been *convicted* of the same offence. If the accused had previously been *acquitted* of an offence, he cannot, on constitutional grounds, defeat a subsequent prosecution for the same offence. However, he may rely on the ordinary law of the land. The plea of *autrefois acquit* still forms part of the rules of criminal procedure as set out in the present Code of Criminal Procedure.¹⁶⁵ A separate discussion of the ordinary law as well as the constitutional law on the topic addressed in this chapter is therefore essential.

4.4.2 Statutory protection against successive prosecutions for the same offence

Section 300 of the present Code of Criminal Procedure¹⁶⁶ is an extremely complicated provision which can only be understood if read together with other provisions of the Code. It provides as follows

- (1) [part one] A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall not

¹⁶⁴Under 3.4.1.

¹⁶⁵Section 300 of the Code of Criminal Procedure, 1973 (Act No 2 of 1974) contains both the pleas of *autrefois acquit* and *autrefois convict*.

¹⁶⁶Act 2 of 1974.

be liable to be tried again for the *same offence*,¹⁶⁷

[part two] nor on the same facts for any other offence¹⁶⁸ for which a different charge from the one made against him might have been made under subsection (1) of section 221, or for which he might have been convicted under subsection (2) thereof.

Section 221 enables the prosecutor to join in one trial all the offences arising out of a single transaction. It provides as follows

- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts that can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.
- (2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under subsection (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Indian courts have held that the term "same offence" as it appears in part one of section 300(1), means the *same* act or omission punishable under the *same* provisions of law.¹⁶⁹ In other words,

¹⁶⁷My emphasis.

¹⁶⁸My emphasis.

¹⁶⁹See Naryana PS *The law of res judicata* 1987 366. Batuk Lal *Commentary on the Code of Criminal Procedure (1973)* 1989 ed 830 points out that although the term "offence" is defined in the Act as "any act or omission punishable by law", the meaning of the concept "same offence" was left to the courts to interpret. The courts have approached the meaning of the words "same offence" (as set out in the first part of this section), on the basis that the expressions "same

what is prohibited in terms of this part of section 300(1), is a subsequent prosecution for *exactly* the same offence as that of which the accused has previously been acquitted or convicted. However, Indian courts have recognised an exception to this rule. A person may be charged subsequently for the exact same offence if it can be regarded as a continuing offence. A "continuing" offence is described as "the repetition of an act or omission constituting an offence on different occasions".¹⁷⁰ In the case of a continuing offence, an acquittal has not been regarded as a bar to a subsequent trial.¹⁷¹

Nevertheless, section 300(1) does not only prohibit a second trial for the same offence, but also, for *any other offence on the same facts* which could have been charged in terms of section 221 of the Code.

offence" and "same act or omission" cannot always be treated as interchangeable. (See Ahmad E *Ejaz's Code of Criminal Procedure 1973* Vol 3 1994, 148). The early case of *Babu Lal Mahton Singh v Ram Saran* AIR 1930 Pat 26 set the precedent for future cases: The court held that the first part of section 403(1) (the identical predecessor of the present section 300(1)) "deals with the case of one set of acts or omissions constituting *one legal offence only*." (My emphasis).

¹⁷⁰See Singh 52. Ahmad 150 states that "where an act or omission constituting the offence is continued from day to day, a fresh offence is committed by the accused on every day on which the act or omission continues". See also Nand Lal *The law and doctrine of res judicata in civil and criminal cases with constitutional guarantees in criminal trials* 2nd ed 1968 418-419 for a discussion of the "continuing offence" exception, particularly in the field of the omission.

¹⁷¹See *inter alia*, *Yamanappa v Emperor* AIR 1947 Bom 467 & *GD Bhattar v The State* AIR 1957 Cal 483. In the first case, the court held that an accused acquitted of retaining articles of stolen property may be subsequently prosecuted under section 412 of the Indian Penal Code in respect of a greater number of articles, though they might have been recovered at the same time as those for which he was indicted of retaining at the previous trial. The subsequent prosecution was allowed because retaining stolen property is regarded as a continuing offence. (At 468).

Read on its own, the second part of section 300(1) seems to recognise a same transaction approach.¹⁷² In *Gauri Shankar Rai v Emperor*¹⁷³ the High Court of Patna stated that this section in effect laid down that generally no accused shall be vexed with more than one trial for offences arising out of the same facts.

However, the High Court of Allahabad held in *Abdul Ahmed v The State*¹⁷⁴ that part two of section 300(1), namely that a person cannot be tried again for any other offence upon the same facts, can only be understood in view of *all* the provisions of the section; in particular, in terms of the various exceptions to the rule, set out in subsections 300(2)-(4).¹⁷⁵ The court observed that the basic principle revealed by these various exceptions is not that a person shall not be tried more than once on the same set of facts, but rather, that a person shall not be put in peril more than once of being convicted for what can be regarded as the same offence.¹⁷⁶ This line of reasoning seems plausible in view of the interpretation by Indian courts of these various exceptions.

¹⁷²See *infra* under 4.5.4, text at note 260 for a detailed discussion of a same transaction approach as advocated by Mr Justice Brennan in American constitutional double jeopardy jurisprudence.

¹⁷³48 Cri LJ 1947 93.

¹⁷⁴AIR 1952 All 597.

¹⁷⁵At 600.

¹⁷⁶*Id.* At 601 the court categorically rejected the notion that the provision is based on the rule that a person may not be tried more than once on the same facts. Moreover, the court expressed its doubt as to whether "any such rule [even] exists".

The first exception, section 300(2), provides that

A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any *distinct*¹⁷⁷ offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.¹⁷⁸

Indian courts have interpreted this particular exception as follows.¹⁷⁹

The words used in the second part of section 300(1) namely, prohibiting a subsequent prosecution "on the same facts for any other offence", denotes another offence (meaning an offence punishable under another provision) than the one which previously had been charged. However, the prohibition only operates if such an offence (the other offence subsequently charged) contains identical elements to the offence previously charged. A *distinct* offence as envisaged in section 300(2) on the other hand, denotes an offence which has different elements than the offence previously charged. Therefore, if the ingredients of the offences involved in both trials are not identical, the courts have usually treated them as distinct offences.¹⁸⁰

¹⁷⁷My emphasis.

¹⁷⁸Section 220(1) provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

¹⁷⁹See *Om Prakash v State of Uttar Pradesh* AIR 1957 SC 458; *Madhya Pradesh State v Veereshwar Rao* 1957 SC 592; *Lalta v State of Uttar Pradesh* AIR 1970 SC 1381 and *Leo Roy v Superintendent, District Jail, Amritsar* AIR 1958 SC 119.

¹⁸⁰See *id.* Cf also Chandrasekharan Pillai KN *Double jeopardy protection - a comparative overview* 1988 230. Batuk Lal points out (at 830) that "it is necessary to analyse and compare not the allegations in the two complaints but the ingredients of the offences and see whether they are identical". See also Basu DB *Commentary on the Constitution of India* 5th ed 1965 16 to the same effect.

Distinct offences do not bring into effect double jeopardy protection. This is so, even though the successive charges may be based on the same criminal conduct, or the same facts, or the offences may be viewed as part of the same transaction. Only re prosecution for exactly the same offence or, (in terms of part two of section 300(1)) *another* offence which has identical elements to the one previously charged, brings into effect protection against double jeopardy.

In *Om Prakash v State of Uttar Pradesh*,¹⁸¹ the court distinguished between the offences of "criminal breach of trust committed by a banker or merchant" (a contravention of section 409 read with section 405 of the Indian Penal Code) and "criminal misconduct" in terms of section 5 of the Prevention of Corruption Act (1947), by reasoning as follows¹⁸²

There are three points of difference between these offences. The dishonest misappropriation contemplated in s. 405 Penal Code is different; whereas that under s. 5(1)(c) is either dishonest misappropriation or fraudulent misappropriation. The latter section is much wider in amplitude than the former. In s. 405 Penal Code, the words are "in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied". There are no such expressions in s. 5(1)(c). It is clear, therefore, that whereas under section 405, Penal Code there are three essential ingredients to constitute the offence; each one of them being separate and distinct, in s. 5(1) there are only two.¹⁸³

¹⁸¹*Supra*.

¹⁸²At 464.

¹⁸³The *Om Prakash* decision was followed in a subsequent decision of the Supreme Court, *Madhya Pradesh State v Veereshwar Rao (supra)*; the issue being raised once again in that case whether these particular offences are "distinct", the court applied the reasoning adopted in *Om Prakash* by focusing upon the identity of the legal ingredients of the

These offences were regarded as distinct despite substantial overlapping of elements of offences.¹⁸⁴ The test applied has been whether their ingredients are, in fact, identical.¹⁸⁵ However, the addition of the words "with the consent of the State government" reveals an intention of the legislature to bring some sort of restraint on a subsequent trial for a distinct offence arising from the same facts as the one previously charged. Consent is expected to be given only after due consideration of all the facts and circumstances of the case and in the interest of the promotion of justice.¹⁸⁶

The second exception which deserves discussion is contained in section 300(3), and provides for the intervening death case type of situation.¹⁸⁷ It enacts

A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such lastmentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

offences.

¹⁸⁴*Cf* also *MM Ghandi v State of Mysore* AIR 1960 Mys 111. In that case (which focused on the ambit of the constitutional provision against double jeopardy - section 20(2)), offences were also regarded as "distinct" despite substantial overlapping of legal elements. See *infra* under 4.4.3 for a discussion of constitutional protection in this particular respect.

¹⁸⁵This was again confirmed by the Supreme Court in *The State of Bombay v SL Apte* 1961 SC 578 discussed *infra* under 4.4.3, text at note 198.

¹⁸⁶See *Ahmad 152 & Sharma v State of Andhra Pradesh* 1978 Cri LJ 392.

¹⁸⁷See *supra* under 4.2.1, text at note 27 for a discussion of this exception in English law and *infra* under 4.5.2, text at note 237 for a discussion of this exception as recognised in American law.

The High Court pointed out that the consequences must be such as to indicate a type of offence different from the one of which the accused had previously been convicted.¹⁸⁸ The basic requirement for the application of this exception is that the new facts or consequences should not have been known to the court at the time of the first trial, or, should not have happened at the time of the first trial.¹⁸⁹ Otherwise, a second trial would be prohibited on double jeopardy grounds.

The fourth exception (section 300(4)) stipulates that

[a] person acquitted or convicted of any offence constituted by any acts, may be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

This means that a person who has already been tried for an offence can be tried again for another offence arising from the same facts if the former court was not competent to try the offence subsequently charged.¹⁹⁰ The words "not competent to try" carry the same meaning as that of having "no jurisdiction to try".¹⁹¹ An example

¹⁸⁸See *Arsala Khan v Emperor* AIR 1935 Pesh 18. In that case, the court allowed a person, tried and convicted previously for causing grievous harm, to be tried subsequently for culpable homicide in respect of the same victim in circumstances where the victim had died after the first trial. Therefore it is not enough to simply show circumstances of aggravation or serious consequences of the offence which have occurred since the first trial.

¹⁸⁹See in general Singh 60-61.

¹⁹⁰See Ahmed 152.

¹⁹¹*Babu Lal Mahton v Ram Saran Singh supra* 26.

would be the following. A person previously charged with theft, may subsequently be charged, on the same facts, with robbery if the court which heard the theft charge had no jurisdiction to hear the robbery charge.¹⁹²

In *Ramekbal Tiwary v Madan Mohan Tiwary*¹⁹³ the defence argued that facts proven in a trial for a minor offence could not be proven against the accused in subsequent proceedings for a major offence. The Supreme Court rejected this argument. It held that there could be a fresh trial on a charge of a more serious offence in spite of the acquittal of the accused on minor charges, because the order of acquittal by the Magistrate had been validly set aside by the High Court in its revisional jurisdiction.¹⁹⁴ Since the High Court, in its revisional jurisdiction has the power to interfere with an order of acquittal, it may, in the Supreme Court's view, also direct that the accused be retried on a graver offence than that which previously had been charged.¹⁹⁵

4.4.3 Constitutional protection against successive prosecutions for the "same offence"

As indicated above,¹⁹⁶ section 20(2) of the Constitution only affords the accused protection against a subsequent prosecution if he has previously been *convicted* of the "same offence" for which he is

¹⁹²See *Ahmed* 152.

¹⁹³AIR 1967 SC 1156.

¹⁹⁴At 1160-1161.

¹⁹⁵*Id.* See chapter six *infra* under 6.4.4 for a discussion of revisionary powers of superior courts in India to set aside acquittals.

¹⁹⁶See chapter three under 3.4.1.

subsequently charged. Section 20(2) is limited to indictment before a criminal court. Therefore, it does not bar proceedings before a civil court for disobedience of an injunction together with criminal proceedings; in Indian law, the former is *not* regarded as in the nature of criminal proceedings.¹⁹⁷

The Supreme Court explained the meaning of the term "same offence" (used in Article 20(2)) in the decision of *State of Bombay v SL Apte*.¹⁹⁸ In that case, the accused was charged with criminal breach of trust by a public servant in respect of property entrusted to him¹⁹⁹ and wrongfully obtaining or withholding property.²⁰⁰ Both these crimes were based on the same act. He was convicted on the first mentioned charge, but discharged upon the second because the required sanction to prosecute had not been obtained (as required under the Insurance Act).²⁰¹ However, he was charged once again with the second offence (after the required sanction was obtained) but the magistrate acquitted him on the ground that section 20(2) barred his prosecution.

The question before the Supreme Court was whether the bar imposed by article 20(2) was brought into effect when the allegations in the two complaints were substantially the same, or whether it was

¹⁹⁷See Jain MP *Indian Constitutional Law* 4th ed reprinted 1993 568 who cites the case of *Bachcha Lal Bansi Lal v Lalji* AIR 1976 All 393.

¹⁹⁸*Supra*.

¹⁹⁹A contravention of section 409 of the Indian Penal Code 1860.

²⁰⁰Section 105 of the Insurance Act 1938.

²⁰¹See chapter three *supra* under 3.4.2, note 140 for an explanation of this requirement for the prosecution of certain offences.

necessary that the elements of the offences also be identical.²⁰²

The court held that the term "same offence" as used in article 20(2) denotes an offence which has identical ingredients to the offence previously charged. The court made the following statement²⁰³

The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.

The court compared the ingredients of the two offences and concluded that²⁰⁴

[w]hereas the element of dishonest intention is essential for the offence of criminal breach of trust as defined by section 405, Penal Code, mere withholding of the property is sufficient for the offence under section 105, Insurance Act. Furthermore, whereas it is sufficient for the [last-mentioned] offence ... that the manager or director had obtained possession of the property, ... the accused must be entrusted with property or with dominion over that property [under the first-mentioned offence].

The court accordingly held that the doctrine of double jeopardy did not apply because the two offences contained different legal

²⁰²At 581.

²⁰³*Id.*

²⁰⁴At 581.

elements.²⁰⁵ Therefore, in Indian law, even the constitutional protection against being placed in jeopardy more than once for the same offence has been limited to offences with identical legal elements. Moreover, this rule prevails even if only some (but not all) ingredients of the two offences are common.²⁰⁶

However, the narrow offence-defining test adopted in India has been supplemented by application of the doctrine of issue estoppel. Moreover, Indian courts have also employed their inherent powers to prevent an abuse of process in the field of double jeopardy. This expanded protection against double jeopardy will be discussed in the paragraphs below.

4.4.4 Application of the doctrine of issue estoppel

The principle of issue estoppel is not recognised explicitly in either statutory or constitutional Indian law. It is an equitable principle which originated (in India) from judicial pronouncements only. Naryana explains that the principle of issue estoppel has been invoked in criminal cases in order to cover cases where the plea of *autrefois acquit* will not be available because the crime with which the accused is charged in the later proceedings may not be the same crime of which he has been acquitted earlier.²⁰⁷ However, the verdict of acquittal might have been based on a finding, the consequences of which would be that he must also be acquitted of the charge in the later proceedings. The application of this doctrine has also been

²⁰⁵This approach was (despite a brief reference to treatment of the topic in American law), once again confirmed by the Supreme Court in *State of Bihar v Murad Ali Khan* AIR 1989 SC 1.

²⁰⁶See *MM Gandhi v State of Mysore (supra)*.

²⁰⁷At 376.

viewed as an exercise of Indian courts' inherent powers to prevent an abuse of its process.²⁰⁸

The principle was first applied by the Supreme Court of India in 1956, in the case of *Pritam Singh v State of Punjab*.²⁰⁹ The defendant in that case was accused of murder. He had, however, previously been tried for possession of a revolver under the Indian Arms Act. In the murder trial, the prosecution tried to prove that the police found the same revolver in his possession and that he had committed the murder with that weapon. The Supreme Court ruled that the doctrine of issue estoppel prevented the state from proving the possession of the revolver inasmuch as that issue had already been concluded in favour of the accused.²¹⁰ Since the prosecution was precluded from proving this fact, they were left with insufficient evidence to prove their case and the accused was acquitted on the murder charge.

The doctrine was subsequently applied in a number of cases and retained in Indian double jeopardy jurisprudence despite the fact that it had been rejected in the United Kingdom.²¹¹ In *Manipur*

²⁰⁸See Singh 198, emphasising that an attempt to relitigate an issue already determined by a court of competent jurisdiction, amounts to an abuse of the process which justifies application of the doctrine in terms of the courts inherent powers to prevent such abuse.

²⁰⁹AIR 1956 SC 415.

²¹⁰The court relied on a decision of the Privy Council, *Sambavisam v Public Prosecutor Malaya* (1950) AC 458 (PC). As indicated earlier (under 4.2.3) the Appeal Court subsequently rejected the application of issue estoppel in English law in the case of *DPP v Humphries*.

²¹¹In *TV Sharma v R Meeraiah* AIR 1980 AP 219, the Andhra Pradesh High Court took notice of the English rejection of the rule in *Humphrys*. However, it held that the rule was, in terms of decisions of the Supreme Court, binding on Indian courts. See also *State of*

*Administration v Thockhom Bira Singh*²¹² the court explained that the doctrine does not prevent a trial for an offence as does *autrefois acquit*, but concerns "the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court at a previous trial".²¹³

In *Ravinder Singh v State of Haryana*²¹⁴ the Supreme court limited the application of the rule by requiring that the parties must be the same in both cases. In that case, the accused tried unsuccessfully to rely on an issue of fact previously determined in favour of another person in a case between the state and that person. The issue was his (that other person's) non-participation in an offence of which the accused in the case at hand (Ravinder Singh) was subsequently charged in a separate trial. The court held that he could not rely on issue estoppel because the parties in both trials were not the same.

The court has not as yet had an opportunity to decide whether the doctrine may also be invoked by the prosecution. The doctrine of issue estoppel has, so far, only been raised by the defence.²¹⁵

The application of the doctrine in Indian law has been welcomed by

Andhra Pradesh v Kokkiligoda Meeraiah AIR 1970 SC 771, a case in which the Supreme Court of India expressly favoured application of the doctrine in Indian law.

²¹²AIR 1965 SC 87.

²¹³At 961.

²¹⁴AIR 1975 SC 856.

²¹⁵See Singh 196, expressing himself against a theory of mutuality in this particular field of law on the basis of the presumption of innocence as applicable in criminal trials, namely the duty of the prosecution to prove its case beyond reasonable doubt.

Indian legal commentators.²¹⁶ It has been explained, for instance, that the application of the doctrine was discontinued in England "not because the principle is unsound, but because of certain technical difficulties in applying it to the conditions prevalent in England".²¹⁷ These are, *inter alia*, that a large category of crimes are tried by juries which usually do not return special verdicts. This means that they either find the accused guilty or not guilty (in a general verdict) without giving reasons for their findings, which makes it very difficult to identify an issue decided in favour of the accused. In the Indian criminal justice system this difficulty does not present itself because juries are not employed and specific issues are determined by judges.²¹⁸ Application of the doctrine of issue estoppel in India has therefore offered expanded protection against double jeopardy, at least in the field of relitigation of issues of which the accused has previously been acquitted.

4.4.5 Employment of inherent powers to prevent abuse of process in respect of successive prosecutions for related offences

The High Court of India has exercised its inherent powers to prevent an abuse of process in this field in at least two decisions. In the first, *Chudaman Narayanan Patil v State of Maharashtra*²¹⁹ the defendant was tried and convicted for breach of trust for misappropriating, in his capacity as a Recovery Officer, a certain amount of money. Thereafter, the prosecution again brought two proceedings based on "the misappropriation of some more amounts during the same period.

²¹⁶See Pillai 273 & Singh 197-199.

²¹⁷Singh 198.

²¹⁸*Id.*

²¹⁹AIR 1969 Bom 1.

The Bombay High Court held that though it was perfectly legal for the prosecution to bring these subsequent proceedings, it would not be in the interests of justice to subject the defendant to further prosecutions. Thus, by prohibiting the subsequent proceeding, the court exercised its inherent powers to prevent an abuse of process. In *Gangadhar Panda v State of Orissa*²²⁰ the defendant was charged in the first trial with misappropriation. Subsequently, he was charged for the same offence on the basis of another item of defalcation. The High Court of Orissa held that, although perfectly legal, it was oppressive to subject the defendant again to a further trial. The court argued that since this particular item of defalcation was (at the time of the first trial), known to the prosecution and there was no explanation as to why it was not included in the first trial, the accused would be "prejudiced and harassed" by subsequent proceedings.²²¹ The court concluded that in such circumstances, "it [would] be vexatious to have a piecemeal trial".²²² Therefore, the court exercised its inherent powers to stay proceedings in favour of the accused.

These cases can be viewed as indications of Indian courts' willingness to expand protection against successive prosecutions for related offences arising from the same transaction beyond the parameters of what has traditionally been understood under the concepts "same" and "distinct" offences.

²²⁰1978 Cri LJ 863.

²²¹At 864.

²²²*Id.*

4.4.6 Summary

* The Indian accused is protected against a second prosecution for the same offence both in terms of the ordinary law of the land and the Constitution. The Constitution only affords the accused protection against a subsequent prosecution if he has previously been *convicted* for the same offence. In the ordinary law of the land, the accused may rely on the plea of former jeopardy regardless of whether he has previously been acquitted or convicted of the "same offence."

* In determining the sameness of offences, Indian courts focus exclusively on the legal elements of the offences. This particular aspect of Indian double jeopardy jurisprudence is less sophisticated than in the other legal systems under consideration in this thesis. Instead of resorting to models of lesser and greater included offences, the courts have opted for a narrow approach which investigates merely whether the offences have *identical* legal elements. The courts have held consistently that the concept "same offence" denotes the identical offence than that previously charged, or *another* offence which has *identical elements* to the one previously charged. The same meaning is attached to the words "same offence" in the constitutional guarantee against double jeopardy. Therefore, even constitutional protection against being placed in jeopardy more than once for the same offence has been limited to offences with identical legal elements.

* Although the approach adopted above may achieve the same results, it is also specifically provided for in the Code that an accused may be charged in a subsequent trial for a more serious offence in the so-called "intervening death" cases, and in instances where the court that tried the accused for a less serious offence was not competent to try him also for the greater offence.

* Provision is made in Indian law that a person may be charged successively for a continuing offence. A continuing offence is described as the repetition of an act or omission (constituting an offence) on different occasions.

* The narrow offence-defining test in India has been supplemented by application of the principle of issue estoppel and exercise of inherent discretionary powers to stay proceedings as an abuse of process. Application of the principle of issue estoppel has expanded protection in the field of relitigation of issues of which the accused has previously been acquitted. Employment of inherent powers to prevent abuse of process indicate that Indian courts recognise that the identity of legal ingredients criterion does not always adequately protect the accused against oppressive state conduct. The High Court of India has permanently stayed proceedings for a *different* offence to the one previously tried on the basis that both offences stemmed from the same *factual transaction*, and the consideration that the prosecution was unable to explain sufficiently why the offence charged in the second trial had not been included in the first trial.

4.5 THE LAW OF THE UNITED STATES OF AMERICA

4.5.1 General

As indicated in chapter three, the Supreme Court of the United States recognised that the double jeopardy clause offers the defendant in a criminal trial three distinct constitutional protections:²²³ protection against a second prosecution for the same offence after an acquittal; protection against a second prosecution for the same offence after a conviction; and protection against multiple punishment for the same

²²³See *North Carolina v Pearce supra* 717.

offence.

Although this explanation of the scope of protection afforded by the guarantee seems to be straight-forward, the double jeopardy clause has nevertheless become "one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights".²²⁴

A fair amount of this litigation was focused on the issue addressed in this chapter; the definition of the concept same offence in the context of successive prosecutions.²²⁵ As will become clearer from the analysis of Supreme Court cases in the paragraphs that follow,

²²⁴*Whalen v US supra* 669 (per Rehnquist J, dissenting). See also *Burks v US* 437 US 1, 9 (1978), a case in which the court commented that its holdings with respect to the clause "can hardly be characterised as models of consistency and clarity"; *Albernaz v US* 450 US 333, 343 (1981) (double jeopardy decisions have resulted in "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"). One commentator ("Comment: twice in jeopardy" 263) expressed the view that the multi-faceted nature of the rule (not one rule, but three separate rules), and the fact that each rule is "marooned in a sea of exceptions" complicate the law of double jeopardy and undermine consistency in this particular field of jurisprudence. Sigler *Double Jeopardy* 32 partly blames the "antique" language used in the clause for the subsequent confusion in this field of law. (One writer described the clause as a "quaint relic of medieval jargon" - See Comley H "Former jeopardy" *Yale Law Journal* Vol 35 1926 674, 675.) In Sigler's view, the drafters of the double jeopardy clause "were so steeped in common law that they tended to perpetuate its inadequacies rather than declare a precise protection for a criminal defendant" (at 33). He laments that the clause was adopted without much debate or indication of its intended meaning (at 32).

²²⁵By examining the double jeopardy jurisprudence of thirty states, an American legal commentator (Thomas GC "The prohibition of successive prosecutions for the same offense: (*sic*) In search of a definition" *Iowa Law Review* 1986 324, 330 (hereinafter referred to as Thomas *Successive prosecutions*), has catalogued not less than two thousand "same offense" (*sic*) cases.

the lack of consistency during almost a century of jurisprudence on this definitional issue, can largely be ascribed to a basic conflict of policy, namely whether an inquiry into the concept same offence should go beyond a mere examination of the statutory elements of offences. In other words, whether broader protection should be given to the accused in the context of successive prosecutions than traditionally has been afforded in terms of the common law same evidence test.

4.5.2 The early cases

The same evidence test was applied for the first time in the colony of Massachusetts in the early case of *Morey v Commonwealth*.²²⁶ However, the court introduced a modified version of the test originally formulated in the English case of *Vandercomb*.²²⁷ It suggested that

[a] conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence *required* to support a conviction upon *one of them* would have been sufficient to warrant a conviction upon the other.²²⁸

The difference between the *Vandercomb* and the *Morey* versions of the same evidence test is explained as follows.²²⁹ According to the *Vandercomb* test, re prosecution would not be barred unless evidence necessary to convict on the second indictment would have been sufficient to convict on the first indictment. According to *Morey* on

²²⁶108 Mass (12 Browne) 433 (1871).

²²⁷See chapter two *supra* under 2.3.2 for a discussion of the "same evidence" standard as proposed in the case of *Vandercomb*.

²²⁸At 434. My emphasis.

²²⁹See Comment: "Twice in jeopardy" 272.

the other hand, the later prosecution would be barred if the evidence in respect of *either* offence would be sufficient to convict of the other offence. Similar to the *Vandercomb* test, *Morey* focused on the minimum evidence necessary to prove the crime charged (in other words the legal elements of the offences), instead of the evidence actually presented.

Eighteen years after *Morey* was decided the Supreme Court of the United States of America had its first opportunity to give constitutional content to the concept same offence. The case was *In re Nielsen*.²³⁰ An adherent of the Mormon faith (Nielsen), had been convicted for cohabiting with two wives over a two and a half year period. One day after the period of cohabitation ended he was charged with adultery with one of the women. The issue before the Supreme Court was whether the subsequent prosecution for adultery was prohibited in terms of the Fifth Amendment guarantee against double jeopardy. The court referred to the same evidence test as proposed in *Morey*.²³¹ However, it did not expressly apply this test to the relevant statutory offences. Instead, it concluded that the Fifth Amendment double jeopardy clause barred the subsequent prosecution for adultery because

where, as in this case, a person has been tried and convicted for a crime which has various *incidents* included in it, he cannot be a second time tried for one of those *incidents* without being twice put in jeopardy for the same offence.²³²

²³⁰131 US 176 (1889).

²³¹At 185.

²³²At 188. (My emphasis).

The court argued that since the crimes of cohabitation and adultery both require proof of the same "incident" namely, living together as a man and wife, they constitute the same offence.²³³ Proponents of a conduct approach instead of an elements approach have made out a strong argument that *Nielsen* endorsed the principle that the double jeopardy clause prohibits a second trial if the prosecution has to rely on *conduct* already used to prove another offence.²³⁴

²³³At 189.

²³⁴Thomas *Successive prosecutions* 343 submits, *inter alia*, that had the court followed an element-based approach, it would have allowed the subsequent prosecution for adultery because each offence necessitated proof of an element that the other did not: cohabitation required proof of sexual intercourse and living with more than one woman. On the other hand, adultery required proof of sexual intercourse by the defendant with one woman while married to another. Several other writers have interpreted *Nielsen* as a case which endorsed a same conduct or even a same transaction approach. See *inter alia*, Comment: "Constitutional law - Double Jeopardy - Successive prosecutions for a single transaction as a violation of the due process clause" *Rutgers Law Review* Vol 20 1966 631, 641 (hereinafter referred to as "Comment: Constitutional law"; Pace K "Fifth Amendment - The adoption of the 'same elements test': The Supreme Court's failure to adequately protect defendants from double jeopardy" *The Journal of Criminal Law and Criminology* Vol 84 1994 769, 771; Blake RA "U.S. v. Dixon - Finally a 'bright line rule' in double jeopardy analysis?" *Texas Bar Journal* Vol 58 1995 453, 456. The Supreme Court, however, continued to grapple with the interpretation of *Nielsen*. In *Brown v Ohio* 432 US 161, 166-167 (1977), *Nielsen* was cited in a footnote to demonstrate that the same evidence test "...is not the only standard for determining whether successive prosecutions involve the same offense (*sic*)" (note 6). This interpretation of *Nielsen* was at a later stage relied on by the Supreme Court in adopting a same conduct test in *Grady v Corbin* 495 US 508, 519 (1990). However, in a subsequent case, *US v Dixon* 113 S Ct 2849, 2860-2861 (1993) the Supreme Court argued that the court in *Nielsen* barred the prosecution for adultery because it had the same "essential elements" as cohabitation. Cf also the views of Richardson EJ "Matching tests for double jeopardy violations with constitutional interests" *Vanderbilt Law Review* Vol 45 1991 273, 295 note 153, namely that the court in *Nielsen* used the term "incident" as synonymous with "statutory element".

However, twenty years later in *Gavieres v US*,²³⁵ the court abandoned a same conduct approach and focused solely on the *elements* of the crimes charged successively. The court applied the *Morey* version of the same evidence test to the crimes successively charged, namely disorderly conduct and outraging and insulting a public official, and concluded that since each offence required proof of an element that the other did not, the subsequent prosecution did not violate the double jeopardy provision.²³⁶

Gavieres was followed by *Diaz v United States*,²³⁷ a case in which the Supreme Court recognised the so-called "intervening death" exception.²³⁸ In that case, the court held that the double jeopardy clause did not prohibit Diaz from being prosecuted for homicide after he had already been prosecuted for assault and battery of the victim, if that victim died only after the first prosecution. This exception was also later expanded to cover offences not discovered at the time of the first trial, despite the exercise of due diligence.²³⁹ The rationale

²³⁵220 US 338 (1911).

²³⁶At 344. The court stated (at 342) that although "[it] is true that the acts and words of the accused set forth in both charges are the same, each crime contained a distinct element: Outraging a public official required proof of the insult, but not that it occurred in a public place. Disorderly conduct on the other hand, required proof that the offense (*sic*) occurred in a public place, but not proof of an insult of a public official".

²³⁷223 US 442 (1912).

²³⁸See the English case of *Connelly supra* under 4.2.1 for a discussion of the recognition of this exception in English law.

²³⁹In *Brown v Ohio (supra)* 168 note 7, the court (citing *Diaz*) recognised that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence". This was confirmed in the subsequent decision of *Illinois v Vitale* 447 US

underlying these exceptions is that the prosecution was, in these particular instances, unable to proceed on the more serious charge at the first trial.²⁴⁰ In American legal context, this exception is referred to as the *Diaz* due diligence exception.

4.5.3 The establishment of the *Blockburger* test

In 1932, The *Gavieres* formulation of the same evidence test which was merely a restatement of the *Morey* formulation, was applied in *Blockburger v United States*.²⁴¹ From then onwards, the test has commonly been known and referred to as the *Blockburger* test. *Blockburger* dealt with the issue of multiple punishments at a single trial. Blockburger was charged with two related offences in one trial: selling narcotics without a written prescription and selling narcotics from a container other than the original stamped package. Citing *Gavieres*, the court held that although both violations resulted from a single narcotics sale, the offences were distinct because "each provision require[d] proof of a fact which the other [did] not".²⁴² The court concluded that the imposition of cumulative punishment would, *in casu*, not violate the double jeopardy rule.

The same elements test as applied in *Blockburger* became the standard to determine whether cumulative punishment in a single prosecution setting ought to be allowed.²⁴³ At this stage it is

410, 420 note 8 (1980).

²⁴⁰See *id.*

²⁴¹284 US 299 (1932).

²⁴²At 304.

²⁴³See *Grady v Corbin (supra)* where the majority (per Brennan, J) cited a number of cases in which the Supreme Court applied the

important to mention that the issue of multiple punishments in a single trial has never been regarded in American law as one that involves double jeopardy principles. Instead, a study of the development of the doctrine of double jeopardy has led to the conclusion that "[n]either the historical nor modern functions of the doctrine encompass more than prohibition of *successive prosecutions*".²⁴⁴

The proper investigation in the single-trial multiple-punishments cases has always been whether the legislature intended the imposition of consecutive multiple sentences. The premise has always been that the legislature may, "consonant with legitimate penological principles", authorise consecutive sentences when a single act violates several statutory provisions. Applied in a cumulative punishment single-prosecution context, the *Blockburger* test has therefore been described as a mere "rule of statutory construction, a guide to determining whether the legislature intended multiple punishments."²⁴⁵ This assessment of the purpose of the rule can be summarised as follows. A valid assumption which can be made in the interpretation of statutes

Blockburger test in the context of multiple punishment in a single prosecution.

²⁴⁴See Comment: "Consecutive sentences in single prosecutions: Judicial multiplication of statutory penalties" *Yale Law Journal* 1958 916, 918 (hereinafter referred to as "Comment: consecutive sentences"). The author of this comment points out that the rule of double jeopardy serves the purpose of securing finality in criminal litigation and of protecting defendants from the threat, harassment and stigma of *repeated* criminal trials. The author refers (at 919 note 17) to a number of American decisions in which American courts (including the Supreme Court) held that the erroneous imposition of two sentences for a single offence does not constitute double jeopardy.

²⁴⁵Per Justice Brennan in *Grady v Corbin* 517. Justice Brennan referred to a number of cases (dealing with the issue of multiple punishments in a single trial) in which the *Blockburger* test was applied to determine whether cumulative punishment may be allowed.

is that legislatures generally do not intend to impose punishment for offences with the same elements under two separate statutes. The *Blockburger* test arguably ensures that a court does not impose punishment for a single offence under more than one statute when Congress intended punishment under only one statute.²⁴⁶ However, if the prosecution can show that the legislature intended that multiple punishments be available, a court may impose multiple punishment even if, according to *Blockburger*, they are punishments for the same offence.²⁴⁷ In other words, American courts (including the Supreme Court) have treated the prohibition against multiple punishments for the same offences rather as a *measure of legislative intent* than as a strict constitutional prohibition against any imposition of multiple punishments for the same offence.²⁴⁸

Nevertheless, the *Blockburger* test also came to be recognised as the established test for determining whether two offences are the same in the context of successive prosecutions.²⁴⁹ Whether it has ever attained the status of an exclusive test to be applied in the context of successive prosecutions, has, however, been a highly

²⁴⁶See *Whalen v US* 691-692.

²⁴⁷See *Whalen v US* 692; *Garret v US* 471 US 773, 778-779 (1985) and *Missouri v Hunter* 459 US 359, 368-369 (1983).

²⁴⁸See Richardson 278. However, the author points out that *Blockburger* is also a rule of constitutional dimension in the multiple-punishments single-trial context, because the Constitution requires an adequate assessment of congressional intent regarding multiple punishment. It is suggested that application of the *Blockburger* test effects such adequate assessment.

²⁴⁹See *Brown v Ohio* 166 and *Illinois v Vitale* 416. Although both these cases recognised the application of the *Blockburger* test in the context of successive prosecutions, they also introduced broader criteria to determine the sameness of offences in this context. These cases will be discussed in detail in the text that follows.

contentious issue over which the Supreme Court has particularly during the last decade been strongly divided.²⁵⁰ The development of this conflict of policy becomes apparent from a number of decisions which followed on *Blockburger*. These will be discussed in the following paragraphs.

4.5.4 *Ashe v Swenson* - collateral estoppel recognised as a component of double jeopardy protection and a new "same offence" test proposed

In 1970, the Supreme Court held in *Ashe v Swenson*²⁵¹ that the principle of collateral estoppel (known in English law as issue estoppel) is embodied in the Fifth Amendment guarantee against double jeopardy. Without referring to the *Blockburger* test, the majority held that the defendant who had previously been acquitted in a prosecution for robbing one of six poker players, could not be prosecuted subsequently for the robbery of another player in the same poker game.²⁵² The court reached this conclusion on the ground that

²⁵⁰See in particular the opposing views adopted by the court in a time span of merely three years in *Grady v Corbin* (rejecting the exclusivity of *Blockburger* in favour of a two-level inquiry which also employs a standard based upon the same conduct) and *United States v Dixon* (reinstating *Blockburger* as an exclusive criterion to determine the sameness of offences).

²⁵¹397 US 436 (1970).

²⁵²At 447. In a dissenting opinion, Chief Justice Burger criticised the majority for ignoring *Blockburger*, " ...the accepted offense (*sic*) defining rule ... to reach a decision in this case. What [the court] has done is to superimpose on the same-evidence test a new and novel collateral estoppel gloss". (At 464-465).

... when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.²⁵³

The court found that the identity of the robber was the "single rationally conceivable issue in dispute before the jury [at the first hearing]".²⁵⁴ Therefore, the court argued, once the jury determined in its verdict that Ashe was *not* one of the robbers, the state was prohibited from litigating that particular issue (the identity of the robber) again.²⁵⁵

However, as a tool to expand double jeopardy protection, the collateral estoppel rule has limited value. The rule only applies to previous acquittals and not to convictions. Furthermore, the collateral estoppel rule only forecloses litigation of an issue if it appears that a rational jury could have based its verdict on no other issue. Since criminal juries return only general verdicts (namely guilty or not guilty), this may be extremely difficult to assess, particularly where alternative defences were used.²⁵⁶

However, the significance of *Ashe* lies in the fact that it established the double jeopardy clause as more than a mere guarantee against being twice put in jeopardy for the same offence. In *Ashe*, a second

²⁵³At 443. (Mr Justice Stewart delivered the majority opinion).

²⁵⁴At 446.

²⁵⁵*Id.*

²⁵⁶For a discussion of the drawbacks of the collateral estoppel rule, see in general Comment: "The Double Jeopardy Clause as a Bar to Reintroducing Evidence" *Yale Law Journal* Vol 89 1980 10-13 (hereinafter referred to as "Comment: reintroducing evidence") & Land BL "Increased double jeopardy protection for the criminal defendant: *Grady v Corbin*" *Willamette Law Review* Vol 27 1991 913, 924-925.

prosecution would most certainly have been possible if the *Blockburger* test were to have been stringently applied; it necessarily involved distinct factual elements namely, robbery of a different victim in each case. However, the court in *Ashe* did not simply focus on the meaning of the words "same offence" as used in the clause. Instead, it emphasised that the double jeopardy concept, *inter alia*, protects a person who has been acquitted from having to "run the gauntlet" a second time.²⁵⁷ The court observed that the state in actual fact had conceded in *Ashe* that it used the first trial as "no more than a dry run for the second prosecution".²⁵⁸ In the court's view, this is precisely what the constitutional guarantee forbids.²⁵⁹

A valuable contribution to the law of double jeopardy can also be found in the separate, concurring opinion of Justice Brennan in *Ashe*.²⁶⁰ First of all, he emphasised that the double jeopardy clause "stands as a constitutional barrier against possible tyranny by an overzealous prosecutor".²⁶¹ In order to correct the abuse of the criminal process, collateral estoppel would in his opinion, not be an adequate tool.²⁶² Instead, Justice Brennan advocated that the concept "same offence" in the double jeopardy clause be construed to

²⁵⁷ At 446, quoting the phrase used in *Green v US supra* (at 190). See also chapter eight *infra* under 8.5.4 for a detailed discussion of the *Green* case.

²⁵⁸ At 447.

²⁵⁹ *Id.*

²⁶⁰ At 449-460.

²⁶¹ At 459.

²⁶² *Id.* Justice Brennan observed that it was doubtful that collateral estoppel would have aided the accused if the jury had had to resolve additional contended issues.

embody a same transaction standard.²⁶³ In his view, a same transaction standard would best serve the underlying purpose of a double jeopardy guarantee in today's modern society, namely to prevent abuse of the criminal process. He continued by explaining that in modern criminal legislation a tendency to divide the phases of a criminal transaction into separate crimes has developed. This phenomenon enhances opportunities for multiple prosecutions for "an essentially unitary criminal episode".²⁶⁴ However, combined with "[an] unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution", it made continued application of the same evidence test (in Justice Brennan's view), "intolerable" in present times.²⁶⁵

Justice Brennan observed that the facts in *Ashe* served to highlight the "hazards of abuse inherent in the 'same evidence' test",²⁶⁶ and demonstrated the necessity for the adoption of the same transaction test. In his view, a constitutional guarantee against double jeopardy in present times requires the prosecution (except in very limited circumstances)²⁶⁷ to join at one trial all the charges against the

²⁶³At 453-454.

²⁶⁴At 452.

²⁶⁵*Id.*

²⁶⁶At 457. Justice Brennan noted (at 459) that in *Ashe* the prosecution plainly organised its case for the second trial to provide the links missing in the chain of identification evidence that was offered at the first trial.

²⁶⁷At 454 (note 7) Justice Brennan acknowledged the *Diaz* due diligence exception, namely that where a crime has not been completed or not discovered despite diligence on the part of the police, an exception to the same transaction rule ought to be made to permit a subsequent prosecution. He added that another exception would be necessary if no single court had jurisdiction in respect of all the alleged crimes. (See *infra* under 4.5.7, text at note 325 for a

defendant that develop out of a single criminal transaction. Although a majority of the Supreme Court has not as yet endorsed this approach, Justice Brennan's plea for expanded protection nevertheless has paved the way for adoption of a same conduct test in the nineties in *Grady v Corbin*.²⁶⁸

4.5.5 *Blockburger* undergoes a change in status - *Brown, Harris & Vitale*

During the 1970's and 1980's, the Supreme Court handed down three decisions that suggested that *Blockburger* could not be regarded as an exclusive test to determine the sameness of offences in the context of successive prosecutions. Certain ambiguous *dicta* of the court in these three decisions have, however, created confusion as regards the scope of protection afforded the accused in the context of successive prosecutions. The opposing conclusions reached by the court (in the 1990's) in the respective decisions of *Grady v Corbin* and *US v Dixon*, can be ascribed to divergent interpretations of these cases. A discussion of these cases is therefore essential to understand recent cases.

In the first of these cases, *Brown v Ohio*²⁶⁹ an accused who had previously been prosecuted for joyriding was subsequently prosecuted for auto theft stemming from the same incident. The Ohio Court of Appeal held that joyriding was a lesser included offence of auto theft because "every element [of joyriding] is also an element of the crime

discussion of the merits of this exception). He also suggested that an exception be made in circumstances where joinder of offences would be prejudicial to either the prosecution or the defence.

²⁶⁸See *infra* under 4.5.6 for a detailed discussion of this decision.

²⁶⁹*Supra*.

of auto theft".²⁷⁰ The court explained that the only difference between the crime of stealing a motor-vehicle and joyriding was that conviction for stealing requires proof of an intent on the part of the thief to deprive the owner of possession permanently.²⁷¹ The question before the Supreme Court was whether the double jeopardy clause would prohibit the second prosecution for the greater offence.

The Supreme Court initially stated that *Blockburger* was the established test to determine whether offences are the same in the context of multiple punishment in a single trial as well as in the context of successive prosecutions.²⁷² The court then applied the *Blockburger* test to the facts and concluded that, because the lesser included offence (joyriding) did not require proof of an element distinct from auto theft, the state was prohibited from subsequently proceeding against Brown on the greater charge of auto theft. However, the court did not end its analysis at this point. In a footnote, the court made the following statement²⁷³

The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense (*sic*). Even if two offenses (*sic*) are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires *the relitigation of factual issues already resolved by the first*.²⁷⁴

²⁷⁰At 163.

²⁷¹At 163-164.

²⁷²At 166.

²⁷³At 167, note 6.

²⁷⁴My emphasis.

The court then referred to its decisions in *Ashe* and *Nielsen* and observed that these broader criteria clearly appears from the *Nielsen* case. The court argued that, if the standard proposed in *Blockburger* was applied stringently in *Nielsen*, the offences in that case would have been found *not* to be the same.²⁷⁵ However, these statements in *Brown* were clearly *obiter dicta*. The court stated later in the same footnote that "[b]ecause we conclude today that a lesser included and a greater offense [*sic*] are the same under *Blockburger*, we need not decide whether the *repetition of proof* required by the successive prosecutions against *Brown* would otherwise entitle him to the additional protection offered by *Ashe* and *Nielsen*."²⁷⁶

The second case which implied that an accused is afforded additional protection in the context of successive prosecutions, was *Harris v Oklahoma*.²⁷⁷ The state of Oklahoma charged *Harris* for robbery after a conviction for felony murder in which the same robbery was the underlying felony. The state in fact conceded that, in a felony-murder case, proof would be required of the underlying felony (in this particular case robbery with a firearm) in order to prove the intent necessary for a felony-murder conviction. The question before the Supreme Court was whether the double jeopardy clause prohibited a subsequent prosecution for the same robbery. In a terse opinion, the court referred to the judgment in *Nielsen* to the effect that same *incidents* equalled same offences and concluded that

when, as here, conviction of a greater crime cannot be had without conviction of a lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution

²⁷⁵*Id.*

²⁷⁶*Id.* (My emphasis.)

²⁷⁷*Supra.*

for the lesser crime after conviction of the greater one.²⁷⁸

The third case, *Illinois v Vitale*,²⁷⁹ probably cleared the way for the subsequent adoption of a same conduct test in *Grady v Corbin*. The facts of this case were as follows. After his automobile struck and killed two children, Vitale (who drove the car) was charged with a traffic offence of failing to reduce speed to avoid an accident. He was convicted on that charge but on the very next day charged with involuntary manslaughter. The issue before the Supreme Court was whether the double jeopardy clause barred a subsequent prosecution for involuntary manslaughter. The Supreme Court ruled that the subsequent prosecution for involuntary manslaughter would be barred in terms of the *Blockburger* test if the prosecution *necessarily* had to establish failure to reduce speed to prove this offence.²⁸⁰ In other words, it had to be determined whether the offence previously charged could be regarded as a lesser included offence of the offence of involuntary manslaughter. However, the court could not make a definitive ruling on the constitutionality of the manslaughter charge (in terms of the *Blockburger* rule) because the Illinois Supreme Court had not clearly delineated the necessary elements of the crime of manslaughter. Consequently, the court remanded the case for a definitive ruling as to the necessary elements of manslaughter and a disposal of the case consistent with the court's rulings.²⁸¹

However, in an *obiter dicta*, the court indicated that Vitale's claim

²⁷⁸At 682.

²⁷⁹447 US 410 (1980).

²⁸⁰At 419, referring to its application of *Blockburger* in *Brown*.

²⁸¹At 421.

of double jeopardy would be "substantial under *Brown* and our later decision in *Harris v Oklahoma*..."²⁸² if the prosecution would *in actual fact* (albeit not necessarily) rely on the same conduct previously prosecuted or concede prior to trial that it will do so, in order to prove a necessary element of the offence subsequently charged.²⁸³ Therefore, the court implied that even if a subsequent prosecution passes the *Blockburger* test it may still be prohibited on constitutional grounds if it involves repetition of proof.²⁸⁴ The approach of the court seems to have been that proper analysis in double jeopardy claims should not only focus on the elements of the offences charged successively, but also on the underlying conduct.

4.5.6 *Grady v Corbin*: A brief expansion of protection in the nineties

In *Grady v Corbin*,²⁸⁵ a Supreme Court majority of five to four came out in support of expanded protection against double jeopardy in the context of successive prosecutions. The facts of that case were very similar to those present in *Vitale*. Thomas Corbin, while intoxicated, drove his car over the median and crashed into a young couple's car.

²⁸²At 420.

²⁸³At 421.

²⁸⁴Henning PJ "Precedents in a Vacuum: The Supreme Court continues to tinker with double jeopardy" *American Criminal Law Review* Vol 31 1993 1, 11-12 expresses the view that reference to *Brown* and *Harris* shows that the court did not view the lesser included offence analysis as limited solely to crimes that necessarily entail a complete overlap between the elements of the offences. He suggests that *Vitale* is an indication that the court was not entirely comfortable in permitting the statutory definition of an offence to govern the meaning of "same offence" without reference to the actual conduct being prosecuted. See also, in the same vein, Thomas *Successive prosecutions* 351-356.

²⁸⁵495 US 508 (1990).

The driver died of the injuries she had sustained in the crash. The District Attorney was informed of the fatality on the same night. Corbin pleaded guilty to two traffic offences in the Town Justice Court: driving while intoxicated and failing to keep to the right of the median. No mention was made at that trial of the fatality that he had caused and he received a minimum sentence.²⁸⁶

In the meantime, the District Attorney's office was investigating more serious charges against Corbin. Approximately two months later, he was indicted on charges of reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault and driving while intoxicated.²⁸⁷ The prosecution filed a bill of particulars in which it identified three reckless or negligent acts on which it would rely to prove the homicide and assault charges: (i) operating a motor vehicle on a public highway in an intoxicated state; (ii) failing to keep to the right of the median and (iii) driving too fast for the weather and road conditions then pending (45-50 miles per hour).

The question before the court was whether the constitutional protection against double jeopardy barred a second prosecution if the state intended to prove its case by relying on conduct which constitutes an offence (or offences) of which the defendant had already been convicted and sentenced.²⁸⁸ The majority of the court (per Brennan, J), answered this question in the affirmative. It held that the constitutional prohibition against double jeopardy prevented a prosecutor from building a criminal case around proof of conduct for

²⁸⁶A 350 dollar fine and a six months licence revocation (at 513).

²⁸⁷*Id.*

²⁸⁸At 514-515.

which a defendant has already been tried. Relying upon its previous *dicta* in *Vitale*,²⁸⁹ Justice Brennan stated that

[t]he double jeopardy clause bars a subsequent prosecution if, to establish an essential element of an offense (*sic*) charged in that prosecution, the government will prove conduct that constitutes an offense (*sic*) for which the defendant has already been prosecuted"²⁹⁰

The court rejected the proposition that the *Blockburger* test (applied exclusively) offered adequate constitutional protection against double jeopardy in the context of successive prosecutions. The majority reasoned that the *Blockburger* test was developed in the context of multiple punishments imposed in a single prosecution; more particularly, *Blockburger* was described as "a guide to determining whether the legislature intended multiple punishments".²⁹¹

Quoting the famous *dicta* in *Green*,²⁹² Mr Justice Brennan argued that successive prosecutions (after acquittals or convictions) raise

²⁸⁹See *supra* text at note 283 for a discussion of this case.

²⁹⁰At 510. At face value, the same conduct test as formulated in *Grady* makes no provision for the *Diaz* due diligence exception. (See *supra*, text at note 237 for a discussion of this exception.) However, the court recognised in a footnote (note 7 at 516) that such an exception "may exist" in the circumstances set out in *Diaz* and reiterated in *Brown v Ohio*. However, the exception was found to be inapplicable to *Grady*, because the District Attorney was informed of all the facts on the night that the accident occurred.

²⁹¹At 516-517. See also *supra*, text at note 245 for a detailed discussion of this argument. Justice Brennan then cited (at 517 note 8) a number of cases in support of his contention that the *Blockburger* rule is merely a test to determine the permissibility of multiple punishment in a single trial context.

²⁹²See chapter three *supra* under 3.5.1, text at note 150 for the *dicta* in *Green*.

concerns which extend beyond the mere possibility of an enhanced sentence.²⁹³ He explained that, unlike the position in regard to multiple punishments in a single proceeding, multiple prosecutions give the state an opportunity to rehearse its presentation of proof, "thus increasing the risk of an erroneous conviction for one or more of the offenses (*sic*) charged".²⁹⁴

The court also emphasised that even when the state can bring multiple charges against an individual according to *Blockburger*, "a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding".²⁹⁵ Justice Brennan remarked that if the entire double jeopardy enquiry was based on *Blockburger*, the state would be able to try Corbin in at least four consecutive trials: (i) failure to keep to the right of the median; (ii) driving while intoxicated; (iii) assault and (iv) homicide.²⁹⁶ Therefore the state would be able to improve its presentation of proof with each trial by assessing which witness had given the most

²⁹³At 518.

²⁹⁴*Id.* Justice Brennan cited *inter alia*, *Tibbs v Florida* 457 US 31, 41 (1982) (a case which dealt with the issue of retrial on appellate reversal of a conviction). In that case, the court noted that the double jeopardy clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction" (at 41). See chapter eight *infra* under 8.5.2 for a detailed discussion of that decision. The court (in *Grady*) also referred to *Ashe v Swenson* (discussed *supra* under 4.5.4) where the state in fact conceded that, after the defendant had been acquitted at the first trial, it "refined its presentation [at the subsequent trial] in the light of the turn of events at the first trial" (at 447) and *Hoag v New Jersey* 356 US 464 (1958) where the prosecution in a subsequent trial (after a previous acquittal), only called the witness who had testified most damagingly in the first trial and, subsequently, obtained a conviction.

²⁹⁵At 519. (My emphasis.)

²⁹⁶At 520.

persuasive testimony etcetera, and consequently enhance the possibility that an innocent person could be convicted.

Therefore, the court concluded that a same conduct test should supplement the *Blockburger* test in the context of successive prosecutions.²⁹⁷ This means that in order to determine whether a successive prosecution for the same offence is barred in terms of the double jeopardy clause, a court first has to apply the *Blockburger* test. If the offences prove to be the same in terms of the *Blockburger* test that would be the end of the matter. However, if the offences are not the same, the court also has to enquire whether the prosecution (in the second trial) will rely on conduct which constitutes an offence for which the defendant has already been prosecuted.²⁹⁸ In *Grady*, the court concluded that the *Blockburger* test did not prohibit the subsequent prosecution.²⁹⁹ However, it held that since the conduct (set out in the bill of particulars) which the state intended to rely on to prove the offences in the second indictment had already been relied on by the state in the earlier prosecution to prove "the entirety of the conduct for which Corbin had been convicted",³⁰⁰ the subsequent prosecution would be barred on double jeopardy grounds.³⁰¹

²⁹⁷The court found ample historical justification for the adoption of a same conduct test (at 520) in previous decisions such as *Nielsen* (discussed *supra*, text at note 230); *Brown v Ohio* (discussed *supra*, text at note 269) and, in particular, *Vitale* (discussed *supra*, text at note 279).

²⁹⁸At 521.

²⁹⁹At 522.

³⁰⁰At 523.

³⁰¹*Id.* The court remarked that if the state, for example, had relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence, the subsequent prosecution would have

The court went to great lengths to explain the application of the same conduct test in practice. It pointed out, *inter alia*, that the test does not prevent the same actual *evidence* from being presented at the subsequent trial; in other words, evidence which was also presented at the first trial. In Justice Brennan's words, "the critical enquiry is what conduct the State will prove, not the evidence the state will use to prove that conduct".³⁰² Furthermore, the court explained the difference between a same conduct test and a same transaction test.³⁰³ adoption of a same transaction test would have barred the homicide and assault prosecutions (in *Grady*) even if the state was able to establish the essential elements of those crimes *without* having to rely on *conduct* for which Corbin had previously been convicted.³⁰⁴

The same conduct test as proposed and adopted in *Grady* could be regarded as a compromise between the *Blockburger* and the same transaction tests. The court did not totally discard the *Blockburger*

been allowed in terms of the same conduct test.

³⁰²At 521. Justice Brennan explained that if two bystanders had witnessed Corbin's accident, it would have made no difference to the court's double jeopardy analysis if the state had called one witness to testify in the first trial that Corbin crossed the median and had called the other witness to testify to the same conduct in the second trial. The second trial would still have been prohibited in terms of the same conduct test: the conduct being the crossing of the median. However, this distinction had not been altogether clear to the two dissenting judges in *Grady* (Justice O'Connor and Justice Scalia). See *infra* under 4.5.7 for a discussion of their views on the same conduct test as proposed by Justice Brennan, and the distinction drawn between same conduct and same evidence.

³⁰³At 523 note 15.

³⁰⁴*Id.* Ironically, Justice Brennan never achieved his long-time goal of adopting a same transaction test. He retired shortly after delivering the opinion in *Grady*.

test, but instead incorporated it in a new two-level test which also focused on the same conduct.

4.5.7 Implications of the "same conduct" test

The move of the Supreme Court to offer the defendants in criminal cases broader Fifth Amendment protection in the context of successive prosecutions has been received favourably in academic circles.³⁰⁵ However, it has also been acknowledged that application of the same conduct test may present problems in practice. One of these problems was addressed by Justice O'Connor in her minority opinion in *Grady*.³⁰⁶ She held the view that the same conduct test proposed by the majority could not be reconciled with the court's previous decision (five months earlier) in *Dowling v United States*³⁰⁷. In her view, the same conduct test also casts doubt on the "continued

³⁰⁵See Herrick JM "Double jeopardy analysis comes home: The 'same conduct' standard in *Grady v Corbin*" *Kentucky Law Journal* Vol 79 1990/91 847 (arguing (at 866) that "only a same 'conduct' standard can adequately protect defendants against potential legislative abuse of the power to define offenses [*sic*]"); Thomas *Modest Proposal* (applauding the court at 195 for affirming "a position [he] had taken in previous articles"); Poulin AB "Double jeopardy: *Grady* and *Dowling* stir the muddy waters" *Rutgers Law Review* Vol 43 1991 889 (stating at 930 that "[t]his broader protection [afforded by *Grady*] is warranted by the defendant's interest in closure and in freedom from fragmented prosecutions"); Land (reasoning at 944 that "[i]n formulating its 'same conduct' test, the court has identified and effectuated the fundamental value that underlies the doctrine of double jeopardy [namely], verdict finality". By this, the author meant that *Grady* supports the underlying idea that "the government has no legitimate interest in relitigating the first factfinder's culpability determination" at 915).

³⁰⁶At 524-526.

³⁰⁷493 US 342 (1990).

vitality" of Rule 404(b) of the Federal Rules of Evidence.³⁰⁸ A brief exposition of *Dowling* and the provisions of the specific rule of evidence are essential for an understanding of her objections.

Rule 404(b)³⁰⁹ provides

Evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident.

In *Dowling*, the Supreme Court had to consider whether the testimony of an eyewitness regarding a robbery (at the house of the eyewitness) for which Dowling had been acquitted was admissible at a second trial of Dowling for an unrelated bank robbery. The eyewitness, a certain Mrs Henry, had testified at the first trial that a man had entered her house with a ski-mask and a small handgun and that his mask had come off revealing his identity. However, Dowling was acquitted of the robbery of Mrs Henry's residence. In the bank robbery trial, it was testified that the bank robber wore a ski-mask and had a small hand-gun. Mrs Henry also testified at this trial. The evidence of Mrs Henry (namely that the perpetrator who had entered her house had also worn a ski-mask and had a small handgun) was allowed in terms of the abovementioned rule in order to establish identity in the bank robbery trial.

The question before the Supreme Court was whether the collateral

³⁰⁸At 526.

³⁰⁹Federal Rules of Evidence.

estoppel rule as set out in *Ashe*³¹⁰ barred the prosecution from relying on this evidence. The Supreme Court held that the collateral estoppel rule does not bar *all* evidence of conduct for which an accused has been acquitted. The court argued that, because the defence had failed to prove that the prior acquittal by the jury *necessarily* represented a determination that Dowling had *not* been the masked man who had entered the witness' home, the testimony rendered by Mrs Henry in *Dowling* was not barred in terms of the collateral estoppel rule.³¹¹

As stated above, Justice O'Connor found the ruling in *Grady* to be inconsistent with *Dowling*. However, several commentators suggested that she had failed to distinguish between repetition of proof of the

³¹⁰See *supra* text at note 251 for a discussion of this decision.

³¹¹At 351. The court stated that there were numerous grounds other than identity on which the jury could have based its acquittal. The court reached this conclusion on the grounds that Dowling's presence in the house was not seriously contested by his defence, who "rather had claimed" that a robbery had not taken place because he (Dowling) and his partner had gone to retrieve money from an individual in the house. The hyper-technical approach adopted by the majority in *Dowling* has been severely criticised by legal commentators. (See *inter alia*, Crawford CL "*Dowling v. United States: A failure of the criminal justice system*" *Ohio State Law Journal* 1991 991 (describing the case as "simply repugnant to the concepts of due process and double jeopardy" (at 1009)) and Goldstein RA "Double jeopardy, due process, and evidence from prior acquittals: *Dowling v. United States*" *Harvard Journal of Law and Public Policy* Vol 13 1991 1027 (emphasising the "prejudice inevitable in the introduction of evidence from prior proceedings" (at 1035)). In his minority opinion (in *Dowling* 361-363), Justice Brennan expressed concern for the potentially damaging effect that evidence from a prior proceeding might have on a defendant's chances of receiving a fair trial. More in particular, he criticised the majority's approach on the basis that it undermined the very purpose of constitutional safeguards such as the double jeopardy clause, namely to protect the defendant from the risk of erroneous conviction. In his view, this is exactly the kind of risk that *Dowling* created.

same *conduct* and repetition of the same actual *evidence*.³¹² Nevertheless, the main concern has been that if Supreme Court judges could not make the subtle distinction between same conduct and same evidence, it would be difficult for ordinary judges to distinguish when the same evidence or the same conduct is involved.³¹³

Justice Scalia, delivering a dissenting opinion in the *Corbin* case, expressed himself in favour of the exclusive application of the *Blockburger* test.³¹⁴ In a lengthy opinion, he regarded the majority opinion to be an activist decision without historical support.³¹⁵ Moreover, he raised certain concerns as regards the implementation of the same conduct test in practice. He argued, *inter alia*, that since the double jeopardy clause protects the defendant from being twice put in jeopardy (namely, made to stand trial more than once), it presupposes that "sameness" be determined before the commencement of the second trial. Since the Constitution does not entitle the defendant to be informed of the evidence against him, the majority's "proof-of-same-conduct-test" will be implementable before trial "only if the indictment happens to show that the same evidence is at issue, or

³¹²See Land 932, pointing out that the evidence from the first trial in *Dowling* was not being used to prove the *same conduct* as was proved in the first trial. Therefore, the second prosecution was not barred and *Dowling* could be reconciled with *Grady*. See also, in the same vein, Poulin 903. In the majority opinion (of *Grady* at 521), Justice Brennan reconciled *Dowling* with his adoption of a same conduct test on the basis that the same conduct test would not (necessarily) bar the introduction of the same actual evidence offered in the previous trial.

³¹³This point is raised by Barton S "Grady v. Corbin: An unsuccessful effort to define 'same offense'" *Georgia Law Review* Vol 25 1990 143, 159.

³¹⁴At 527-543.

³¹⁵At 536 he stated that "[t]he Court today abandons text and longstanding precedent to adopt the [same conduct] theory..."

only if the jurisdiction's rules of criminal procedure happen to require the prosecution to submit a bill of particulars that cannot be exceeded".³¹⁶ Therefore, the same conduct test will in most cases not succeed in preventing the defendant from being tried twice.³¹⁷ Justice Scalia also raised his concern that adoption of a same conduct test would, eventually, lead to the application of an expanded same transaction test.³¹⁸

However, the only truly valid criticism raised by Justice Scalia is the following. The same conduct test as formulated in *Grady* necessitates that the evidence introduced to prove an essential element of the offence charged in the second prosecution, must prove conduct *that constitutes an offence* for which the accused had previously been convicted. If interpreted literally, it would mean that prosecution for a lesser included offence may follow upon prosecution for a greater offence; for example, a prosecution for drunken driving may follow a prosecution for vehicular homicide based on the same conduct.³¹⁹ In view of the purposes of double jeopardy protection set out in detail by the majority, Mr Justice Scalia seriously questioned

³¹⁶At 530.

³¹⁷*Id.* Land (933 note 132) rejected this objection as being without merit. He pointed out that the Court of Appeal (which long ago recognized expanded double jeopardy protection in the context of successive prosecutions) had adopted an essential procedural mechanism for assessing double jeopardy claims prior to trial. He explained that all nine federal circuits have held that "when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense (*sic*) for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses (*sic*)". In Land's view, this procedural mechanism ensures that the same conduct test may be implemented at a stage prior to trial.

³¹⁸At 536.

³¹⁹This example is taken from Thomas *Modest Proposal* 203.

whether this apparent limitation had any "rational basis".³²⁰

Certain legal commentators expressed concern over the fact that adoption of a same conduct test would lead to results that are contrary to "shared intuitions about what double jeopardy should forbid".³²¹ The fact that a person convicted or acquitted of a minor traffic offence may never be called to account in a subsequent legal proceeding for a death following from such traffic offence,³²² has led these commentators to believe that certain exceptions should be made to the same conduct test. Some exceptions suggested are the following:

(i) **A jurisdictional exception.**³²³ This would mean that a second prosecution would not be prohibited in terms of the same conduct test if the court of first prosecution had the required jurisdiction to hear the charges before it, but not the later charges.³²⁴ However, this exception has not gained much ground since it permits the state to structure its judicial system in such a way that it forces the defendant to face successive proceedings for the same offence and consequently

³²⁰At 542.

³²¹See Thomas *Modest Proposal* 195.

³²²See Clarke ML "Double jeopardy revisited: Reflection on the recent expansion of protection" *Western State University Law Review* Vol 18 1991 791, 802. The commentator expresses concern that when an overworked and understaffed District Attorney fails to monitor a case, "a criminal defendant may escape criminal prosecution ...".

³²³This exception is recognised in Indian law. See *supra* under 4.4.2, note 267 for a discussion of section 300(4) of the Indian Code of Criminal Procedure.

³²⁴Justice Brennan raised the possibility of such an exception in *Ashe v Swenson*. See *supra* under 4.5.4. See also Poulin 922.

nullifies protection against double jeopardy.³²⁵

(ii) **Limitation of double jeopardy protection to "grave" offences only.**³²⁶ The somewhat laboured argument raised in favour of such an exception can be summarised as follows. Conduct is the essence of criminal culpability. The *res judicata* principle presupposes that once determined culpability should not be redetermined.³²⁷ However, in the context of criminal proceedings, only *serious* culpability should be foreclosed. Therefore, double jeopardy protection should be limited to grave offences only. Grave offences are those for which incarceration is authorised. Consequently, double jeopardy protection should be afforded only against successive prosecutions for offences for which prison sentences are prescribed.³²⁸

(iii) **Uncompleted offence.** Prosecution for offences not ripe for prosecution at the time of the initial prosecution should not be barred in terms of the double jeopardy clause. This is the so-called *Diaz* due diligence exception discussed above.³²⁹

(iv) **Collusion or manipulation by the defendant.**³³⁰ If a defendant

³²⁵See Poulin 924, citing certain state decisions that rejected this possible exception on this basis.

³²⁶See Thomas *Modest Proposal* 195, 216.

³²⁷Thomas *Modest Proposal* 203.

³²⁸Thomas *Modest Proposal* submits that this construction of double jeopardy protection is supported by the words used in the Fifth Amendment: Protection of "life and limb", in his view, is "1792 shorthand" for "grave" penalties (at 218).

³²⁹See text at note 237 under 4.5.2.

³³⁰Poulin 919-921 discusses the merits of this exception.

through collusion with a public official obtains a conviction on a lesser charge in order to escape prosecution for a greater offence, the state should not be barred from proceeding on the greater charge.

(v) Defendant responsible for separate proceedings. Justification for this exception lies in the fact that a defendant should not complain if he himself initiated the procedural steps that led to separate prosecutions.³³¹

The year after *Grady* was decided, the Supreme Court recognised the first exception to the *Grady* same conduct test. In *United States v Felix*,³³² the court distinguished between cases arising out of a single course of conduct (single-layered conduct) and prosecutions for engaging in continuous criminal activity (multi-layered conduct). The court held that the *Grady* same conduct test could only be applied in the aforementioned cases. Therefore, the court concluded that a previous conviction for an attempt to manufacture illegal drugs did not bar the prosecution from subsequently charging the same person for conspiracy to manufacture the illegal drugs, even if the prosecution would rely on conduct (as an overt act to prove the separate conspiracy charge) of which the defendant had previously been convicted.³³³ However, the court did not explain why *Grady* should be limited to cases pertaining to single-layered conduct. It also failed

³³¹See *supra* under 4.2.1 for a discussion of the English case of *Connelly* that recognised this exception.

³³²112 S Ct 1377 (1992).

³³³Before *Grady* the Supreme Court held in *United States v Garret* 471 US 773 (1985) that a conspiracy charge and a substantive offence were not the same offence for double jeopardy purposes. In *Felix* the court maintained this ruling and reconciled it with *Grady* on the basis that *Grady* only applied to cases which arose out of a single course of conduct (at 1384).

to give guidelines to the courts enabling them to distinguish between single and multi-layered conduct.³³⁴ The court merely stated that *Grady* was "less helpful" once the circumstances proceed beyond the lesser-included offence analysis endorsed in that decision.³³⁵

Felix sent a clear signal that the court was unwilling to give expanded protection in terms of the *Grady* same conduct test, particularly in respect of continuous criminal conduct.

4.5.8 The downfall of *Grady*: *United States v Dixon*.

The application of the *Grady* same conduct test only lasted three years. Instead of refining the test (for example by recognising exceptions to the rule), the Supreme Court opted to overrule itself in *United States v Dixon*.³³⁶ *Dixon* reinstated the *Blockburger* test as the exclusive criterion for double jeopardy analysis. However, the majority could not even agree on how to apply this apparently straightforward test. Consequently, *Dixon* added even more confusion and inconsistency to this already complicated field of law.

The issue facing the court in *Dixon* was "[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based on the same conduct for which he previously has been held in criminal contempt of court".³³⁷ Because the District of Columbia Court of Appeals had consolidated the respective cases of Alvin Dixon and Michael Foster, the Supreme Court case of

³³⁵At 1385.

³³⁶113 S Ct 2849 (1993).

³³⁷At 2854.

Dixon involved two respondents. The first respondent, Dixon, was arrested for murder and released on bail. A condition of his release on the murder charge was that he should not commit any criminal offence and that violation of the release order would result in prosecution for contempt of court. He was subsequently convicted of contempt of court because he violated a drug law (possession of cocaine with the intent to distribute).³³⁸ He was sentenced to 180 days imprisonment. He moved to have the drug violation charge dismissed on double jeopardy grounds.

In the second case, Ana Foster obtained a civil protection order (CPO) against her husband, ordering that he not molest, assault or in any manner threaten or physically abuse her.³³⁹ Ana subsequently filed three separate motions of contempt which alleged that her husband had made three separate threats and committed two assaults in violation of the order. Her attorney filed the motion but the state was already aware of the violations because a grand jury was investigating some charges of the same conduct.³⁴⁰ Foster was acquitted of making the threats, but found guilty of the two assaults in the contempt proceedings. He was sentenced to 600 days in jail. In a later indictment he was charged with

- (i) simple assault (count 1)
- (ii) threatening to injure another (counts 2-4) and
- (iii) assault with intent to kill (count 5).

All of these incidents had already been combined in the CPO proceedings. Foster, accordingly, also moved to have the subsequent indictment dismissed on double jeopardy grounds.

³³⁸At 2853.

³³⁹At 2853-2854.

³⁴⁰At 2854.

Delivering the majority verdict, Justice Scalia held (in the first place) that, since criminal contempt is considered to be a crime, defendants in non-summary contempt proceedings should receive all the constitutional safeguards that defendants in criminal trials receive, including protection against double jeopardy.³⁴¹ The court then proceeded to apply the *Blockburger* (same elements) test to the facts. It concluded that Dixon's subsequent prosecution should be barred, but only Foster's subsequent prosecution on count 1. However, the majority disagreed concerning the proper application of the same elements test. For the sake of clarity, it is essential to give a brief synopsis of the differing applications of the *Blockburger* test by certain members of the court in *Dixon*.

Justice Scalia supported a broad application of the *Blockburger* test. His application to some extent went beyond a mere comparison of the elements of the offences charged successively. He stated that, in the case of *Dixon*, the release order incorporated the entire Criminal Code of the State of Columbia. Drawing an analogy between *Harris v Oklahoma*³⁴² and this case, he argued that the incorporation of the

³⁴¹At 2855. Non-summary contempt proceedings are distinguished from summary contempt proceedings in that the former usually involve contempts that are committed out of the view of the court while the latter occur in the presence of the judge. See Chinnery AY "United States v Dixon: The death of the *Grady v. Corbin* 'same conduct test' for double jeopardy" *Rutgers Law Review* Vol 47 1994 247, 267. The author explains (at 266) that this had been the first opportunity for the court to decide whether double jeopardy principles are also applicable to criminal contempt, because courts had traditionally not issued orders or injunctions prohibiting violations of criminal law. See also Raith PA "Criminal law: Double trouble or double jeopardy - 'same conduct' (*Grady*) test overruled in favor [*sic*] of return to single 'same element' (*Blockburger*) test [*United States v. Dixon*, 113 S. Ct. 2849 (1993)] *Washburn Law Journal* Vol 33 1993 429, 435 for a short summary of the development of criminal contempt proceedings in American law.

³⁴²See *supra* under 4.5.5 for a discussion of this case.

Code in the court order made the substantive drug offence a lesser included offence of criminal contempt.³⁴³ Therefore, since Dixon had already been prosecuted for the greater offence (contempt of court), he could not be prosecuted for the lesser included offence of possession of cocaine with intent to distribute. He applied the same analysis to the simple assault charge (count 1) against Foster. Since the civil protection order forbade Foster from assaulting his wife, the simple assault charge was a lesser included offence of contempt.³⁴⁴ However, Justice Scalia concluded that Foster could nevertheless be tried on the count of assault with intent to kill and the counts of threatening his wife, because in terms of *Blockburger*, each required proof that the other did not.³⁴⁵ The contempt charge required proof of knowledge of the protective order and the charge of assault with intent to kill proof of specific intent.³⁴⁶ Justice Scalia reached the same conclusion regarding the three criminal threat charges against Foster; in his view the charges mentioned above (on the one hand) and the contempt charge (on the other hand) each contained distinct elements.³⁴⁷

Justice Rehnquist (joined by Justices O'Connor and Thomas on the application of *Blockburger*) endorsed the traditional application of the *Blockburger* test. In the Chief Justice's view none of the criminal charges brought against Dixon or Foster were barred by the

³⁴³At 2857.

³⁴⁴*Id.*

³⁴⁵At 2858.

³⁴⁶At 2858-2859. The elements of the crime of criminal contempt are knowledge of a court order and wilful violation of one of the conditions of the order by the defendant.

³⁴⁷At 2859.

Blockburger test.³⁴⁸ He criticised Justice Scalia's reliance on *Harris* in reaching the conclusion that the elements of possession with intent to distribute in Dixon's case and the elements of assault in Forster's case were incorporated into the elements of contempt.³⁴⁹ He distinguished *Harris* on the ground that the elements of armed robbery were necessary in that case to prove felony-murder.³⁵⁰ In his view, *Harris* should be limited to the context in which it arose: where the crimes in question are analogous to greater and lesser included offences. The elements of the crime of contempt did not require proof of a particular crime; therefore, *Harris* could not be understood as requiring the incorporation of the substantive criminal offence into the elements of contempt.³⁵¹

Chief Justice Rehnquist also questioned how serious felonies like assault and possession of cocaine could logically be viewed as lesser offences of a relatively minor offence such as contempt.³⁵² He concluded that "Justice Scalia's double jeopardy analysis bears a striking resemblance to that found in *Grady* - not what one would expect in an opinion that overrules *Grady*".³⁵³

Justice White agreed with the majority that *Blockburger* barred the drug charge against Dixon and the simple assault charge against Foster. However, he expressed the point of view that *Blockburger* also barred the other charges against Foster (assault with intent to kill

³⁴⁸At 2865.

³⁴⁹At 2867.

³⁵⁰See *supra* under 4.5.4 for a detailed discussion of this case.

³⁵¹At 2867.

³⁵²At 2868.

³⁵³At 2867.

and threatening his wife). He reasoned as follows. The court orders merely "triggered the court's authority to punish the defendant(s) for acts already punishable under criminal law".³⁵⁴ Therefore, he put the court orders aside and compared the elements of the substantive offences charged in the contempt and subsequent proceedings.³⁵⁵ This analysis led him to the conclusion that the offences charged subsequently by the state were either identical to or aggravated forms of the offences prosecuted in the respective contempt proceedings. In his view, this was prohibited in terms of the double jeopardy clause.³⁵⁶

Mr Justice White also considered the prosecution's argument that application of double jeopardy principles in the context of contempt proceedings would "cripple the power to enforce court orders or ... allow individuals to escape serious punishment for statutory criminal offenses [*sic*]".³⁵⁷ He also acknowledged that delays in the operating of the criminal justice system were frustrating³⁵⁸ and that where the potential for violence exists delay could be perilous.³⁵⁹ However, his solutions to these difficult issues did not involve disregarding double jeopardy principles. Instead, he suggested that the courts "take appropriate steps to ensure that their authority is not flouted".³⁶⁰ One option, in his view, would be to try the substantive

³⁵⁴At 2876.

³⁵⁵*Id.*

³⁵⁶At 2875.

³⁵⁷At 2873.

³⁵⁸At 2874.

³⁵⁹*Id.*

³⁶⁰At 2872.

and the contempt charge together.³⁶¹ The only remaining issue would then be to ensure that the total punishment would not exceed that authorised by the legislature.³⁶²

Justice Blackmun's opinion did not strictly relate to the scope of the *Blockburger* test. He agreed with the majority that the double jeopardy clause did not preclude the charges against Forster of assault with intent to kill and making threats. However, he felt that Dixon could also be prosecuted for the drug offence and Foster for the simple assault charge. He argued that the contempt and the substantive offence charges were not the same because they protected disparate interests.³⁶³ Therefore, they could not even be compared in terms of the *Blockburger* test. He argued that the sole purpose of contempt proceedings is to vindicate the authority of the courts, and not to punish criminal offences.³⁶⁴ He reasoned that contempt "punish[es] the specific offense [*sic*] of disobeying a court order" instead of "punishing an offense [*sic*] against the community at large".³⁶⁵ He also warned that the majority's "willingness to overlook the unique interests served by contempt proceedings will undermine the courts' ability to respond effectively to unmistakable threats to their

³⁶¹At 2873.

³⁶²At 2874.

³⁶³At 2880.

³⁶⁴*Id.*

³⁶⁵*Id.* He emphasised the difference between a battered woman who seeks an order to end the violence against her personally and society's interest in having the criminal law enforced.

own authority and those who have sought [the courts'] protection".³⁶⁶

On concluding its *Blockburger* analysis, the court then turned to the same conduct test. The court noted that *Grady* would undoubtedly prohibit the subsequent prosecution of Foster on the four remaining counts because the state would only be able to rely on the exact same conduct.³⁶⁷ However, *Grady* was overruled by a majority of 5-4.³⁶⁸ The court held that *Grady* lacked "constitutional roots"³⁶⁹ and has resulted in "confusion" inasmuch as it was "wholly inconsistent with earlier Supreme court precedent and with the clear common law understanding of double jeopardy".³⁷⁰ *Blockburger*, on the other hand, had in the majority's view "deep historical roots and has been accepted in numerous precedents of the Court".³⁷¹ Having rejected the same conduct test, Justice Rehnquist accordingly remanded the case of Foster back to the State court to proceed on the remaining charges.³⁷²

In a separate dissenting opinion (Justice Blackmun, White, and

³⁶⁶*Id.* Cf the similar views of Chinnery 281-290, who makes out a strong case that contempt proceedings should be excluded from double jeopardy protection.

³⁶⁷Per Scalia J, at 2860.

³⁶⁸Justices Rehnquist, O'Connor, Thomas and Kennedy joined Justice Scalia in this part of the opinion.

³⁶⁹At 2860. Justice Scalia further described *Grady* as a mistake which has contradicted an unbroken line of decisions. (At 2864).

³⁷⁰At 2864. Justice Scalia in fact pointed to his dissent in *Grady* as providing a basis for overruling *Grady* in *Dixon* (at 2860).

³⁷¹At 2860.

³⁷²*Id.*

Stevens concurring), Justice Souter questioned the constitutional adequacy of the *Blockburger* test. He identified a troublesome aspect which originated from the exclusive application of *Blockburger* in the context of successive prosecutions, namely that "the government could manipulate the definitions of offenses, [*sic*] creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same conduct".³⁷³ Citing the famous *Green dicta*,³⁷⁴ he concluded that the same conduct test best serve the interests which the double jeopardy clause was designed to protect.³⁷⁵ Accordingly, Justice Souter would have prohibited any further prosecution of Foster.

Dixon's case has been widely criticised by academic commentators.³⁷⁶ A shared concern of these writers are that

³⁷³At 2883-2884.

³⁷⁴See chapter three *supra* under 3.5.1, text at note 150.

³⁷⁵At 2883.

³⁷⁶See Chinnery 281, (evaluating *Dixon* as "an attempt to freeze double jeopardy protection at a level no greater than that which the Court believed that the Framers intended", and expressing the view that "[a] test that could produce such varied applications can hardly be regarded as more workable than the purportedly unworkable *Grady* test"); Pace 794-795 (observing that the court focused on "historical application of the clause" instead of focusing on "the interests that the clause is intended to protect and develop a test that best protects those interests in the context of today's society and criminal justice system"); Henning 4 (stating that "the [*Dixon*] decision does not provide much meaningful guidance on how to judge whether a successive prosecution involves the same elements as the prior action"); Pamenter KA "U.S. v. *Dixon*: The Supreme Court returns to the traditional standard for double jeopardy clause analysis" *Notre Dame Law Review* Vol 69 1994 575, 577 (stating that "[t]he majority did not address the issue that the *Blockburger* standard does not satisfy the *Green* policy interests, but rather allows for piecemeal litigation"); Green P "Constitutional Law - Goodbye *Grady*! *Blockburger* wins the double jeopardy rematch" *University of Arkansas*

Blockburger fails to adequately protect the criminal defendant in modern society from being harassed more than once for which is essentially the same criminal conduct. These concerns cannot be viewed as merely being theoretical. In the present American criminal justice system, new trends have developed that seriously implicate constitutional protection against double jeopardy. Increased focus on combating crime and repeat offenders have led to greater use of comprehensive statutory schemes (complex criminal statutes) such as the Racketeering Influenced and Corrupt Organisations Act (RICO)³⁷⁷ and the Continuing Criminal Enterprise (CCE)³⁷⁸ provision in the drug and money laundering statutes.³⁷⁹ These comprehensive statutes

at *Little Rock Law Journal* Vol 17 1995 369, 381 (aptly describing the *Dixon* decision as "woven from a tangled web of concurring and dissenting opinions" and expressing concern that "[u]nder *Blockburger*, the potential does indeed exist for prosecutorial abuse of fine distinctions and definitions in the elements of the crime, thus enabling a defendant to be repeatedly tried for the same offense [*sic*]"). *Contra* Blake 460 (expressing the view that "[f]or those of us who have sincere doubts that the founding fathers would have considered, for example, speeding and criminal homicide to be "the same" offense [*sic*], it [*Blockburger*] provides a fully satisfactory implementation of the constitutional safeguard [of double jeopardy]". In this author's (a practising prosecutor) view, *Blockburger* provides "the simple and effective rule for which our courts have been searching for more than 100 years").

³⁷⁷18 USC paras 1961-68 (1988). RICO requires proof that, among other things, the defendant engaged in a pattern of racketeering activity involving violations of a long list of criminal statutes. See Henning 4 note 21.

³⁷⁸21 USC para 848 (1988). A continuing criminal enterprise involves drug violations undertaken by a group of five or more persons over whom the defendant occupies a supervisory or managerial position, and who derive substantial income or resources from the enterprise. See Henning 5, note 23.

³⁷⁹18 USC paras 1956-57 (1988). Proof of money laundering requires, among other things, that the defendant engaged in "specified unlawful activity" that involves the receipt or transfer of funds arising from violations of a long list of criminal statutes. See Henning 5 note 23.

are all built on substantive offences. Therefore, constitutional protection against double jeopardy may be undermined by the legislature (as Justice Souter suggested)³⁸⁰ if *Blockburger* continues to be applied exclusively as a standard to determine the permissibility of successive prosecutions.

However, the formulation of a same conduct test in *Grady* is not regarded unanimously as the ideal replacement of the traditional same elements test. Some legal commentators have questioned the practicality of this test and expressed themselves in favour of a broader same transaction test as has been advocated by Mr Justice Brennan in previous decisions.³⁸¹ Others expressed the view that, instead of overruling *Grady*, the court should have refined *Grady* by defining guidelines in regard to the application of the test in practice and delineating exceptions to the rule in the interest of society.³⁸² It has been suggested that the judgment in *Dixon* could have justified the recognition of an exception in the case of non-summary criminal contempt prosecutions - the "underpinning interest of the contempt power as being irrelevant to the Double Jeopardy Clause".³⁸³

One commentator expressed the alternative view that the

³⁸⁰See *supra*, text at note 373.

³⁸¹See Pace 800 (rejecting *Blockburger* as inadequate, but questioning *Grady's* efficacy because of the uncertainties surrounding the practical application of the test and the fact that "it does not guarantee that a defendant will not be subjected to the embarrassment, expense and ordeal of the initial stages of a second prosecution until the court can make a double jeopardy determination") and Pamerter 595 (opining that Brennan's "same transaction" test best serves the policies set out in *Green*).

³⁸²Chinnery 287.

³⁸³See Chinnery 282 and the views of Justice Blackmun in *Dixon* discussed *supra*, text at note 363.

Blockburger test (as confirmed in *Dixon*) would bring certainty and predictability in regard to the definitional issue of same offence.³⁸⁴ However, the differences of the majority (in *Dixon*) on the proper application of *Blockburger* has undoubtedly added confusion rather than certainty to this particular field of double jeopardy jurisprudence. It has been suggested, *inter alia*, that Justice Scalia's application of *Blockburger*, in reality focused on the *facts* underlying the contempt orders instead of on the statutory elements of the offences successively charged (as would be required in a strict application of *Blockburger*).³⁸⁵

Another commentator speculated that the broader application of *Blockburger* by Justice Scalia, namely by examining whether one offence has been incorporated as a lesser included offence of another (without necessarily enquiring whether each had an additional element distinct from the other), could permit courts to inquire more comprehensively into double jeopardy claims; particularly when it has to be established whether comprehensive statutory schemes incorporate more narrowly drawn provisions.³⁸⁶ The author points out that in the past lower courts have consistently found that CCE, RICO and money laundering offences³⁸⁷ are separate from the substantive offences on which the statutes are based and therefore,

³⁸⁴Blake 460.

³⁸⁵See Pamerter 593 and the opinion of Justice Rehnquist to the same effect, discussed *supra* text at note 353.

³⁸⁶Henning 30.

³⁸⁷See *supra* text at note 377 for a discussion of these particular offences.

do not qualify for double jeopardy protection.³⁸⁸ However, the author expresses the view that Justice Scalia's application of *Blockburger* in *Dixon* may be interpreted to mean that if the statutes cover the same "unit of conduct" they may be regarded as species of a lesser included offence that would bar a second prosecution³⁸⁹ - a view that further blurs the distinction between the same conduct test and the *Blockburger* test.

4.5.9 Summary

* The development of double jeopardy jurisprudence in the field addressed in this chapter is characterised by inconsistency. This can be ascribed to a constant conflict of policy, namely whether inquiry into the concept same offence should go beyond a mere examination of the statutory elements of offences. The most important developments that occurred over the last century are noted below.

* A modified version of the same evidence test was introduced in American law in the latter half of the previous century. The effect of the same evidence test as applied in America has resulted in prevention of subsequent prosecutions for greater as well as lesser included offences. However, similar to the *Vandercomb* test, the same evidence test (proposed in American law), focuses on the *elements* of the offences instead of on the evidence actually

³⁸⁸Henning 30. In a state case cited by Henning (31) it was, for example, held that a guilty plea to conspiracy to possess marijuana does not bar a CCE indictment in which conspiracy is one of the predicate acts. This was also the approach adopted in *US v Garret supra* note 333 (CCE charge not barred when underlying conduct subject of prior prosecution). In *US v Felix* (discussed *supra*, text at note 332) the Supreme Court relied on *Garret* in order to limit *Grady* to single-layered conduct.

³⁸⁹Henning 31.

presented. The test, initially applied to give effect to the legislature's intent in multiple-punishment single-trial cases, eventually also acquired the status of an exclusive test or criterion to determine whether a *successive* prosecution relates to the same offence of which the accused had previously been convicted or acquitted. The test has commonly been known and referred to as the *Blockburger* test.

* During the 1970's, the Supreme Court recognised in the case of *Ashe* that the principle of issue estoppel is embodied in the constitutional guarantee against double jeopardy. Recognition of the principle as part of the constitutional guarantee was an important breakthrough. For the first time, the court focused on the underlying rationale of the constitutional guarantee against double jeopardy. In *Ashe*, the court found that the state had used the first trial as a "dry run" for the second prosecution. The court regarded this kind of prosecutorial conduct to be precisely what the constitutional guarantee seeks to prevent, namely oppressive state conduct, abuse of power and harassment of the accused by multiple prosecutions.

* However, inadequacies of the issue estoppel principle as a tool to protect the accused against oppressive state conduct (highlighted by Mr Justice Brennan in his concurring opinion in *Ashe*), also posed other questions. These questions probe the essence of what constitutional protection against double jeopardy encompasses. Mr Justice Brennan for instance, expressed the point of view that a broad same transaction instead of a same elements test would more effectively serve double jeopardy values. He pointed out that the tendency in modern criminal legislation to divide the phases of a criminal transaction into separate crimes enhances opportunities for continued prosecution for an essentially unitary criminal episode; a phenomenon which defeats the very purpose of the constitutional

guarantee against double jeopardy, namely the protection of the accused against "possible tyranny by an overzealous prosecutor".³⁹⁰ He consequently suggested that, in order to avoid potential harassment of the accused by the state, all charges arising out of a single criminal transaction ought (as a rule) to be joined in one charge. However, successive prosecutions for an essentially unitary criminal episode could be allowed if it were impossible to charge the accused with all the relevant offences at one trial, either because the crime (successively charged) had not yet occurred at the time of the first trial, or could not have been discovered despite due diligence on the part of the prosecutor. (The *Diaz due diligence* exception). He added that another exception would be necessitated if no single court had jurisdiction of all the alleged crimes and in circumstances where joinder of offences would be prejudicial to either the prosecution or the defence.

* The identification of policies which underlie the rule against double jeopardy (in *Ashe*), paved the way for broader protection in this area of double jeopardy jurisprudence. The Supreme Court handed down a number of decisions in the 1970's and 1980's which suggest that constitutional protection against double jeopardy require not only an investigation into the elements of offences successively charged but also into the underlying criminal conduct. This shift in emphasis can be ascribed to the fact that the court recognised that *relitigation of issues already resolved in the first trial* enhances the possibility of state abuse of power.

* However, the developments described above never resulted in adoption of a broader same transaction test. Instead, the court opted for a two-tiered test which focuses on elements of offences as well as

³⁹⁰At 459 of his opinion in *Ashe*.

the actual conduct being prosecuted once again. In *Grady* the Supreme Court endorsed a two-tiered test which involves an application of the same evidence test (*Blockburger*), and a same conduct test. In *Grady*, the test was applied in the following way. First of all, the *Blockburger* test was applied to determine whether the offence prosecuted qualified (in terms of its elements) as a lesser or a greater included offence of another offence of which the accused had previously been convicted or acquitted. Because the court found that the offences charged successively did not qualify as lesser or greater included offences in terms of *Blockburger*, it was also considered whether the state (in the second trial) had relied on *conduct that constitutes an offence for which the accused has already been prosecuted*. In *Grady* the subsequent prosecution was barred on the basis that the state relied on the same conduct as that relied on in the first trial to prove the offence charged in the second trial.

* The policy considerations underlying the *Grady* two-tiered test as reflected in the majority opinion delivered by Mr Justice Brennan in *Grady* are that the *Blockburger* test is insufficient to adequately protect the accused against double jeopardy. On the facts present in *Grady*, exclusive application of the *Blockburger* test would have allowed not less than four successive trials for the same criminal conduct. The majority in *Grady* pointed out that an exclusive application of *Blockburger* could defeat the values which underlie the constitutional guarantee against double jeopardy; multiple prosecutions for essentially the same conduct not only raise concerns of an enhanced sentence, but also about providing an unfair opportunity for the state to improve on its presentation of evidence (including cross-examination of witnesses for the defence) in the first trial, thereby *enhancing the possibility that an innocent person could be found guilty*. These considerations led the majority in *Grady* to believe that the state had no legitimate interest in relitigating the first fact finder's culpability

determination.

* The test proposed in *Grady* prohibits relitigation of the same criminal conduct. There is a subtle difference between the *same conduct* on the one hand, and the *presentation of the same actual evidence* on the other hand. The same conduct test (as explained in *Grady*) does not necessarily bar the introduction of the same evidence which was presented in the previous trial. The crucial enquiry is whether the criminal *conduct* which has already been adjudicated upon in the first trial (in *Grady*, the driving of a motor car on the wrong side of the road), again forms the subject of adjudication in the second trial. It follows that the introduction of similar fact evidence in a trial is not prohibited in terms of the test.

* It has also been pointed out that application of the same conduct test in practice may give rise to a number of difficulties. Concerns raised in this regard are the following. A person convicted or acquitted of a minor traffic offence might never be called to account in a subsequent legal proceeding for a death following from such traffic offence. Therefore, legal commentators have suggested that certain exceptions should be introduced to the rule. Proposed exceptions are, *inter alia*, the following: prosecution for the more serious offence is not possible at the time of the first trial (the Diaz due diligence exception); the accused obtains a conviction of the less serious offence as a result of collusion with a public officer, and the accused is responsible for the institution of the procedural steps that leads to separate prosecutions.

* A second criticism which deserves to be mentioned is that raised by Justice Scalia in his minority opinion in *Grady*. Justice Scalia

questioned the "rational basis"³⁹¹ of the same conduct test as proposed in *Grady* on the basis that if the evidence introduced in the second trial to prove an essential element of the offence charged must prove *conduct that constitutes an offence of which the accused had previously been convicted or acquitted*, it would mean that prosecution for a lesser offence may follow upon prosecution for a greater offence. For instance, prosecution for drunken driving could follow on a prosecution for vehicular manslaughter based on the same conduct. This can be explained as follows. If the prosecution relies on the drunken driving conduct of X (which had been relied on in the first trial on a charge of vehicular manslaughter) to prove the offence of drunken driving in the second trial, the *Grady* test would not assist the accused because the conduct relied on in the second trial would not qualify as *conduct that constitutes an offence for which the accused had previously been convicted*.

* In *US v Felix* the Supreme Court delineated the first exception to the *Grady* same conduct test. The court limited the application of the criterion to cases arising out of a single course of conduct (*single-layered conduct*) as opposed to cases arising out of continuous criminal activity (*multi-layered conduct*). *Felix* gave a clear indication that the court was unwilling to give expanded protection to the accused in terms of the same conduct test, particularly in the field of continuous criminal conduct. The court did not explain why *Grady* should be limited to single-layered conduct, or how courts should distinguish between single and multi-layered conduct.

* The *Grady* same conduct test was subsequently rejected by the Supreme Court in *US v Dixon*. Faced with the difficult issue of determining whether the double jeopardy clause barred prosecution of

³⁹¹Per Justice Scalia in a minority opinion in *Grady* 536.

an accused on substantive criminal charges for the same conduct of which he has previously been held to be in criminal contempt of court, the court opted to resort to *Blockburger* as the exclusive criterion for determining sameness of offences. The majority of the court preferred this approach to recognition of more exceptions to the same conduct test. However, the division of the majority on the proper application of *Blockburger* added more confusion than certainty in this particular field of double jeopardy jurisprudence. It has been suggested, for instance, that Justice Scalia's application of the *Blockburger* test (in *Dixon*), namely by examining whether an offence is incorporated as a lesser included offence of another *without* necessarily inquiring whether each offence has an additional element distinct from the other, in reality focused on the *facts* underlying the contempt orders instead of on the statutory elements of the offences (as required by a strict reading of *Blockburger*). However, it has also been observed that a broader application of *Blockburger*, namely by examining whether one offence is incorporated as a lesser included offence of another without necessarily enquiring whether each offence has an additional element distinct from the other, may result in expanded protection where it is found that comprehensive statutory schemes incorporate more narrowly drawn provisions.

* The above observations regarding the ambit of the *Blockburger* test after *Dixon*, can be described as mere speculation of future double jeopardy jurisprudence in this particular field. Whereas *Dixon* and *Grady* both turned on a single vote, the question of whether *Blockburger* provides adequate double jeopardy protection for defendants may still be revisited in American constitutional jurisprudence.

4.6 SOUTH AFRICAN LAW

4.6.1 General

As indicated in chapter three, colonial courts relied exclusively on common law principles in order to solve double jeopardy issues.³⁹² It was only in 1933, in the case of *R v Manasewitz*,³⁹³ that the Appellate Division laid the foundation for the application of broader principles based upon equitable considerations in this particular field of law. However, before considering the *Manasewitz* decision, it is necessary to focus on a number of the early cases.

As a point of departure it is essential to point out that the courts (in the early cases) did not draw a proper distinction between rules which prohibit multiple punishment in one trial on the one hand and rules which prohibit successive prosecutions for the same offence on the other hand. This can be ascribed to a failure by the courts to consider the particular values which underlie each of these prohibitions. Instead, the courts simply referred to both these different procedural phenomena as "splitting of charges".³⁹⁴ The result of this approach was that the same criteria came to be applied in both contexts; cases which dealt with the issue of multiple charges in one trial relied upon decisions dealing with the pleas of former jeopardy and vice versa. It was only in 1936 that the Appellate Division drew a distinction

³⁹²The courts relied on English textbooks and authoritative case law dealing with the pleas, for example the early common law decisions of *Elington* and *Miles*. See chapter two *supra* under 2.3.2, text at notes 125 and 138 for a detailed discussion of these decisions.

³⁹³*Supra*.

³⁹⁴See for example *R v Van der Merwe* 1921 TPD 1, 4 where the court, in dealing with a plea of *autrefois acquit* referred to cases which have been decided on the question of "splitting of charges".

between these separate prohibitory rules in criminal procedure.³⁹⁵ During the 1960's and 1970's the courts expanded protection in respect of successive prosecutions, in other words in true double jeopardy situations.³⁹⁶ However, most probably as a result of the failure of our courts to distinguish between these different procedural rules in the early cases, the belief has persisted that the criteria to determine the permissibility of multiple punishment in one trial, on the one hand, and the criteria to determine the permissibility of successive prosecutions, on the other hand, are the same.³⁹⁷

This thesis will demonstrate to the contrary that the accused in South Africa has particularly over the last four decades, enjoyed broader protection against successive prosecution for the same offence in a multi-trial context than against the splitting of charges in a single-trial context. This will become apparent in the following discussion of the case law.

4.6.2 The early cases (1855-1930)

In the first decisions in which the defence raised the pleas of former jeopardy, colonial courts applied the criteria advanced in English case law to determine the sameness of offences. The most popular of

³⁹⁵*Ex parte Min of Justice: In re Rex v Moseme* 1936 AD 52, discussed in detail *infra* under 4.6.3.

³⁹⁶See *S v Davidson* 1964 (1) SA 192 (T) and *S v Ndou* 1971 (1) SA 668 (A).

³⁹⁷See Hiemstra *Suid-Afrikaanse Strafproses* 5th ed by Kriegler J 1993 222 (hereinafter referred to as Hiemstra 1993 ed) stating that "[d]ie vraag of daar verdubbeling van aanklagte is [in een verhoor], word presies net so benader soos die vraag of die beskuldigde al voorheen weens dieselfde misdaad tereggestaan het". Cf also Du Toit *et al Commentary on the Criminal Procedure Act* Service 11, 1993 14-5.

these were the in peril test and the same evidence (*Vandercomb*) test.³⁹⁸ The following cases are examples of early application of the in peril test.

In *R v Umbambeni*³⁹⁹ the court allowed a subsequent prosecution for rape after an acquittal for indecent assault on the basis that the accused was not in jeopardy of a conviction of rape at the previous trial.⁴⁰⁰ This approach was endorsed in *R v Nkani*.⁴⁰¹ In that case, the court allowed a subsequent prosecution for indecent assault after conviction of a statutory offence prohibiting the use of indecent language (arising from the same incident). The court argued that the offences were quite distinct because "the prisoner will not have been in peril or jeopardy for the same offence if he be now tried for indecent assault".⁴⁰² *Nkani* was followed by *R v Samoosing and Others*⁴⁰³ (a decision by the same Division), in which the court allowed a charge of assault after a conviction of breach of the peace (arising from the same facts) on the ground that there was not "that identity of crime which would justify us in coming to the conclusion that as a matter of fact he had been in jeopardy twice for the same offence".⁴⁰⁴ The court per Bale CJ, remarked *obiter* that "as a general rule, where as here, two crimes arose out of the same transaction it is better that the man should be tried for the major

³⁹⁸See chapter two *supra* under 2.3.2 for a discussion of the development of these tests in English law.

³⁹⁹(1895) 16 NLR 61.

⁴⁰⁰At 62.

⁴⁰¹(1903) 24 NLR 255.

⁴⁰²At 258.

⁴⁰³(1905) 26 NLR 145.

⁴⁰⁴At 146.

crime".⁴⁰⁵

During the first decades of this century, the in peril test was also applied frequently by other divisions of the Supreme Court,⁴⁰⁶ and eventually approved of and applied by the Appellate Division in *R v Long*.⁴⁰⁷ An example of the early application of the same evidence or *Vandercomb* test can be found in *Kerr v Rex*⁴⁰⁸ which was decided in 1907. The facts were as follows. The accused was charged of murder in the first trial. The evidence presented by the crown was that he first committed a rape and subsequently in order to hide the traces of that crime committed murder. The jury disagreed and the presiding judge discharged them. Thereafter the Solicitor-General withdrew the indictment on which the court discharged the accused. Shortly afterwards he was charged with rape and murder arising from the same incident previously adjudicated upon. His plea of *autrefois acquit* was upheld by the court on the murder charge on the basis that the withdrawal of the indictment amounted to a "stoppage of a prosecution" which was then valid in terms of a specific section of an Ordinance⁴⁰⁹ which entitled the accused to a verdict of acquittal. For the purpose of this discussion the central issue was whether he could nevertheless be charged subsequently for rape as the evidence in both charges would have been the same.⁴¹⁰

⁴⁰⁵*Id.*

⁴⁰⁶See *inter alia* *R v Cassiem* 1914 CPD 886,889; *R v Mabengu* 1914 EDL 21, 22; *Gwenca v Rex* 1938 NPD 163; *Neethling v South African Railways and Harbours* 1938 AD 487, 492.

⁴⁰⁷1958 (1) SA 115 (A). See *infra* under 4.6.4 for a discussion of this case.

⁴⁰⁸(1907) EDL 324.

⁴⁰⁹Section 9 of Ordinance 40 of 1828.

⁴¹⁰At 340.

The court relied on the common law and concluded that "[whereas] the evidence necessary to support the second indictment would [not] have been sufficient to procure a legal conviction upon the first", the plea of former jeopardy could not be sustained.⁴¹¹ The court argued that even though the evidence in both charges was to a great extent the same, it did not follow that the two offences successively charged were necessarily the same. In the court's view, a person indicted and acquitted for murder could still be tried for rape because "in contemplation of law the one does not include the other".⁴¹²

The court considered the rule laid down by Cockburn CJ in *Elrington's case*,⁴¹³ namely that a series of charges should not be preferred out of the same facts.⁴¹⁴ However, it held that the case at hand could be distinguished from *Elrington*. The court stated that in *Elrington*, the defendant had been acquitted of assault and that the court (in that case) had ruled that he could not again be tried for the same assault in a more aggravated form. The court continued by explaining the difference between the case at hand and the decision in *Elrington* as follows⁴¹⁵

That [*Elrington's case*] was, therefore, a case of crime within a crime, the assault in both instances being one and the same act. We have a similar rule in our own criminal practice, which does not allow of a splitting up

⁴¹¹*Id.* The court referred *inter alia* to Archbold 1900 ed 155 and the discussion therein of the facts and test (same evidence test) advanced in *Vandercomb's case*.

⁴¹²At 342.

⁴¹³See chapter two *supra* under 2.3.2, text at note 125 for a discussion of this case.

⁴¹⁴At 342.

⁴¹⁵*Id.*

of charges, where in reality they are comprised in one transaction.....But rape and murder are not the same crime or transaction, although on an indictment for rape or murder a verdict of assault is a possible and a legal verdict.

In an approach similar to that adopted in *Vandercomb*, the court in *Kerr* focused upon the legal elements of offences in order to determine their sameness and not on the similarity of the evidence presented in both trials, despite the fact that the test employed was labelled the same evidence test.⁴¹⁶

A third test suggested during this early period was the single intent criterion. First suggested in cases which dealt with the issue of splitting of charges in a single trial,⁴¹⁷ it was thereafter also applied in cases which dealt with the pleas of former jeopardy.⁴¹⁸ Therefore it is essential to explain this criterion's evolution in the case law.

In *R v Sabuyi*, the issue before the Supreme Court was whether convictions and cumulative sentences for both the offences of unlawful breaking into a home and theft amounted to an improper splitting of charges. The court concluded that it did. Innes CJ

⁴¹⁶The same evidence test was subsequently applied in *Petersen v Rex* 1910 TPD 859. In that case, the court allowed a subsequent prosecution (on the same facts) for gross indecency following on an acquittal of indecent assault on the ground that the parties had consented. The court argued (at 866) that "there are other elements in a charge of indecent assault which are entirely wanting in a case of contravention of the section in question [gross indecency]".

⁴¹⁷The test was first introduced in *R v Sabuyi* 1905 TS 170, a case which dealt with the issue of improper splitting of charges in a single trial.

⁴¹⁸See for example *R v Van der Merwe supra* discussed *infra*, text at note 427.

approached the problem as follows. He observed that although the offences charged were separate criminal offences *in law* "that does not in itself settle the question".⁴¹⁹ He continued by saying that⁴²⁰

where a man commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then it seems to me that he ought only to be indicted for one offence; because the two acts constitute one criminal transaction..... [Thus] where the intent with which the man breaks into the premises is the intent which he successfully carries out afterwards, then it seems to me that his conduct should be regarded as constituting not two crimes, but one crime.

Sabuyi was followed by *Gordon v Rex*,⁴²¹ another multiple charges single trial decision. In that case, the court relied on the English decision of *Vandercomb* and applied the same evidence test to determine the permissibility of multiple charges in one trial.⁴²² However, Kotze JP's formulation of the test differed from the *Vandercomb* version and is strongly reminiscent of the American model.⁴²³ He suggested that⁴²⁴

where two different indictments or counts *each* lay a charge differing in its elements from that laid in the other, though they both relate to one transaction, there the offences are separate and distinct.

⁴¹⁹At 171.

⁴²⁰*Id.*

⁴²¹1909 EDC 254.

⁴²²At 264.

⁴²³See *supra* under 4.5.2 for a discussion of the test advanced in the early American decision of *Morey v Commonwealth*.

⁴²⁴At 269, (my emphasis) remarking that this rule is also supported by *Kerr v Rex*.

However, the traditional same evidence test (the *Vandercomb* version) was thereafter again applied by another division in *R v Klaas*.⁴²⁵ In that case (which allowed a charge of housebreaking and theft after a previous acquittal of sedition arising from the same incident) the court reiterated the reasoning adopted in *Kerr*, namely that the fact of the same actual evidence being relied on in both cases, was not sufficient to bar the subsequent charges.⁴²⁶

In *R v Van der Merwe*⁴²⁷ the Transvaal Provincial Division applied both the same evidence and the single intent tests in the context of successive prosecutions. Van der Merwe was first charged and acquitted of a statutory offence of indecently exposing his person. Thereafter he was charged of soliciting a woman on the basis of the same facts. The defence raised the plea of *autrefois acquit*, arguing that, the exposure was a mere continuation of soliciting in an aggravated form. It was submitted that all the acts of the accused were part of the same transaction; the indecent exposure being merely another step in the accused's main object, namely soliciting of the woman. In the defence's view, because all the acts of the accused formed part of the same transaction, there had been a splitting of charges.⁴²⁸

Mason J, rejected this argument. In his view, the evidence did not reveal that the accused had exposed himself with the object of obtaining compliance with his rejected request already refused (namely to have sexual intercourse with the woman) but rather amounted to a

⁴²⁵1915 CPD 58.

⁴²⁶At 63.

⁴²⁷*Supra*.

⁴²⁸At 2.

separate "act of a dirty minded man".⁴²⁹ Therefore, the single intent test could not assist the accused. The court also applied the same evidence test, commenting that this test as suggested in the decisions "seems on the whole a fair and reasonable test".⁴³⁰ The court then concluded that since each of the crimes could be proved by evidence "which had no necessary connection with the evidence on the other charges" the plea of *autrefois acquit* could not be sustained.⁴³¹

4.6.3 Refinement of double jeopardy principles during the 1930's - *Dayzell, Manasewitz and Moseme*

The courts handed down three decisions during this period which refined the law of double jeopardy in the context addressed in this chapter. In the first of these, *R v Dayzell*,⁴³² the exception of subsequent death was recognised.⁴³³ Dayzell was indicted for culpable homicide despite the fact that prior to the death of the deceased and on the same evidence, he had been convicted of the statutory offence of negligent driving. The defence did not raise the plea of *autrefois acquit* (common law authorities being not being very helpful to their case),⁴³⁴ but relied on section 385 of Act 31 of 1917

⁴²⁹At 4.

⁴³⁰*Id.*

⁴³¹*Id.*

⁴³²1932 WLD 157.

⁴³³See *supra* under 4.2.1, 4.4.2 and 4.5.2 for a discussion of recognition of this exception in other legal systems.

⁴³⁴See chapter two *supra* under 2.3.2, text at note 127 for a discussion of English common law law on this issue.

which provided that⁴³⁵

[w]here an act or omission constitutes an offence under two or more Statutes, or is an offence against the Statute and the common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either Statute or (as the case may be) under the Statute or the common law, but shall not be liable to more than one punishment for the act or omission constituting the offence.

The submission of the defence that the accused had, in terms of this provision, already been convicted of an act or omission identical to the act or omission set out in the second indictment was rejected by the court. Krause J argued that at the time when the accused had been charged with the act of negligent driving, no offence under the common law has as yet arisen because the offence of culpable homicide had only originated with the death of the person injured. In other words, the section could not assist the accused because the common law offence only arose after the trial for the statutory offence.⁴³⁶

The second case, *R v Manasewitz*,⁴³⁷ is regarded as one of the landmark decisions on double jeopardy. It is also one of the most difficult decisions to understand in the field of double jeopardy. A number of complicated issues concerning the application of the rule of *res judicata* were raised in this case. However, the immediate discussion will deal mainly with the broader principles of double jeopardy introduced in this case, inasmuch as they are relevant to the

⁴³⁵This provision still forms part of the present Criminal Procedure Act (section 336 of Act 51 of 1977).

⁴³⁶At 159.

⁴³⁷*Supra*.

issues addressed in this chapter.⁴³⁸

The facts of this case were as follows. M was charged in the magistrate's court with defrauding the Secretary for Lands. He was convicted. He then successfully appealed to the Transvaal Provincial Division on the ground that it was the Union Government which had been prejudiced by his misrepresentation and not the Secretary of Lands. He was subsequently prosecuted in the magistrate's court on a charge of having defrauded the Union Government. He raised the plea of *autrefois acquit* which was rejected and he was convicted of fraud. He then appealed once again to the Transvaal Provincial Division, contending that he had been in jeopardy of a conviction of fraud of the Union Government at the first trial despite having been charged with fraud of the Secretary of Lands in that trial. His appeal was dismissed and he then appealed to the Appellate Division. The matter was argued twice in the Appellate Division.⁴³⁹ At the first hearing, the central issue before the court was whether the accused was legally in jeopardy of being convicted of the crime of fraud to the prejudice of the Union Government at the first trial (despite the fact that fraud of the Secretary of Lands was alleged in the charge sheet).

The majority of the court (Stratford ACJ, Beyers JA and De Villiers JA) first of all affirmed that they had the power to go beyond the decision of the provincial division (a decision that fraud of the Secretary of Lands did not also amount to fraud of the Union Government). In other words, the court did not regard that particular

⁴³⁸ *Manasewitz* is once again discussed in the paragraph which deals with issue estoppel. See *infra* under 4.6.9.

⁴³⁹ 1933 AD 165 and 1934 AD 95.

decision as *res judicata*.⁴⁴⁰ The court then ruled that if the appellant had been legally in jeopardy at this first trial of being convicted of the offence with which he was charged at his second trial, he could validly plead *autrefois acquit* at his second trial. In order to determine this question the majority felt that it ought to have the record of the first trial before it. In the second hearing (after having obtained the record), it was held (per Stratford JA, Beyers JA De Villiers JA and Gardiner AJA) that the first charge had by implication in fact meant, that prejudice had been caused to the Secretary of Lands in his capacity as a servant of the Union Government. In other words, that the Union Government had in fact been prejudiced. It followed that M had been in jeopardy at his first trial of being convicted of the offence with which he was charged subsequently. Therefore, the court concluded that his plea of former jeopardy should have been sustained at the second trial.

It is clear that the court applied the in peril test in this case in order to determine the permissibility of the second trial.⁴⁴¹ However, the importance of the decision lies in the fact that the Appellate Division also introduced broader criteria based on Roman and Roman-Dutch law to determine whether a subsequent prosecution should be prohibited.

⁴⁴⁰This particular aspect of the judgment, namely that the majority of the Appellate Division did not regard the provincial division's decision as *res judicata*, is considered and explained in the paragraphs that deal with the doctrine of issue estoppel *infra* under 4.6.9, text at note 567.

⁴⁴¹The majority agreed that in order to succeed with a plea of *autrefois acquit*, it had to be shown that the court had jurisdiction, that the accused was in jeopardy at the first trial and acquitted on the merits. See the opinions of Wessels CJ 173; De Villiers JA 179, 181; Stratford JA 173 and Curlewis JA dissenting in part but endorsing the view (at 188) that "a plea of former acquittal or conviction is a good defence to a second indictment not only for the same crime, but also for any other crime of which the accused might in law have been convicted on the first indictment".

In his judgment, Wessels CJ made certain statements that substantiate this understanding of the decision. He stated that in South African law, "a plea of *autrefois acquit* is in fact equivalent to a plea of the *exceptio rei judicatae*" of Roman law.⁴⁴² Relying on a text by Voet,⁴⁴³ he explained that no distinction is made between civil and criminal matters with regard to the plea of former jeopardy in our law.⁴⁴⁴ The principles of the *exceptio rei judicatae*, as recognised in civil law, should therefore also find application in the field of criminal law. The Chief Justice explained that in terms of these principles "the question whether a defendant is being vexed again for the same cause of action depends not upon technical considerations but upon matters of substance".⁴⁴⁵ This principle is also at a later stage reiterated by Wessels CJ in the following terms⁴⁴⁶

The application of the rule depends not upon any technical considerations of the identity of forms of action, but upon matters of substance.

Beyers JA supported these views, observing that the *exceptio rei judicatae* finds application in both civil and criminal cases.⁴⁴⁷ He added that the doctrine of *res judicata* originated from notions of

⁴⁴²At 168, expressing the view that the maxim *nemo debet bis vexari* is derived from the Roman law of the *exceptio rei judicatae*.

⁴⁴³44.2.1. See chapter two *supra* under 2.2, text at note 14 for this text.

⁴⁴⁴At 169, citing Voet 44.2.1.

⁴⁴⁵*Id.* The Chief Justice relied on the common law decision of *Brunsdon v Humphrey* 14 QBD 141, 147-148.

⁴⁴⁶At 169-170.

⁴⁴⁷At 176. The judge relied upon Voet 44.2.1.

fairness and reasonableness⁴⁴⁸

Die leer van *res judicata* is juis die gevolg van en het ontstaan uit die natuurlike billikheidsgevoel wat die woorde *non bis in idem* of *nemo debet bis vexari* ens. ten grondslag lê. Dit druis teen die natuurlike regsgevoel of regskepeneid in dat iemand tweemaal vir dieselfde misdaad moet vervolgd of gestraf word.

The broader principles of *res judicata* introduced in *Manasewitz* paved the way for expanded protection in the particular field of double jeopardy addressed in this chapter. The emphasis placed on "matters of substance" as opposed to "technical considerations"⁴⁴⁹ sent a clear signal to the courts that the artificial same evidence and in peril tests, (although useful), could not be regarded as the only criteria to determine whether a successive prosecution ought to be prohibited on double jeopardy grounds. Nevertheless, the courts continued to apply these common law tests during the 1950's and 1960's. The only exception was *S v Davidson*.⁴⁵⁰ In that case, the Transvaal Provincial Division (on the strength of *Manasewitz*) afforded broader protection to the accused by focusing upon the criminal conduct successively charged instead of the legal elements of the offences successively charged. This approach was subsequently (in the early 1970's) considered and approved of by Appellate Division in *S v Ndou*.⁴⁵¹ These cases will only be discussed at a later stage in this chapter.⁴⁵²

⁴⁴⁸At 178.

⁴⁴⁹See *supra* texts at notes 445 and 446.

⁴⁵⁰1964 (1) SA 192 (T).

⁴⁵¹1971 (1) SA 668 (A).

⁴⁵²See *infra* under 4.6.5 and 4.6.6.

The third and final decision which deserves specific mention under the present heading, is the decision of the Appellate Division in *Ex parte Minister of Justice: In re Rex v Moseme*.⁴⁵³ This decision finally brought clarity with regard to the difference between the pleas of former jeopardy and the rule against improper splitting of charges in one trial. De Villiers JA explained (in this case) that the question of splitting of charges can only arise in a case where an accused is charged in one and the same trial with several offences arising out of the same act or with a connected series of acts or transaction.⁴⁵⁴ The pleas of *autrefois acquit* and *autrefois convict* on the other hand, may be raised by a person who, previously acquitted or convicted of an offence, is subsequently charged with "an offence or offences arising out of the same transaction."⁴⁵⁵

The judge continued by explaining that the rule against splitting of charges in one single trial did not originate from the maxim *nemo debet bis vexari*. Instead, he suggested that the rule "owes its origin to the necessity of confining the magistrates' courts jurisdiction as to punishment within its due merits".⁴⁵⁶ He explained that if acts constituting "one offence in substance" were allowed to be split up into several offences and all such offences charged against the accused in one trial, it would have the effect of multiplying by several times the magistrates' jurisdiction with regard to the imposition of

⁴⁵³1936 AD 52.

⁴⁵⁴At 57.

⁴⁵⁵*Id.*

⁴⁵⁶At 58. De Villiers JA relied upon the early case of *Regina v Marinus* 1887 (5 Juta 350) for this suggested rationale of the rule. In that case, the court described it an "objectionable practice" to split up charges and so to enable the court to impose punishment, on the whole, far in excess of the limit of the jurisdiction conferred on it by the legislature.

punishment.⁴⁵⁷ He continued by pointing out that in applying the rule against splitting of charges, the courts have experienced difficulty in deciding whether, in a particular case, the accused's conduct constitutes only "one offence in substance".⁴⁵⁸ He then referred to the various tests advanced in different decisions namely, the single intent test (suggested in *Sabuyi's* case)⁴⁵⁹ and the same evidence test suggested in *Gordon's* case),⁴⁶⁰ and concluded that, depending

⁴⁵⁷At 58. The court relied on the early case of *Rex v Marinus* 1887 (5 Juta 350) in which Buchanan J identified the rationale which underlies the rule against splitting of charges in this sense. The rationale of the rule was subsequently reconsidered by the Appellate Division in *S v Grobler* 1966 (1) SA 511 (A). In this case the court pointed out that the rule is also essential to prevent multiple punishment of the accused for the same act. The court also explained (at 523B) that an improper duplication of conviction may prejudice an accused in the sense that a number of previous convictions proved against him may render him liable to one or other form of compulsory punishment upon a conviction of another offence in a subsequent trial. Cf also the views of Coetzee TF "Splittings van aanklagte" *South African Journal of Criminal Justice* 1993 Vol 6 292 on the rationale of the rule.

⁴⁵⁸At 59.

⁴⁵⁹See *supra* text at note 417 for a discussion of *Sabuyi's* case.

⁴⁶⁰See *supra*, text at note 421 for a discussion of *Gordon's* case. In *S v Grobler* (*supra*) the court seemingly added another test to determine whether there is an improper duplication of charges in one trial. The court emphasised the conduct of the accused by enquiring whether all the criminal aspects of the accused's conduct could be contained in the same charge. (At 523B Wessels JA enquired whether "the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge". (My emphasis). However, as pointed out by Du Toit *et al* (14-7) *Service* 12 1993 this is merely a different expression of the same evidence test. The focus remains on the elements or legal ingredients of the offences; if the criminal aspects or elements of the offences differ, they cannot be contained in one charge and then the test would not prevent multiple charges.

on the circumstances, both these tests, or only one may be applied in order to determine whether an improper splitting of charges has occurred.⁴⁶¹

The judge then discussed the pleas of former jeopardy. He concluded that, in order to succeed with these pleas "it is as a general rule essential for an accused person to show (*inter alia*), that he was legally in jeopardy, on his first trial of being convicted of the offence wherewith he is charged on his second trial".⁴⁶²

During the next three decades, the in peril test as applied in *Manasewitz* and approved of in *Moseme*, was employed by our courts in the vast majority of double jeopardy decisions.⁴⁶³ A number of these decisions will be considered in the text that follows.

4.6.4 The "in peril" test acquires superior status - (1940-1970).

The in peril test was again applied by the Appellate Division in *R v Long*.⁴⁶⁴ The accused was charged with theft of shares. At the close of the state's case she was discharged on the ground that the evidence did not make out a *prima facie* case of theft of shares. She

⁴⁶¹At 159.

⁴⁶²At 60, citing *Rex v Manasewitz* as authority.

⁴⁶³See *Neethling v South African Railways and Harbours* 1938 AD 492; *Gwenca v Rex* 1938 NPD 163; *R v Long* 1958 (1) SA 115 (A); *R v Ngetu* 1958 (4) SA 175 (C); *O'Neill v South African Railways and Harbours* 1958 (3) SA 269 (A); *R v Hlengwa* 1958 (4) SA 160 (N); *R v Schuza* 1959 (3) SA 538 (T); *R v Constance* 1960 (4) SA 629 (A); *S v Makutani* 1961 (3) SA 799 (T); *S v Sikiti* 1962 (1) SA 493 (E); *S v Xoswa and Another* 1964 (2) SA 459 (C); *S v Pokela* 1968 (4) SA 702 (E) and *S v Watson* 1970 (1) SA (RA) 3201.

⁴⁶⁴*Supra*.

was then charged (on the same facts) of theft of money. This time it was alleged that she stole the proceeds of the sales of the shares in the form either of the cheques or of the money represented by the cheques.⁴⁶⁵ She raised the plea of *autrefois acquit* which was rejected by the court. In an appeal to the Appellate Division on the ground that she had previously been acquitted (in terms of section 169(2)(d) of the Criminal Procedure Act 56 of 1955)⁴⁶⁶ of the offence with which she was now charged, Schreiner JA made the following statement⁴⁶⁷

The plea recognised by sec. 169(2)(d) of the Criminal Code is 'that he has already been acquitted of the offence with which he is charged'. It is not enough to support the plea that the facts are the same in both trials. The offences charged must be the same, but *substantial identity* is sufficient. If the accused could have been convicted at the former trial of the offence with which he is subsequently charged, there is substantial identity, since in such a case acquittal on the former charge necessarily involves acquittal on the subsequent charge. Another way of putting it is that he must legally have been in jeopardy on the first trial of being convicted of the offence with which he was charged at the second trial.⁴⁶⁸

The court held that since the appellant was charged in the first trial

⁴⁶⁵At 117.

⁴⁶⁶Section 169(2)(c) and (d) of Act 56 of 1955 recognised the pleas of former jeopardy. It provided that an accused may plead that he has already been convicted (c) or acquitted (d) of the offence with which he is charged. Similar provisions are contained in section 106 (c) and (d) of the present Criminal Procedure Act 51 of 1977.

⁴⁶⁷At 117G-H.

⁴⁶⁸My emphasis. The court relied upon *Manasewitz, Moseme* and the English case of *Rex v Barron* (discussed in chapter two *supra* under 2.3.2, text at note 118).

with theft of shares, she could not have been convicted of the theft of the cheques or money at that trial without an amendment of the indictment which had in fact not occurred. Therefore her plea of *autrefois acquit* could not be sustained.⁴⁶⁹

The "in peril" test was again applied by the Appellate Division in *O'Neill v South African Railways and Harbours*.⁴⁷⁰ O'Neill was a railway ticket examiner who had been acquitted by a court of law of a charge of theft of certain moneys alleged to have been paid to him by certain passengers for tickets. It was common cause that he had not handed over tickets to them and also did not hand over any money to the Administrator. However, the state could not prove that he had received the money and he was therefore acquitted. He was subsequently charged with the same misconduct, which was also a contravention of a certain statutory interdepartmental Railway instruction. After receiving notice of the departmental disciplinary inquiry to be undertaken against him, he applied to the Supreme Court for an interdict which would prevent the Railways from proceeding with the enquiry. His case was based on a specific section of the (then existent) Railway Act⁴⁷¹ which prohibited a disciplinary charge or punishment of an employee for misconduct for the same offence of which he had previously been acquitted by a court of law.

The issue before the Appellate Division was whether he had in fact

⁴⁶⁹A further contention raised by the defence, namely that the defendant might have been convicted had the charge in reality been amended, was likewise rejected by the Appellate Division (at 118). See chapter three *supra* under 3.6.2, text at note 283 for a discussion of this particular aspect of the case.

⁴⁷⁰*Supra*.

⁴⁷¹Section 16(5) of the Railways and Harbours Service Act 23 of 1925.

been acquitted of the same offence. An application of the in peril test would obviously have allowed the subsequent departmental inquiry for the same misconduct. However, counsel for the appellant raised the following argument.⁴⁷² In *Manasewitz* Wessels CJ equated a plea of *autrefois acquit* to a plea of *res judicata* and emphasised that it is necessary to consider the substance and not the form of the subsequent charge. A plea of *res judicata* not only includes a previous decision for which relitigation is sought, but also facts which have been decided in an earlier trial (whether civil or criminal) between the same parties. In other words, it was argued that by equating *autrefois acquit* with *res judicata* the court had given it a wider meaning which also covered cases of estoppel in respect of particular facts which would lead up to the verdict. Schreiner JA rejected this argument. In his view, the *dicta* of Wessels CJ in *Manasewitz* could not be interpreted so broadly. He expressed the view that "[a]ll that could have been intended was that *autrefois acquit* is one of the forms of *res judicata* in our law".⁴⁷³ He added that the expression (namely that the pleas of former jeopardy and *res judicata* are equivalent) was introduced in *Manasewitz*

to support the conclusion that, looking at the substance of the matter, as should be done in cases of *autrefois acquit*, it is not merely the names of the crimes and the misconduct that matter but their real equivalence.⁴⁷⁴

However, the court ruled that in the past this consideration of the substance of the matter was held to justify treating the offences as the same "whenever the charge on the first was such as in law to

⁴⁷²At 275C-D.

⁴⁷³At 275.

⁴⁷⁴At 276A-B.

permit a verdict of guilty on the second to be returned".⁴⁷⁵ Therefore the in peril test was once again approved of and applied in this case, despite closer scrutiny and recognition of the broader principles introduced in *Manasewitz*.⁴⁷⁶

Two subsequent decisions, *Rex v Schuza*⁴⁷⁷ and *S v Makutani*⁴⁷⁸ serve as good illustrations of the inadequacy of the in peril test to protect the individual against repetitive harassment by the state for substantially the same criminal conduct. In *Schuza* the accused had been found guilty on a charge of extortion. He was sentenced to six months imprisonment. At a later date, he was charged again on the same facts, this time for theft of a wristwatch. He was convicted of this offence and again sentenced to six months imprisonment. The evidence relied on by the state in both cases was that the accused had pretended to the complainant that he was a railway constable; that he had arrested him on the ground that he

⁴⁷⁵*Id.*

⁴⁷⁶The in peril test was subsequently applied by the Appellate Division in *R v Constance* (*supra*). In that case, the court once again emphasised that the fact that the same evidence is rendered in both trials is not decisive in determining whether successive prosecutions for offences are prohibited. However, the court ostensibly also based its conclusion that the offences charged successively (namely robbery and murder) were different on the basis that the intention required for these respective crimes differs radically (at 636F). In a subsequent decision, *S v Vorster* 1961 (4) SA 863 (O) the court remarked that the pleas of former jeopardy rest not only on the doctrine of *res judicata*, but also on considerations of reasonableness contained in the maxim *nemo debet bis vexari* (at 866). However, the court did not suggest that any broader protection should be afforded to the accused on these grounds; it suggested that the in peril or the same evidence tests should be applied to determine whether a successive prosecution ought to be barred (at 867).

⁴⁷⁷*Supra.*

⁴⁷⁸*Supra.*

failed to carry a reference book and that he had told him that he would release him if he handed over his wristwatch.⁴⁷⁹ The complainant refused this request, but shortly thereafter he felt the watch being plucked off his arm by the accused.

On review, the court held that although both cases were based on the same facts, a plea of *autrefois convict* could not be sustained because the accused was not in peril of a conviction of theft at the first trial.⁴⁸⁰

In *S v Makutani*,⁴⁸¹ the accused was first charged of a statutory offence which, in essence, prohibited the brewing and/or possession of a substance known as skokiaan.⁴⁸² He raised the plea of *autrefois acquit* on the ground that he had previously been charged and acquitted of a different but similar statutory offence. The essential elements of that offence were the brewing and/or possession of a substance *similar* to the substance known as skokiaan.⁴⁸³ The court rejected his plea of *autrefois acquit* on the basis that he could not have been convicted on the first indictment of the offence subsequently charged.⁴⁸⁴ However, the court was not entirely happy with its conclusion. Jansen J expressed his dissatisfaction as

⁴⁷⁹At 539F.

⁴⁸⁰At 539H-540A. The court applied the in peril test, relying on *Long* and *Manasewitz*. However, the court held that the sentences imposed should run concurrently.

⁴⁸¹*Supra*.

⁴⁸²At 799F.

⁴⁸³At 800D.

⁴⁸⁴At 802E.

follows⁴⁸⁵

Bedenkinge teen hierdie slotsom kan uit die volgende oorweging voortvloei. Gestel die appellant was in die eerste saak skuldig bevind soos aangekla en hy is toe weer aangekla soos in die tweede saak. As hy dan die verweer van *autrefois convict* geopper het, wat sou die posisie gewees het? Die grondslag van hierdie verweer skyn in die algemeen dieselfde te wees as die verweer van *autrefois acquit* Volg dit nie nou op die voorgaande benadering dat die verweer van *autrefois convict* ook sou misluk nie? En dat die appellant dus vir een en dieselfde handeling dus twee skuldigbevindings en strawwe sou kon oloop nie? Hierteen rebelleer die regsgevoel - 'n regsgevoel wat hom ook openbaar in die sg reël teen splitsing van aanklagte....

The court suggested that a sense of justice (regsgevoel) could be satisfied in such instances, by the use of other measures which fall outside the ambit of the specific pleas of former jeopardy.⁴⁸⁶ However, he found it unnecessary to decide whether South African law provides for broader protection in this particular field, as is the position in English law.

4.6.5 *S v Davidson* paves the way for broader protection - the "same conduct" test introduced

One decision which was handed down in the sixties is worthy of a separate discussion. In this decision, *S v Davidson*, the Transvaal Provincial Division moved away from a strict element based approach

⁴⁸⁵At 802F-G.

⁴⁸⁶At 802H-803A. Jansen J referred in this regard to English authority (*R v Barron & R v King*,) which suggested that the courts use its inherent discretionary powers to prevent a subsequent trial in such instances. See chapter two *supra* under 2.3.2 for a detailed discussion of these cases.

to a more equitable same conduct approach. Davidson was initially charged with two offences. Forgery, and uttering of a forged instrument knowing it to be forged. He was acquitted on both charges. Thereafter, he was again charged on the same facts; this time, however, he was charged with theft and alternatively with fraud. The relevant facts in respect of the second charge (in support of the main as well as the alternative count) were the same as in the previous trial. These were that the accused presented a forged document which he knew to be forged as if it were valid and thereby obtained value for it from a Mr X who was induced by the misrepresentation to give such value.⁴⁸⁷ The magistrate upheld the accused's plea of *autrefois acquit* but the prosecution appealed against that decision.

On appeal Colman J first of all remarked that the second charge (of theft and fraud) was based on the "same transaction" which formed the basis of the first charge (of forgery and uttering).⁴⁸⁸ However, he then referred to the famous *dicta* in *R v Long* by Schreiner JA, namely that it is not enough to support pleas of former jeopardy that the facts are the same in both trials; the offences charged must also be the same, but substantial identity is sufficient.⁴⁸⁹ The prosecution (in *Davidson's* case) argued that substantial identity was lacking between the offences of uttering and fraud, because of the "difference between the definition[s]" of these offences.⁴⁹⁰ The prosecution also submitted that the test suggested in *Long* to establish substantial identity, namely the in peril test, had not been complied

⁴⁸⁷At 194E.

⁴⁸⁸At 194H-195A.

⁴⁸⁹See *supra*, text at note 468 for the exact citation from *Long*.

⁴⁹⁰At 196B.

with.⁴⁹¹

Colman J, disagreed with these contentions. As a point of departure, he referred to the approach adopted in *Manasewitz* by Wessels CJ, namely that the rule of former jeopardy does not depend "upon any technical consideration of the identity of forms of action, but upon matters of substance".⁴⁹² Elaborating on this premise, he made the important statement that in order to apply the test of substantial identity defined in *Long*, the court should "go beyond the definitions of the two or more offences which fall to be considered".⁴⁹³ The judge expressed the point of view that, in order to establish substantial identity, the court should compare the offences as charged, and

... if the offences *as charged* are identical in substance, even though they may differ in immaterial respects, the test is, in my judgment, satisfied.⁴⁹⁴

Judge Colman explained the above statement by adding the following statement⁴⁹⁵

If specific unlawful *conduct* is such that it may properly be described and charged as the commission of more than one crime known to our law, to charge a man with two of those crimes on those facts would be to charge him twice with the same offence, or substantially the same offence under different names.

⁴⁹¹At 197A.

⁴⁹²At 195H, citing Wessels CJ in *Manasewitz* (165).

⁴⁹³At 196C.

⁴⁹⁴*Id.* (My emphasis).

⁴⁹⁵At 96D-E.

He then applied these rules to the facts of the case concluding that whatever the definitions of the particular offences charged successively had been, it was nevertheless clear that the prosecution had relied on the same *conduct* in both trials.⁴⁹⁶ In his view, the idea that a person could have been found guilty of the uttering charge and punished, and again convicted of the same conduct after being charged of theft or fraud; "would offend against one's sense of justice".⁴⁹⁷

The shift in focus from the traditional same elements approach to a same conduct approach could be regarded as a significant breakthrough in South African law on double jeopardy. Being fully reconcilable with the broader criteria of *res judicata* introduced (and explained) in *Manasewitz*, the decision in *Davidson* can also not be regarded to be without precedent. Nevertheless, an elements approach was maintained by other divisions of the Supreme Court during the 1960's; an approach which suited the state in its endeavours to obtain guilty verdicts for subversive acts against the state, which were prohibited at the time by means of various overlapping statutory offences.⁴⁹⁸ It was only in 1971, in *S v Ndou*,⁴⁹⁹ that the Appellate Division supported the idea of protection against successive prosecutions for the same unlawful conduct.

⁴⁹⁶At 196F.

⁴⁹⁷At 196G. *Cf* also the remarks of Jansen J, in *Makutani* discussed *supra*, text at note 485.

⁴⁹⁸See for example *S v Xoswa* 1964 (2) SA 459 (C) and *S v Pokela* 1968 (4) SA 702 (E). See also Dugard J "Autrefois acquit and substantially identical offences" *South African Law Journal* 1971 301, 304-305 for an example of one single act of subversive conduct punishable (during this period) under four different statutes.

⁴⁹⁹1971 (1) SA 668 (A).

4.6.6 *S v Ndou* - The Appellate Division recognises a "same conduct" approach

In *S v Ndou*, the Appellate Division approved of and applied the same conduct criterion as introduced in *Davidson*. However, certain *dicta* of the court have apparently led to a belief in subsequent decisions that the court (in *Ndou*) merely applied the traditional same-evidence test which focuses upon the elements of offences. A detailed discussion of the *Ndou* decision is therefore essential.

The facts of *Ndou* were as follows. In December 1969, twenty two people were charged with certain statutory offences in terms of the Suppression of Communism Act.⁵⁰⁰ It was alleged by the state that, as members of the banned organisation the ANC, they had acted in concert and with the knowledge that the ultimate aim of the ANC was the violent overthrow of the State and had engaged in a variety of unlawful activities or, had, by engaging in these activities, performed acts calculated to further the aims and objectives of communism. The accused pleaded guilty but before the conclusion of the case, the Attorney-General stopped the prosecution. The accused were accordingly found not guilty and discharged.⁵⁰¹

However, nineteen of the accused together with a certain R, were subsequently charged with having participated in terrorist activities in contravention of section 2(1) of the Terrorism Act. The acts or unlawful conduct alleged in the second indictment were in actual fact a repetition of the conduct which had been alleged in the first indictment. The only fundamental addition to the second indictment

⁵⁰⁰Act 44 of 1950.

⁵⁰¹In terms of section 8 and 169(6) of the Criminal Procedure Act 56 of 1955.

was that these acts were performed with the intention of endangering the maintenance of law and order in the Republic; the specific intention necessary for a conviction of terrorism under section 2(1) of the Terrorism Act. The plea of *autrefois acquit* was raised and upheld in the court of first instance. The state then reserved a question of law to the Appellate Division as to the correctness of this decision.

The central issue before the Appellate Division was whether "substantial identity" existed between the successive charges.⁵⁰² If so, the plea of *autrefois acquit* would have to succeed.⁵⁰³ The state argued (relying upon *Long*), that in relation to *autrefois acquit*, substantial identity comprises only those offences which would have been competent verdicts under the first indictment. In other words, the state contended that, in terms of *Long*, the in peril test should be regarded as decisive in determining substantial identity between offences successively charged.⁵⁰⁴ The defence on the other hand (relying in particular upon *Davidson* and *Manasewitz*),⁵⁰⁵ argued that the plea of *autrefois acquit* was valid inasmuch as the accused had already been acquitted of the same criminal conduct with which they were charged in the second indictment.⁵⁰⁶

Mr Justice Ogilvie Thompson rejected the state's argument. He

⁵⁰²The "substantial identity" criterion was first suggested in *Long's* case. See *supra*, text at note 467.

⁵⁰³At 673D, Ogilvie Thompson JA remarked that "the question for decision in this appeal revolves around the true limits of 'substantial identity' in relation to a plea of *autrefois acquit*".

⁵⁰⁴At 673H-674A.

⁵⁰⁵See *supra* text at note 437 and 487 for a discussion of these decisions.

⁵⁰⁶At 673G.

pointed out that the court's decision in *Long* did not limit the enquiry of substantial identity to application of the in peril test.⁵⁰⁷ He discussed the court's ruling in *Manasewitz*, namely that the plea is based upon the *exceptio rei judicatae* of Roman law⁵⁰⁸ and, indicated that in order to establish a plea of *res judicata* in civil proceedings, it must be shown that the earlier judgment had been in respect of the same subject-matter as that of the second.⁵⁰⁹ He then added that⁵¹⁰

[s]imilarly, it appears to me that, in the criminal law, it is of the very essence of a valid plea of *autrefois acquit* that the *conduct now averred by the State to constitute a crime*, the conduct comprising the charge preferred against the accused in the second indictment, was the subject matter of previous adjudication and acquittal by a competent tribunal".

Ogilvie Thompson JA continued by stating that it was upon "not dissimilar principles" that the plea of *autrefois acquit* was upheld in *Davidson*.⁵¹¹ This is a clear indication that the court in *Ndou*

⁵⁰⁷At 675A-B. He also regarded the court's previous decision in *O'Neill* (discussed, text at note 470) in the same light, namely, that it did not suggest that the in peril test ought to be regarded as the sole or exclusive criterion to determine substantial identity (at 675D).

⁵⁰⁸At 675E .

⁵⁰⁹At 675H, relying upon Digest 44.2.14 and Grotius 3.49. (See chapter two *supra* under 2.1, text at note 9 and under 2.2, text at note 34 for a discussion of these texts).

⁵¹⁰At 675 H-676A (my emphasis). In the judge's view, it is that concept which is embodied in section 169(2) (d) of the previous Criminal Procedure Act (currently contained in section 106 (2) (d) of the present Criminal Procedure Act).

⁵¹¹At 676H. See *supra* under 4.6.5 for a detailed discussion of *Davidson*.

endorsed a conduct as opposed to an elements approach. A confusing aspect of the decision is that the court had also referred to the same evidence test as previously applied in *Kerr v Rex*.⁵¹² The judge remarked that this test (as applied in *Kerr's* case), had been fully reinstated in English law in *Connelly v DPP*.⁵¹³ The court then made the following statement (which has often been cited in subsequent decisions)⁵¹⁴

I come to the conclusion that, in relation to a plea of *autrefois acquit*, "substantial identity" is not - as contended by the State - confined to such offences as would have been competent verdicts at the previous trial. The overall enquiry is whether there exists that identity of subject-matter necessary to establish the *exceptio rei judicatae*. Such identity is well recognised to exist when the crime charged in the second indictment would have been a competent verdict on the first indictment. In my view, however, a plea of *autrefois acquit* tendered in terms of sec. 169 (2) (d) of the Code must also be upheld if the offences charged in the two indictments are substantially the same, even though the offence alleged in the second indictment would not have been a competent verdict in the first indictment. In determining whether substantial identity exists, the Court must, in my opinion, consider the *essential ingredients of the criminal conduct* respectively charged in the two indictments and apply the test as accepted by Kotze JP, in *R v Kerr*, namely: whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment.

Applying these principles to the case before it the court found that

⁵¹²At 678C-D. See *supra* text at note 408 for a discussion of this decision.

⁵¹³At 678F-679E and 680B, referring to Lord Morris' fourth proposition in *Connelly* (see *supra* under 4.2.1, text at note 27 for a discussion of this proposition).

⁵¹⁴At 680D-F.

the state relied on the same conspiracy in both indictments and that both indictments had charged the same activities against the respondents.⁵¹⁵ The court remarked that "in reality, all that the second indictment does, is to repeat with some additions and extensions the acts, namely the same criminal conduct alleged in the first indictment with the added averment of the specific intent [required for a conviction of terrorism]".⁵¹⁶ Ogilvie Thompson JA therefore concluded that the plea of *autrefois acquit* was rightly sustained because "the essential ingredients of the criminal conduct charged in the second indictment do not materially differ from those of the criminal conduct charged in the first indictment".⁵¹⁷ However, in final analysis he also added that "the evidence necessary to support the second indictment would, ...unquestionably have been sufficient to procure a legal conviction upon the first indictment".⁵¹⁸

Viewed in its totality, the decision undoubtedly endorses a conduct as opposed to an elements approach. The court's reference to a same evidence test can in my view, be reconciled to this approach. It is submitted that whenever the court referred to the same evidence test in *Ndou*, it had in mind a subsequent reliance on the same conduct, or the same evidence by the state. In this respect, the court perhaps failed to make the subtle distinction between conduct on the one hand

⁵¹⁵At 686C the court identified the conduct charged in both charges as conspiratorial activities as members of the ANC with the ultimate aim of violent overthrow of the State. See also 687A; 687E and 688A.

⁵¹⁶At 685H.

⁵¹⁷At 688B.

⁵¹⁸At 688D-E, stating that he applied the test accepted in *R v Kerr*.

and the evidence presented to prove that conduct.⁵¹⁹ An opposite view, namely that the court by referring to the same evidence test focused purely on the elements of the offences successively charged, cannot be supported by the judgment as a whole.

It is therefore submitted that the court, in referring to the same evidence test, had an unadulterated same evidence test in mind; a test which focused on the conduct (or the evidence) relied upon by the state in both trials in order to determine the substantial identity of the offences successively charged. Another explanation which may be advanced, is that the court, in principle, had used a conduct criterion, but had also found that the application of the same evidence test (as suggested in *Kerr*) could be applied to the particular facts present in *Ndou*. In other words, that application of the traditional same evidence test achieved the same result (in that case) as a conduct test.

Unfortunately closer scrutiny of decisions which followed on *Ndou* has revealed that the distinction drawn in that case between same conduct and same elements has (understandably, in view of the use of the same evidence test *as proposed* in *Kerr*), not been fully appreciated by South African courts. This becomes clear from a discussion of a few subsequent decisions.

4.6.7 Subsequent decisions - a "same elements" or a "same conduct" approach?

This writer's understanding of *Ndou*, namely that it endorses a

⁵¹⁹This distinction was pointed out by Mr Justice Brennan in the United States Supreme Court decision of *Grady v Corbin*, discussed *supra* under 4.5.6, text at note 302.

conduct instead of an elements approach, is supported by a subsequent decision, *S v Nyati and Another*.⁵²⁰ The accused were first charged and acquitted of a statutory offence which prohibits dealing in dagga.⁵²¹ They were then charged (on the same facts) with the crime of possession of dagga.⁵²² Their plea of *autrefois acquit* was rejected and they were convicted of this offence. On review, Galgut J observed that the evidence in the first case was that accused 1 had been allocated a small piece of ground on which he planted mealies. However, the police had also found five dagga plants among the mealie plants and according to the evidence both accused had known about the existence of the dagga plants. Since the state could not prove that they had dealt in dagga, the accused were acquitted (in the first trial).⁵²³

In determining whether a subsequent charge for possession ought to be barred, the court referred to the *dicta* of Oglivie Thompson JA in *Ndou's* case concerning the concept of substantial identity of offences.⁵²⁴ Applying these principles, the court concluded that the plea of *autrefois acquit* ought to have been upheld because the conduct which was relied on at the first hearing was the same conduct relied on at the second hearing.⁵²⁵ The court added that

[a] comparison of the two charge sheets and the

⁵²⁰1972 (4) SA (T) 11.

⁵²¹Section 2(a) of Act 41 of 1971.

⁵²²Section 2(b) of Act 41 of 1971.

⁵²³At 12E.

⁵²⁴At 13F. See *supra* text at note 514 for this *dicta*.

⁵²⁵At 13H. The conduct relied on in both trials was the planting or cultivation of dagga plants by the accused.

evidence led at both trials shows that such difference as there is in the charge sheets and the evidence, is one of particularity and not one of substance.⁵²⁶

In a subsequent decision, *S v Le Roux*,⁵²⁷ the court applied both the same evidence test (focusing on the elements of offences) and the same conduct test, and achieved the same result. Le Roux was first charged of the following offences

- (i) drunken driving⁵²⁸ or
- (ii) driving with an unlawful percentage of alcohol in his blood⁵²⁹
or
- (iii) reckless or negligent driving⁵³⁰ or
- (iv) inconsiderate driving.⁵³¹

The prosecution withdrew the second charge before the accused had pleaded, presumably because they had not at the commencement of the trial yet received the report on the blood analysis.⁵³² The case then proceeded on the remaining charges. Le Roux was convicted of negligent driving but found not guilty of drunken driving. He was subsequently charged with the offence which had previously been withdrawn, namely driving with an unlawful percentage of alcohol in his blood. He pleaded *autrefois convict*, the basis of his plea being that the state in both cases had relied on substantially the same act;

⁵²⁶Referring also to the *dicta* in *Davidson's* case.

⁵²⁷1973 (2) SA 103 (SWA).

⁵²⁸Section 140 (1) of Ordinance 30 of 1967.

⁵²⁹Section 140(2) of the Ordinance.

⁵³⁰Section 138(1) of the Ordinance.

⁵³¹Section 189 of the Ordinance.

⁵³²At 104G-H, per Trengove, J.

the driving of a vehicle in a certain place at a certain time.⁵³³ The court rejected this plea and he appealed against that decision. On appeal, it was pointed out by counsel for the appellant that the only difference between the different charges was that in the first case it had been averred that he drove the vehicle negligently, and in the second charge, that he had driven the vehicle with an unlawful percentage of alcohol in his blood. In the view of counsel for the defence this constituted an extremely artificial distinction.⁵³⁴

The court rejected this contention. Mr Justice Trengove relied upon the *dicta* in *Ndou*⁵³⁵ and concluded that the offences differed substantially in respect of their essential elements.⁵³⁶ The court explained that the first charge dealt with the manner in which the accused had driven the car, the main issue being whether he had driven the car in a reckless or negligent manner. However, in the second trial, the court was concerned with the question whether the percentage of alcohol present in the accused's blood at the time that he had driven the car had exceeded the legal limit. In the second charge his ability to drive the car was consequently irrelevant.⁵³⁷

The court then stated that in terms of *Ndou* there was *another* test which also had to be applied, namely the same evidence test.⁵³⁸

⁵³³Note that counsel for the appellant did not rely upon a same (unlawful) conduct test, but a same transaction or same criminal episode or facts test. See *infra*, text at note 514.

⁵³⁴At 105G.

⁵³⁵See *supra*, text at note 514.

⁵³⁶At 106E.

⁵³⁷At 106C-F.

⁵³⁸At 106H.

The court then applied this particular test to the offences and concluded that the plea of *autrefois convict* could not be sustained because "the evidence necessary to support the second indictment would not have been sufficient to procure a legal conviction upon the first indictment."⁵³⁹

Although the court had distinguished between the offences on the basis of their elements and had ultimately applied the same evidence test, it cannot be denied that it also distinguished between the offences successively charged on the basis of the difference in *unlawful conduct*. Application of the same conduct and the same evidence (or legal elements test) led to the same conclusion in this case; the offences charged successively were different in terms of both these tests. It is suggested that the conduct test as proposed in *Davidson* and endorsed in *Ndou* focuses on the similarity of the *criminal or unlawful conduct* successively charged, and not merely on the similarity of the facts. In *Le Roux*, the court (in my view) distinguished between the unlawful conduct of reckless or negligent driving on the one hand, and the unlawful conduct of driving with an illegal percentage of alcohol in his blood on the other hand. This distinction was made despite the fact that both charges were based on the same facts or transaction, namely the driving of a vehicle on a public road on a specific date.

The important lesson to be learned from *Le Roux's* case is that even the broader and more equitable same conduct test does not guarantee protection against subsequent prosecutions and continuous harassment for offences arising from the same criminal episode or transaction, even if one's sense of justice would, in particular circumstances (like those present in *Le Roux's* case), require that a

⁵³⁹*Id.*

person be charged with *all* the offences in a single proceeding. In my view, even if the accused in *Le Roux* had relied on the more apposite plea of *autrefois acquit* (that he had previously been acquitted of the same offence, namely drunken driving), application of a same conduct test would not have led to a different result. Drunken driving and driving with an illegal percentage alcohol in the blood requires proof of different types of unlawful conduct.

Le Roux's case was followed by *S v Makoko*,⁵⁴⁰ a decision which flies in the face of the principles laid down by the Appeal Court in *Ndou*. Makoko was a prisoner convicted on a prison regulation which prohibited the possession of dagga.⁵⁴¹ He was sentenced to 20 days solitary confinement. He was subsequently charged in the ordinary courts with the statutory offence of possession of dagga⁵⁴² and convicted despite his plea of *autrefois acquit*. One of the issues on appeal was whether the crimes successively charged were substantially the same.⁵⁴³ The opening statement by the court was that, in order to determine this issue, the same approach as was necessary to determine whether there is an improper splitting of charges in one trial should be applied,⁵⁴⁴ and that no definitive test could be prescribed to solve this problem. Suggesting that common sense and considerations of fairness should be applied when

⁵⁴⁰1984 (2) SA 62 (O).

⁵⁴¹In terms of the Prison Act 8 of 1959.

⁵⁴²Section 2(b) of the former Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971.

⁵⁴³At 64H.

⁵⁴⁴*Id.*, relying on Hiemstra's *Suid-Afrikaanse Strafprosesreg* 3rd ed 233 for this statement.

deliberating the question,⁵⁴⁵ the court concluded that the offences ought to be regarded as different for the following reasons

(a) the enquiry must focus on the definitions of the offences ("misdaadskrywings").⁵⁴⁶ The definitions of the offences were different.⁵⁴⁷ Also, the evidence necessary to prove one charge did not prove the other⁵⁴⁸ because contravention of the prison regulation required the additional proof that the offender was a prisoner. Therefore, the court followed a strict elements approach in this case.

(b) The court also based its decision on the fact that the different provisions had different aims: the prison regulation was aimed at maintaining discipline in prison and the subsequent indictment was aimed at protecting the whole community against a social evil.⁵⁴⁹

Makoko was deservedly criticised by legal commentators and ought to be regarded as a decision without precedent.⁵⁵⁰

⁵⁴⁵At 64H-65A.

⁵⁴⁶At 65B.

⁵⁴⁷At 65B-C. Without even considering the leading authority on double jeopardy in the context of successive prosecutions (namely, *S v Ndou*), the court relied on the leading decision on splitting of charges in one trial (*S v Grobler supra* at 814C) for this contention.

⁵⁴⁸At 65A-B.

⁵⁴⁹At 65F.

⁵⁵⁰See Du Toit *et al* Service 14 1994 15-6A (submitting that there was "real equivalence" between the offences because the "same *actus reus* and *mens rea* supported both convictions"); Snyman JL and Alberts RW "*S v Makoko* 1984 (2) SA 62 (0) *Autrefois convict* - verrigtinge voor offisiershof ingevolge die Wet op Gevangenisse" *Tydskrif vir Hedendaagse Romeins-Hollandse reg* 1985 237 (commenting that the accused was punished more than once for the same criminal conduct - "dieselfde inhoudelike misdadige gedrag");

4.6.8 Recognition of inherent discretionary powers to prevent piecemeal adjudication of criminal matters - *S v Khoza*⁵⁵¹

In *S v Khoza*, the court suggested that, in terms of its inherent discretionary powers, it may stay criminal proceedings which have the effect of subjecting the accused to harassment more than once for the same cause of action.⁵⁵² The facts of this case were the following. Khoza and three others were convicted of public violence. They were then charged with murder. The second charge alleged that they murdered O on a certain date in a certain town. It was common cause that the deceased had been killed during the disorder that formed the basis of the previous conviction of public violence. It was also common cause that the assault on the deceased and the fact that she was set alight had carried weight in the judgment of the regional court with regard to the conviction on the charge of public violence.⁵⁵³

In the subsequent murder trial, the state relied once again on some of the unlawful acts which had been relied on in the trial for public violence.⁵⁵⁴ The defence raised the plea of *autrefois acquit*, relying mainly on the *dicta* in *Ndou* as authority for its contention that

Hiemstra 1993 ed (noting that the decision was incorrect inasmuch as the "strafwaardige handelingselement [primêr] is by die identifikasie van 'n misdad").

⁵⁵¹1989 (3) SA 60 (T).

⁵⁵²At 66A.

⁵⁵³At 64I-J and 65A Mr Justice Strydom pointed out that the record of the case in the regional court revealed that "this conduct [various acts of public violence] not only caused a million rands worth of damage in the settlement but also the death of Ollisa Khumalo".

⁵⁵⁴At 63H. These were several different acts of assault allegedly performed by the various accuseds in respect of the deceased.

substantial identity existed between the two charges.⁵⁵⁵ The court rejected this argument. Strydom J focused on the elements of the offences and interpreted the principles laid down in *Ndou* as follows⁵⁵⁶

As ek die toets toepas wat hier in *Ndou* se saak geopper is, naamlik of die getuienis wat noodsaaklik is om die tweede aanklag te ondersteun en te vra of dit dan voldoende sou wees om 'n veroordeling op die eerste aanklag daar te stel, dan kan ek dit by toepassing op feite van die huidige saak, wat gemeensaak is, soos volg stel: of beskuldigdes skuldig bevind kon word aan openbare geweld by bewys dat hulle opsetlik en wederregtelik die oorledene gedood het. Die antwoord is myns insiens negatief. Op die benadering moet die beroep op art 106(1)(c) dus afgewys word.

Therefore, the court applied the traditional version of the same evidence test, focusing upon the elements of the offences charged successively instead of the unlawful conduct which had been relied on in both trials to prove the offences or the similarity of the evidence which had been presented in both trials. The importance of the decision lies in the fact that the court (clearly uncomfortable with the unequitable result of its conclusion) declared itself opposed to the procedure adopted by the state in this case, namely to proceed on charges arising from the same criminal episode or transaction in a piecemeal fashion.⁵⁵⁷ The court referred to a rule of practice, namely that courts are reluctant to participate in piecemeal litigation on the same facts.⁵⁵⁸ The court explained the *rationale* of this rule

⁵⁵⁵See *supra*, text at note 514.

⁵⁵⁶At 64C-D.

⁵⁵⁷At 64E.

⁵⁵⁸At 64F.

as follows⁵⁵⁹

Die grondslag van hierdie verweer is daarin geleë dat dit in die openbare belang is dat daar 'n einde aan gedingvoering moet kom: *interest republicae ut sit finis litium* en dat niemand meer as een keer aan gedingvoering oor dieselfde saak blootgestel behoort te word nie: *nemo debet bis vexari pro una et eadem causa*.

The court also referred to a case in which Van Winsen AJA stated that⁵⁶⁰

[t]he law requires a party with a single cause of action to claim in one and the same action whatever remedies the law affords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by one of them to proceed against the other on the same cause for the same relief can be met by an *exceptio rei iudicatae velitis finitae*. The reason for this rule is given by Voet 44.2.1 (*Gane's* translation vol 6 at 553) as being: "To prevent inexplicable difficulties arising from discordant or perhaps mutually contradictory decisions, due to the same suit being aired more than once in different judicial proceedings". This rule is part of the very foundation of our law *and is of equal application to criminal law*. The rule has its origin in considerations of public policy which requires that there should be a term set to litigation and that an accused or defendant should not be twice harassed upon the same cause.

The court also observed that the procedure adopted by the prosecution namely, to first charge the accused with public violence,

⁵⁵⁹At 65H, citing from Pretorius *Burgerlike Prosesreg in die Landdrosshowe* 677.

⁵⁶⁰*Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA (A) 462, 472 (my emphasis).

created the possibility that an accused could incriminate himself in respect of the subsequent charge of murder.⁵⁶¹ The court explained that if the accused had given evidence in the first case, the prosecution could have questioned them on the death of the deceased. In the court's view, this would have given the prosecution the opportunity to obtain evidence of an accused which could have incriminated him in a subsequent trial.⁵⁶² In view of all these considerations, the court decided to exercise its discretion in favour of the accused and had the case struck from the roll.

It is suggested that by applying the same conduct test, the court (in *Khoza*) could have achieved the same result, which is to prevent the subsequent murder charges. However, by recognising inherent discretionary powers to stay proceedings on double jeopardy grounds, the court cleared the way for expanded protection against double jeopardy. *Le Roux's* case illustrates that the same conduct test cannot in all circumstances achieve the aims of double jeopardy protection, namely to prevent potential abuse of state power and consequent harassment of the accused. The broader protection offered in *Khoza* can therefore be of tremendous value to courts in achieving those aims; particularly in cases in which the application of the same conduct test (in terms of double jeopardy values) would not lead to just results.

4.6.9 Does issue estoppel form part of our law?

It finally remains to consider what role issue estoppel, as opposed to action estoppel, has played in our law. It was pointed out earlier in

⁵⁶¹ At 66D.

⁵⁶² At 66D.

the discussion of *O'Neill's* case⁵⁶³ that the Appellate Division (in that case) disapproved of the idea that the broader concept of *res judicata* could also cover cases of estoppel in respect of particular facts which led to the verdict. The court relied (*inter alia*) on its previous ruling in *Manasewitz*.⁵⁶⁴ The question whether issue estoppel is applicable in criminal cases also surfaced in a few subsequent decisions. Closer scrutiny of these cases reveal a marked reluctance on the part of the courts to consider seriously whether this aspect of *res judicata* should not, perhaps, also be applicable in criminal proceedings. These cases, which are few and far between, will be discussed in the text that follows. However, it is essential to first consider, what is regarded as the classic decision on the recognition or non-recognition of issue estoppel in criminal proceedings, namely *R v Manasewitz*.

In *Manasewitz*, the majority of the court implied that the doctrine of issue estoppel has no place in criminal proceedings.⁵⁶⁵ However, *Manasewitz* can only be regarded as authority for the proposition that issue estoppel cannot be raised by the prosecution to the prejudice of an accused who pleads *autrefois acquit*.⁵⁶⁶ The particular issue addressed in these paragraphs which faced the Appellate Division in that case, was whether it was bound by the reason (the *ratio decidendi*) on which the Provincial Division based its

⁵⁶³See *supra*, text at note 470.

⁵⁶⁴At 275H.

⁵⁶⁵See the opinions of De Villiers JA 180 (stating that a point of general law decided in a case only applies to the court deciding the point); Straford JA 173 (concurring with De Villiers) and Beyers JA 178 (stating categorically that the "leer van estoppel [in strafsake] onbekend is").

⁵⁶⁶*Cf* also Zeffert D "Issue estoppel in South Africa" 1971 *South African Law Journal* 312.

decision of an acquittal in the first appeal. In other words, the ground on which the accused was previously acquitted.⁵⁶⁷ If the Appellate Division had answered this question in the affirmative, it would have followed that the accused would have been prohibited (estopped) from relying on the plea of *autrefois acquit*. In other words, recognition of the application of issue estoppel in criminal proceedings would have had the effect of *prejudicing* the accused in that case. However, the majority of the court reached the opposite conclusion. It held that although an acquittal or conviction on the merits binds all courts (it being *res judicata*), a point of general law or fact decided in a case only applies to the court deciding the point.⁵⁶⁸

The views expressed on issue estoppel in *Manasewitz* ought therefore to be limited to the particular facts of that case namely, that issue estoppel cannot operate to the disadvantage of the accused.

The question whether issue estoppel may be invoked by the prosecution was raised again in the previous Rhodesian Appeal Court in the case of *S v Gabriel*.⁵⁶⁹ Gabriel was charged and convicted of attempted murder on his wife because he had stabbed her in the spinal column. She died two years after the assault and he was subsequently charged with her murder. The central issue on appeal was whether he could rely on the plea of *autrefois convict*. The court (per Beadle CJ) held that the plea was not available to the appellant on the basis that it had not been possible to prefer the more serious

⁵⁶⁷See *supra*, text at note 437 for a discussion of the facts of that case.

⁵⁶⁸Per De Villiers JA 180. *Contra* the dissenting opinion of Curlewis JA who argued (at 190) that the doctrine of *res judicata* means that not only an acquittal should be accepted as correct, but also the very ground on which that acquittal was based.

⁵⁶⁹1971 (1) SA 646 (RA).

charge at the previous trial.⁵⁷⁰

However, counsel for the appellant argued that at the second trial for murder the appellant was in jeopardy of being convicted again for attempted murder and that this was in conflict with the principles of double jeopardy.⁵⁷¹ The court suggested that certain practical measures should be taken to prevent this particular situation from arising. Beadle CJ suggested that the Attorney-General informs the court before plea that he asks only for a verdict of murder, and, if murder is not proved, that he asks for a verdict of not guilty.⁵⁷² However, in the Chief Justice's opinion it would be preferable in such cases if the second trial starts where the first trial stopped. In other words, that the record of the first trial be proved and the judgment of

⁵⁷⁰At 652D-G. He relied on Voet 48.2.12 & 48.8.4. In *S v Ndou (supra)*, the court assumed that the principle also applies where the accused had previously been acquitted. Van Rooyen JH "Opmerkings oor *autrefois acquit*" *Tydskrif vir Hedendaagse Romeins-Hollandse reg* 1971 182 points out that Voet 48.2.12 limited the rule to previous convictions for the reason that a person cannot again be tried if already acquitted of the very act "from which the ensuing charge also is bound to follow" (Gane's translation of Voet). Van Rooyen agrees with the logic underlying this assertion. (*Cf* also the views of Choo discussed in chapter two *supra* under 2.3.2, text at note 127.). However, he (Van Rooyen) expresses the view that Voet's statement cannot be regarded as valid in *all* circumstances where a charge of murder or culpable homicide follows on an acquittal of a lesser included offence. He argues that an enquiry in respect of the grounds on which the accused had previously been acquitted is essential to determine whether a subsequent charge for murder or manslaughter could (logically) follow. The following example is advanced in support of his argument. A person acquitted of negligent driving on the ground that it did not occur on a public road, may be indicted subsequently for culpable homicide.

⁵⁷¹At 655F-G.

⁵⁷²At 660H.

the first trial considered as binding on the court in the second trial.⁵⁷³

However, Beadle CJ realised that this proposition involves recognition of the prosecution's right to invoke the principle of issue estoppel against the accused.⁵⁷⁴ He then embarked on a discussion of the doctrine as recognised (at the time) in English criminal law.⁵⁷⁵ He also considered whether the doctrine is applied in South African criminal proceedings, but, "[f]ortunately, [found] it unnecessary to have to come to a firm decision on the position of the plea of issue estoppel in South African criminal law".⁵⁷⁶ However, he assumed for the purpose of the case at hand that under common law (Roman-Dutch law), the state could raise the plea of issue estoppel against an accused.⁵⁷⁷ The court based its assumption on an early decision of the Cape Provincial Division, *R v Kriel*.⁵⁷⁸ In that case, the accused had been charged with failing to pay maintenance for his child. He pleaded that the child was not his, but the court found the child was his and he was convicted. A year or two later, he was again charged with failing to pay maintenance in respect of the same child and he again raised the plea that he was not the father of the child. However, the court held that the accused was estopped from raising the paternity issue a second time. Beadle CJ, however, considered

⁵⁷³At 660H-661A.

⁵⁷⁴At 661A.

⁵⁷⁵At 661B-D.

⁵⁷⁶At 662H. He focused mainly on the decision in *Manasewitz*, finding the case "confusing" and "concerned only with the plea of *autrefois acquit*..." (at 662H)

⁵⁷⁷At 662H.

⁵⁷⁸1939 CPD 221.

the case to be of "dubious validity" because the court never considered the question in that case of whether it was permissible in the circumstances to allow the accused's previous conviction to be accepted as proved before verdict - an inevitable consequence (in the majority of cases) if the principle is recognised that the prosecution may invoke issue estoppel against the accused.⁵⁷⁹ Since the Zimbabwean Code did not allow such a practice (namely to prove a previous conviction before verdict), Beadle CJ suggested that it be amended to accommodate the type of situation which confronted the court in *Gabriel's* case.⁵⁸⁰

*S v Vermeulen*⁵⁸¹ presented a provincial division of the Supreme Court with an opportunity to decide whether issue estoppel may be raised in favour of the accused. However, the court in that case preferred to deal with the case as one relating to cause of action estoppel ("aksie-grond estoppel") as opposed to issue estoppel ("geskilpunt-estoppel"). The unique set of facts which faced the court in that case were the following. The accused was charged in 1967 with perjury. In evidence in a civil case in 1959, it had been alleged that Vermeulen had falsely testified that he had dug a trench before he built a dam wall. He was acquitted on the perjury charge as the court found that the trench had in fact been dug. However, in 1975 he was again charged with perjury. This time, the state alleged that his evidence in the previous perjury trial concerning the trench-digging was false. He pleaded *autrefois acquit*. The state advanced the argument that since he had only committed the offence for which he was charged in the case at hand in 1967, he had not been in jeopardy

⁵⁷⁹At 663B.

⁵⁸⁰Such an amendment has not as yet been realised either in the Zimbabwean or the South African Codes.

⁵⁸¹1976 (1) SA 623 (C).

of being convicted of this particular offence at the previous trial. The court rejected this argument.

Steyn J observed that the plea of *autrefois acquit* is based on the *exceptio rei judicatae*; a doctrine which, with the necessary modifications, is incorporated in our criminal law.⁵⁸² He discussed the historical development of the rule and particularly focused on the interpretation of the rule by Voet.⁵⁸³ Justice Steyn warned that great care should be taken before principles formulated in the English law regarding the basis of the applicability of the doctrine are transplanted, without more, in South African law.⁵⁸⁴ In his view, considerations of policy, of which the most important is the legal certainty which flows from the finality of judgments in respect of lawsuits between parties, as well as principles of justice and fairness forms the basis of the doctrine of *res judicata*. He explained these considerations in the following terms

Wanneer ek na regverdigheid en billikheid verwys het ek in gedagte dat hierdie leerstuk, opgewerp as *exceptio rei judicatae*, in die strafreg opgeneem is om die burger te vrywaar teen herhaaldelike vervolging ten opsigte van dieselfde skuldoorsaak, tussen dieselfde partye en waar die Staat dieselfde gevolg nastreef, dit wil sê, 'n skuldigbevinding ten opsigte van dieselfde of wesentlik dieselfde misdaad.⁵⁸⁵

⁵⁸²At 630H.

⁵⁸³At 631C-D he referred to Voet 44.2.3 where the author noted that the cause of action is the same if "[w]hat was sought before the earlier is sought before the later Judge" and 44.2.4, where the author emphasised that not so much the action but the "source of the claim ... makes a cause the same".

⁵⁸⁴At 631H.

⁵⁸⁵At 632B, discussing, at length, the approach followed in *Ndou*.

Regarding himself not bound by the restrictions of the traditional common law plea of *autrefois acquit*, Justice Steyn then also referred to application of the doctrine in a number of civil law cases. He noted that in *African Farms and Townships Ltd v Cape Town Municipality*⁵⁸⁶ the court held the doctrine to be applicable where the appellant demanded once again the "same thing on the same ground".⁵⁸⁷ He pointed out that, in that case, Steyn CJ had explained⁵⁸⁸ that "the same thing on the same ground" relates to the identity of the question which is once again raised. Steyn J then reiterated (in the *Vermeulen* case) the explanation of Steyn CJ of the concept "same question"

Where a court has come to a decision on the merits of a question in issue, that question, at any rate, as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings. Where, for instance, the *causa* or *questio* is ownership, the claimant, if his case is that he has the ownership through inheritance, would not, according to *Dig. 44.2.11.*, para. 5, be instituting a new claim by alleging a donation, for no matter in what way he may have acquired the ownership, his right to it would be finally disposed of in the first action.

Steyn J subsequently applied the approach followed in civil law to the facts of the criminal case before him. He concluded that since the prosecution had endeavoured to relitigate the identical cause of action previously adjudicated on (namely, whether a trench had been dug or

⁵⁸⁶1963 (2) SA 555 (A).

⁵⁸⁷At 634D-E, citing Steyn CJ in the *African Farms* case (at 562).

⁵⁸⁸The Chief Justice relied in a passage upon various texts by Voet, Huber and Vinnius for this explanation. This passage is reiterated in *Vermeulen's* case at 634F-G.

not), the plea of *exceptio rei judicatae* should be sustained.⁵⁸⁹ The court preferred not to also deal with the controversial topic whether issue estoppel forms part of South African law.⁵⁹⁰ However, it cannot be denied that the approach followed by the court in *Vermeulen* in reality amounts to a recognition of the proposition that issue estoppel may be invoked in favour of the accused in criminal proceedings.

4.6.10 Summary

* In the first decisions in which the defence raised the pleas of former jeopardy, colonial courts applied the criteria advanced in English law to determine the sameness of offences. These were the in peril and the same evidence tests. This practice continued during the initial decades of the twentieth century. Courts focused on the elements of offences despite the fact that one of the tests applied was labelled the same evidence test.

* Up until the 1930's, courts did not draw a distinction between rules which prohibit multiple punishment in one trial on the one hand, and rules which prohibit successive prosecutions for the same offence on the other hand. Moreover, the courts did not consider the particular values which underlie each of these procedural phenomena. Instead, they referred to both these procedural phenomena as splitting of charges. In 1905, for instance, the Transvaal court introduced a third test to determine improper splitting of charges in one trial. This test was called the single intent test. Unlike the same evidence and in peril tests, the single intent test focused on the issue of whether the

⁵⁸⁹At 653A-D.

⁵⁹⁰At 635G.

accused, by performing offences with different legal elements, acted with a single intent. The test was subsequently also applied in cases dealing with the pleas of former jeopardy.

* During the 1930's important progress was made in the field of double jeopardy jurisprudence. First of all, it was recognised that subsequent death cases deserve to be treated as exceptions to the same evidence test. However, the most important development occurred in 1933. In that year, the Appellate Division, in the case of *Manasewitz* ruled that the pleas of former jeopardy are based on broader principles of *res judicata* (developed in Roman and Roman-Dutch law). By emphasising that the rules of *res judicata* originated from notions of fairness and reasonableness (for example, that a person should not be vexed more than once for the same matter), the court focused on the values which underlie the rule against double jeopardy. *Manasewitz* laid the foundation for expanded protection against repeated attempts by the state to prosecute an accused for the same unit of criminal conduct. The court pointed out, *inter alia*, that "the question whether a defendant is being vexed again for the same cause of action depends not upon technical considerations but upon matters of substance".⁵⁹¹ This sent a clear message to the courts that the criteria applied in the single-trial multiple-punishment context to determine identity of offences could not also be regarded as exclusive criteria to determine whether successive prosecutions for the same criminal conduct ought to be prohibited.

* Shortly after the decision in *Manasewitz*, the court explained the difference between splitting of charges in one trial and successive prosecution for the same offence. The court pointed out that the first of these procedural phenomena originated from the idea that it is

⁵⁹¹Per Wessels CJ in *Manasewitz* 169-170.

objectionable to split charges in order to enable the court to impose punishment in excess of its jurisdiction. However, the second of these procedural phenomena originated from the maxim *nemo debet bis vexari*. The court suggested that the same evidence test be applied in multiple-punishment single-trial cases, and the in peril test in the multiple-trial context.

* During the next three decades (1940-1970), the in peril test became the standard applied to determine whether a successive prosecution relates to the same offence as that of which the accused had already been acquitted or convicted in a previous trial. However, inadequacies of the in peril test as a sole measure to protect the accused against repetitive harassment by the state for the same criminal conduct were revealed in a number of subsequent decisions. This eventually led to the introduction of broader criteria to determine the permissibility of successive prosecutions. Gradually, the traditional same elements approach made way for an approach which focuses instead on the same criminal *conduct* successively prosecuted. The shift in emphasis was initiated in the case of *Davidson* and eventually approved of by the Appellate Division in *Ndou*.

* However, due to certain ambiguities in the *Ndou* decision, courts have not altogether abandoned a same elements approach in subsequent cases. In *Le Roux* for instance, the court applied both the same evidence and the same conduct test. The fact that application of both these tests achieved the same result in that case indicates that a conduct test does not always offer broader protection against repetitive harassment by the state for offences arising from the same criminal episode or transaction. In other words, *Le Roux* illustrates that there may be cases where a sense of justice requires a person to be charged of all the offences in a single criminal proceeding, despite the fact that application of a same evidence and a same conduct test

allow successive prosecutions.

* In 1989, the Transvaal Division of the Supreme Court in the case of *Khoza* expressed itself against the procedure adopted by the state to proceed on charges arising from the same criminal transaction in a piecemeal fashion. The court focused on the values which underlie the rule against double jeopardy, *inter alia*, that an end should come to litigation (the value of finality), and that a person ought not to be twice harassed on the same cause (the value of prevention of state abuse of power). Similar to Lord Devlin's approach in *Connelly*, the court in *Khoza* recognised inherent discretionary powers to stay proceedings as an abuse of process on double jeopardy grounds.

* It has always been a controversial issue in South African law whether the principle of issue estoppel also applies in criminal cases. In *O'Neill*, the Appellate Division disapproved of the idea that the broader concept of *res judicata* also covers cases of estoppel in respect of particular facts which lead up to the verdict. The court relied, *inter alia*, on its previous ruling in *Manasewitz*. However, *Manasewitz* can only be regarded as authority for the proposition that issue estoppel cannot be raised by the *prosecution* to the prejudice of an accused who pleads *autrefois acquit*. As indicated in this comparative study, the principle of issue estoppel is applied in criminal cases only in favour of the accused. In a subsequent decision of the Cape Division of the Supreme court, *Vermeulen*, the court prohibited the state from relitigating a matter (or "cause of action") which had already formed the subject of adjudication in a previous trial. The court preferred to base its decision on *action estoppel* instead of *issue estoppel*. However, the application of broader principles of *res judicata* in *Vermeulen* in effect amounted to a recognition of the values which underlie the rule of issue estoppel.

* The decisions in *Vermeulen* and *Khoza* demonstrate that South African courts are ready to abandon the outdated approach of applying certain rigid tests to determine identity of criminal matters in favour of a more flexible approach which focuses purely on the achievement of the values which underlie the rule against double jeopardy.

PART THREE

THE PROHIBITION AGAINST DOUBLE JEOPARDY AND THE PROSECUTION APPEAL

CHAPTER FIVE

HISTORICAL OVERVIEW

5.1 ROMAN LAW

The institution of appeal as we now understand it did not exist in early Roman law.¹ Roman courts dealing with crime during the

¹Appeal is described by Esmein A *A History of Continental Criminal Procedure* Vol 5 1913 (reprinted 1968) 10 as "the right to bring anew before a higher judge the cause already decided by a lower judge". An important feature of the modern institution of appeal is its alterable character; the verdict of a lower court (or sentence imposed by such lower court) may be altered by a higher court. The institutions which existed during the Republican period, ie *provocatio* (an appeal to the Roman people by a person condemned by a criminal court) and *intercessio* (the veto of a magistrate of another magistrate's judicial act on formal *appellatio* by a private individual) could not be regarded as an appeal in the abovementioned sense of the word for the following reasons. According to the Republican process of *provocatio*, the people could only *as an act of mercy* negate the sentence imposed by the magistrate. Neither the sentence nor the verdict of the magistrate could be altered by this process. Likewise, in the process of *intercessio* the magistrate was only allowed to quash, but not to alter the decision of his colleague. These institutions furthermore did not provide for relitigation of a cause before a higher (hierarchical) tribunal. See Strachan-Davidson JL *Problems of the Roman Criminal law* 1969 Vol II 176-177 and Hunter WA *A systematic and historical exposition of Roman law in the order of a*

Republican period² did not form a hierarchy; they were independent of each other and the sovereign power of the people was theoretically delegated to each separate court.³ Roman criminal procedure was accusatorial in its nature. The state did not prosecute crime; the aggrieved citizen was required to make a formal accusation against the alleged offender and to prosecute at the trial. The issue was limited to the formal allegations of the accuser, who was also obliged to furnish the evidence necessary to support his case.⁴ If at the end of proceedings the accused was acquitted, the matter was regarded as final.⁵

In the course of the second century AD, during the period of the Principate⁶, the institution of appeal was introduced and developed in Roman law.⁷ The establishment of the Empire meant the abolition

Code 2nd ed 1885, 1045 (hereinafter referred to as *Hunter Roman law* 1045).

²509-27 BC.

³*Hunter Roman law* 1045.

⁴For a discussion on the nature and development of criminal procedure during the Republican era, see in general Jolowicz HF *Historical introduction to the study of Roman Law* 2nd ed 1952 321-333 and Kunkel W *An introduction to Roman legal and constitutional history* 1966 61-66.

⁵*Cf* the institutions of *provocatio* and *intercessio* which were available to the convicted accused, discussed above.

⁶27BC-284AD.

⁷See *Hunter Roman law* 1046. Mommsen T *Römisches Strafrecht* 1955 277 describes the importance of this event as follows: "*Von allem Neuerungen des Principats ist die Einführung der reformatorischen Appellation die bleibendste gewesen; die damit gegebene Zerstörung der Unabänderlichkeit des rechtsgültig gefundenen Judicats wirkt nach bis auf den heutigen Tag*". (Of all developments that occurred during the period of the Principate, the establishment of the alterable appeal was the most lasting; the abolition of the idea of unalterability of

of all independent magistracies of the Republic and the substitution of a single sovereign.⁸ The emperors elected themselves as the supreme appellate tribunal for all the courts throughout the Roman world. In the course of time, a hierarchical structure of tribunals developed in the Roman Empire which in contrast to the Republican court structure could and was also intended to accommodate the institution of appeal.

During the late Empire, criminal procedure developed certain inquisitorial and also predominantly oppressive features.⁹ Extraordinary powers of criminal jurisdiction came to be exercised by the Emperor and his delegates. Although the procedure was still based on an accusation brought by an accuser, the judge in his official capacity took a more active part in the process of discovering the truth.

However, the most important change that took place in criminal procedure during this time was the introduction of torture as a method of obtaining evidence against the accused.¹⁰ Esmein suggests that these secret inquisitorial procedures, in particular the application of torture to establish the truth, eventually led to the organisation of a system, not only of formal "legal proofs", but also of appeals as a necessary counterbalance, ostensibly in the interest of the accused.¹¹

legally valid judgments during this period is recognised until today).

⁸Hunter *Roman law* 1046.

⁹See in general Esmein 26-29; Kunkel 66-71 and Jolowicz 413 for a discussion of the inquisitorial nature of criminal procedure during the reign of the Roman Empire.

¹⁰Esmein 8-9 & 28.

¹¹At 3-4.

It is very difficult to establish with certainty whether, during this period, an accuser in a criminal trial could appeal to a higher tribunal against an acquittal of an accused or against a sentence imposed on a convicted person. This is so because the institution of appeal developed simultaneously in civil and criminal procedure and no distinction is made between these procedures by Roman legal writers in their treatment of the institution.¹² The majority of Roman texts which may be interpreted as dealing with criminal appeals, deal with appeals on behalf of the accused (the so-called "condemned party").¹³ Apart from a text by Modestinus, which suggests that a right of appeal was afforded an accuser in bipartite proceedings¹⁴ and a text by Ulpian¹⁵ which implies a right of appeal by an accuser in criminal proceedings, a general statement to the effect that an accuser was allowed to appeal in criminal proceedings against a judgment favourable to the accused cannot be found in Roman legal writings.

¹²Mommsen 496.

¹³See *D*49.1.6; 49.1.18; 49.4.1; 49.4.2.3; 49.5.2 (which text deals with an appeal in criminal cases against an interlocutory decree that torture should be applied); 49.7.1 and 49.7.5. The majority of these texts deal with appeals against sentences imposed on a convicted person.

¹⁴In this context, a "bipartite" proceeding means a combination of a criminal and civil matter in one. See for example *D*49.14.9. The text deals with an action instituted by a beneficiary in terms of a will, which was voided by the birth of a posthumous child of the testator and his wife. The child died shortly thereafter - an event which caused the entire inheritance to devolve on the mother of the child (the testator's wife). The beneficiary under the will alleged in her action that the inheritance by the testator's wife of the entire estate was invalid because she (the testator's wife) had poisoned her husband. According to the text, "... when she had lost her action, she appealed". This example can therefore not be regarded as purely criminal but rather a combination of a criminal and civil matter in one proceeding.

¹⁵*D*49.9.1.

In view of the general treatment of appeals in Roman legal writings, it cannot be stated categorically that an accuser in criminal proceedings had no right whatsoever to challenge a judgment favourable to the accused.¹⁶ However, if one takes into consideration that the majority of Roman texts which deal with criminal appeals refer to appeals instituted by the accused, a reasonable inference seems to be that appeal as an institution in criminal proceedings was developed in Roman law mainly to accommodate the interests of the convicted person.

5.2 ROMAN-DUTCH LAW

The system of criminal procedure which prevailed in the Netherlands during the seventeenth and eighteenth centuries, was exported to the Cape of Good Hope in 1652.¹⁷ An Ordinance issued by Philip II in the year 1570 formed the basis of criminal procedure in the Netherlands during this period.¹⁸ The system was basically inquisitorial in its nature; although private individuals might still report offences to the authority, prosecution of crime was carried out by the state, namely by the fiscal or Attorney-General and officers, sheriffs

¹⁶As indicated above, *D*49.14.9 and 49.9.1 imply that such a right of appeal did exist.

¹⁷For a brief discussion of European history of criminal procedure from the end of the Roman Empire up to the seventeenth century, see in general Dugard 3-5. The most important change that occurred during this period was that the accusatorial system was gradually replaced by an inquisitorial system. This change in procedure can be ascribed mainly to the influence of Canon law during this period. The approach adopted in Canon law also eventually found its way into the Netherlands.

¹⁸See Dugard 6.

and bailiffs of the towns and villages.¹⁹

The issue addressed in this chapter is whether the prosecution had a right of appeal during this period and, if so, to what extent such a right was recognized. In *R v Grundlingh*²⁰ Van den Heever J stated that according to Roman-Dutch law, the general rule was that neither the prosecution nor the convicted person could appeal in a criminal case.²¹ Nathan²² on the other hand, states that in Roman-Dutch law, the general rule was that the prosecutor in a criminal case had the same right of appeal as the accused. He continues in the very next sentence by stating that²³ "[i]n South Africa, however, if the accused is acquitted by a magistrate or a jury, the prosecutor cannot appeal from the judgment". This way of juxtaposing the two statements may create the impression that the prosecution was allowed to appeal against an acquittal of the accused. However, this was apparently not provided for in Roman-Dutch law. Although Voet states that a matter is not *res judicata* if there can still be an appeal,²⁴ he and other commentators on the Law of Holland²⁵

¹⁹See Dugard 6; Decker CW *Simon van Leeuwen's Commentaries on Roman-Dutch Law* translated by Kotzé JG Chief Justice of Tvl Vol II 1872 545-546 (hereinafter referred to as *Decker Van Leeuwen's commentaries*).

²⁰1955 (2) SA 269 (A).

²¹272E-F.

²²Nathan M *The Common Law of South Africa - A treatise based on Voet's commentaries on the Pandects* Vol 1V 1907 2725.

²³At 2725.

²⁴See Voet 42.1.2. The author, *inter alia*, makes the following comment: "A suit cannot be said to have been quite decided and brought to an end when a definitive judgment has been given by an inferior judge, but there will have to be a waiting until either the liberty of appealing has been barred by the passage of ten days or in some other way, or an appeal has been noted, perhaps more than once, and

during this period (seventeenth and eighteenth century criminal procedure), refer to a right of appeal only by the prosecution against sentence.²⁶ Voet makes the following statement in this regard²⁷

If the criminal suit has been devised with due regard to the established order of judicial proceedings²⁸ an accused just as much as an accuser is allowed to appeal from such *conviction*.²⁹

a decision has been given by the final judge whose judgment cannot be any longer dismembered". (Gane's translation).

²⁵As distinguished from other Dutch provinces.

²⁶See Voet Book XLIX.

²⁷At 49.1.10. (Gane's translation).

²⁸In Roman-Dutch law, criminal proceedings could be instituted under the ordinary or extraordinary process. The ordinary process is what is referred to by Voet in this text and was employed where the accused denied the crime and when there *seemed* to be insufficient evidence for a conviction. If the accused was nevertheless convicted, he was allowed to appeal albeit against sentence only. The prosecution was also afforded an appeal against sentence on the basis of it being too lenient. The extraordinary process on the other hand was used where there was a stronger case against the accused. This process provided for a judicial inquiry at which the accused was interrogated with the purpose of obtaining a confession from him. If the accused declined to confess, he could be tortured in order to extract a confession. The accused was not allowed to appeal against conviction or sentence in this process. See in general Dugard 7 and Decker *Van Leeuwen's Commentaries* 556. Van der Linden J *Rechtsgeleerd, Practicaal en Koopmans Handboek* 1806 translated by Henry J under the title "Institutes of the Laws of Holland" 1828 546-547 points out certain exceptions to this rule ie: (a) where there is no confession or at least not a sufficient confession; (b) where there is a manifest nullity in the proceedings and (c) where the punishment is evidently too severe and out of all proportion to the crime.

²⁹My emphasis.

Van Leeuwen³⁰ also makes reference to an appeal by the prosecution against sentence only, on the basis of it being too lenient. The writings of Van der Linden furthermore confirm this practice.³¹

In conclusion, it seems that in Roman-Dutch law an appeal by the state against an acquittal of an accused in a criminal trial was not a recognised practice. However, the state was afforded a right of appeal against sentence. The statement made by Van den Heever J, in *R v Grundlingh*³² should therefore be understood in this sense.

5.3 ENGLISH LAW

The institution of appeal was introduced by the legislature in English criminal law only at the beginning of the twentieth century. However, before this time there were certain procedures available in English criminal procedure which could be applied to challenge the validity of a criminal judgment for serious as well as for minor offences.

In the case of minor offences, legislation enacted in 1879³³ provided that in all cases where a question of law was involved, the decisions of the justices in Petty Sessions could be reviewed by the King's Bench Division of the High Court. Both parties, namely either the prosecutor or defendant could question such a decision on the ground that it was "erroneous in point of law" or "in excess of

³⁰Decker *Van Leeuwen's Commentaries* 557 note 17.

³¹At 546-547.

³²*Supra*.

³³Section 33 of The Summary Jurisdiction Act 1879.

jurisdiction".³⁴ In the case of serious offences on the other hand, certain other remedies were available in order to challenge decisions handed down in trial on indictments. These were the remedies of reserving a case for the Court of Crown Cases Reserved and appealing to a Court of Error by means of a so-called writ of error. The first-mentioned, namely the remedy of reserved cases (also known as case stated), was a method of reviewing points of law arising on the evidence.³⁵ This remedy (initially not available to the accused as a right), was a technique implemented where the trial judge had doubts concerning a conviction. The trial judge then, on an informal basis, consulted his peers and if the judges thought the conviction was wrong or according to law incorrect, a pardon was recommended. Before 1848 these judges also occasionally considered a point of law which had arisen at a trial where the accused was acquitted. Of importance is that they had no power to reverse or in any way affect the acquittal of an accused.³⁶ In 1848 legislation was introduced which created a Court of Crown Cases Reserved.³⁷ In terms of this legislation the court's jurisdiction was limited to appeals on a point of

³⁴See Howard P *Criminal Justice in England* 1931 reprinted 1987 345. Section 33 of the 1879 Act was the forerunner of the present provision contained in the Magistrates' Courts Act 1981 which provides for an appeal by means of "case stated" procedure on a question of law by both parties in criminal proceedings from a magistrate's court decision to a superior court. See chapter six *infra* under 6.2.2 for a discussion of this provision.

³⁵See Baker JH *The legal profession and the common law - Historical essays* 1986 300-301.

³⁶See Friedland 285. The author cites the case of *Wright* 1821 Russ & Ry 456 168 ER 895 where the trial judge submitted for the consideration of the judges the question whether evidence for the accused (who was acquitted) had been properly admitted. No formal resolution was reached by the judges since they had no power to reverse an acquittal.

³⁷Crown Cases Act 1848.

law from *convictions* only.

The writ of error procedure which dates back to the sixteenth century, was initially a remedy brought by a defendant to a Court of Error (the King's Bench) as a means by which his conviction could be reversed.³⁸ This procedure was applicable only to cases in which some procedural irregularity apparent in the record of the proceedings took place. The record of proceedings during this time amounted to a mere abstract of the indictment, a memorandum of the pleas, verdicts and sentences.³⁹ No account was given of evidence led at the trial or even of the direction given by the judge to the jury.⁴⁰ Since this procedure required that the error had to be clearly reflected in the record and normally an error which had been clearly reflected in the record would *not* have prejudiced the crown,⁴¹ the crown was in practice limited to bring a writ of error against an acquittal only in cases where the acquittal was entered on a special verdict, namely on a question of law.⁴²

³⁸For a discussion of this remedy, see in general Stephen *Criminal law* Vol I Chapter X (hereinafter referred to as Stephen *History*).

³⁹See Stephen *Criminal law* Vol 1 and Baker 299.

⁴⁰Stephen *Criminal law* Vol 1 309 could not conceive of "anything more meagre, unsatisfactory or informal" than this record. Baker 299 points out that "in the good old days when barbarous law was tempered by luck judgments might be reserved for the most trifling slips of form or want of certainty". Numerous judgments were accordingly reversed for insubstantial reasons based, according to Baker, most of the time on a kind of compassion for the person who had been convicted.

⁴¹Friedland 287.

⁴²Special verdicts are verdicts by means of which the jury, having legal doubts as to the applicable law, found the facts "specially" and then referred the verdict to the court to decide whether on these facts the defendant could or could not be convicted of the crime charged. See Stephen *Criminal law* Vol 1 311. Apparently, if the court entered an

Although certain English writers discuss the remedy of a writ of error as one being available to the accused only⁴³, there are some writers on the criminal procedure prevailing during the eighteenth century whose writings imply that the crown could bring a writ of error after an acquittal.⁴⁴ The writings of Hawkins⁴⁵ seem to indicate that during the eighteenth century a writ of error could be filed by the crown on an acquittal of an accused, but only in

acquittal, the crown could bring a writ of error to the Court of Error on the basis that the trial court had interpreted and applied the law incorrectly. Friedland 287 note 4 cites a few reported cases permitting an appeal by the crown in such instances. He points out however, that there was an element of consent in all of these cases; for example, in the case of *Chadwick* 1848 II QB 205 116 ER 452 467, the trial judge, who ruled in favour of the accused stated: "When this case was before me in the court below, I did not mean by the judgment I then gave to pledge myself to any definite opinion as I knew that it was intended that the facts found by the jury should be made the subject of a special verdict with the view to the question being considered by a court of error".

⁴³See Stephen *Criminal law* Vol 1 309; Blackstone 1829 ed Vol IV Chapter XXX 391; Chitty J A *Practical Treatise on the Criminal Law* 2nd ed 1826 Vol I 746-754 (referring to this procedure as one being available to the accused only) and Baker 301 (stating explicitly that this remedy could not be taken on acquittal because a verdict of not guilty was final and could not be questioned by the crown).

⁴⁴Hawkins W *A treatise of the Pleas of the Crown* 6th ed 1788 528; Hale Vol II Chapter XXXI. The writings of Archbold (1900 ed) leaves one in some doubt as to the matter since no clear distinction is made between civil and criminal proceedings in his treatment of this remedy. A general statement (at 252) that "[A] writ of error lies at the suit either of the subject or of the Crown" is not elaborated on. Coke EL *First Part of the Institutes of the Laws of England* 1812 ed Vol III par 259b (hereinafter referred to as Coke 1812 ed) merely states that a writ of error lies upon a matter of law and that this remedy "properly lies where false judgment is given in any court which is a court of record". No explicit reference is made to writs of error brought on behalf of the crown. In the United States Supreme Court case of *US v Sanges* 144 US 310 (1892) 313 Mr Justice Gray stated that "the English law on this matter is not free from doubt".

⁴⁵At 528.

circumstances where the initial indictment was defective in that it failed to state an offence ("want of substance in setting out the crime")⁴⁶ or that the trial court lacked jurisdiction ("want of authority in the judge before whom it was taken")⁴⁷. Hale's treatment of the matter indicates or rather implies that a writ of error could be filed by the crown if an individual was found by special verdict to have committed an act that constituted a murder or other felony, but the court mistakenly adjudged the act committed *not* to be a felony.⁴⁸ According to Hale, if no writ of error was entered, a plea of *autrefois acquit* would bar *de novo* proceedings. Hale was furthermore of the view that a judgment of acquittal could be reversed if the acquittal was the result of a defective indictment.⁴⁹ No other possible grounds upon which the crown could file a writ of error following an acquittal are suggested by this writer.

Therefore, it would seem that if the procedure of writ of error was in fact regarded as a remedy available to the crown against an acquittal in a trial on indictment, it was limited (according to the abovementioned two writers), to the following three grounds⁵⁰

- (a) that the trial court lacked jurisdiction

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸At 248 & 394-395.

⁴⁹*Id.* The author relies upon *Vaux's case* discussed in chapter two *supra* under 2.3.1, text at note 65.

⁵⁰*Cf* also the findings of Office of Legal Policy "Report to the Attorney-General on double jeopardy and government appeals of acquittals" *University of Michigan Journal of Law Reform* Spring/Summer 1989 833, 843-851.

- (b) that the initial indictment was fatally flawed (so that it could not be said that the accused was in jeopardy of conviction) or
- (c) that, by special verdict, facts had been found indicating that the offence of which the accused had been indicted had been committed, but that the trial court erroneously held that the facts found did not constitute a crime.

The writ of error procedure continued to exist in English criminal procedure until eventually abolished in 1907 by the enactment of the Criminal Appeal Act.⁵¹ Furthermore, all functions of the previous Court for Crown Cases Reserved were in terms of that Act vested in the Court of Criminal Appeal.⁵² The Act dealt only with appeals in criminal proceedings instituted on behalf of the accused. No provision was made whatsoever in the Act for crown appeals against a judgment favourable to the accused.⁵³ As will be seen in the discussion of current English Law, the policy against crown appeals against acquittals handed down in trials on indictment adopted in the Criminal Appeal Act of 1907 is still in essence preserved in English law today.

⁵¹Section 20(1) of the Criminal Appeal Act of 1907.

⁵²Sect 20(4) of the Act.

⁵³See in general Stephen JF *Stephen's Commentaries on the Laws of England* 18th ed 1925 (revised by E Jenks) Chapter XVII and Friedland 279. No provision was made in the Act to permit of an appeal from an acquittal, or from a judgment given against the crown on a demurrer or from a successful motion to quash an indictment or to arrest judgment.

CHAPTER SIX

THE PROSECUTION APPEAL : AN ANALYSIS OF CURRENT LAW

6.1 INTRODUCTION

The permissibility of prosecution appeals against acquittals is one of the many controversial issues in the law of double jeopardy. The basic question that arises in this particular context of double jeopardy jurisprudence is whether the policy expressed in the maxim "no person shall be placed in jeopardy more than once for the same offence" should be construed as meaning also that the state may not appeal to a higher court against an acquittal handed down by a lower hierarchical court. A further question which arises is whether the state may appeal against a sentence imposed on a convicted person.

From a layperson's point of view, many arguments may be advanced in favour of prosecution appeals against acquittals. The most common is the argument that the high incidence of crime in contemporary societies requires that suspected offenders should not only be apprehended and tried by a court of law for their misconduct, but that the guilty should also be duly convicted and punished. Consequently, if a person who in the layperson's view is clearly guilty of a crime, is acquitted by the court of first instance or if convicted, the sentence imposed on him for his misconduct is so outrageously lenient that it provokes a public outcry, the prosecution should at least get one more opportunity to bring its case before a higher tribunal. This higher tribunal, which is presumed to be more competent than the first trier of fact, should be empowered to reconsider the facts of the particular

case, re-evaluate the decision reached by the trial court, set aside the acquittal and either enter a conviction or direct a retrial of the accused. This argument is supported by the notion that, if the accused is entitled to a rehearing on the merits of the case, the prosecution should not be denied the same opportunity.

Considerably more substantial is the argument that an accused has not as yet been acquitted of an offence before his case has not *finally* been adjudicated upon by the highest empowered court. An appeal by the prosecution in the same cause of action only amounts to a *continuation* of the proceedings initiated in the trial court and can therefore not be viewed as violative of double jeopardy principles. The double jeopardy principle only comes into play after the accused has finally been acquitted or convicted by the highest empowered hierarchical tribunal. In support of this contention it may also be argued that if the accused may be retried after his conviction has been set aside by a higher tribunal, then the prosecution should also be entitled to initiate an appeal.

This rationale, the so-called "continuing jeopardy" theory, was first introduced in a dissenting opinion in an early decision of the Supreme Court of the United States.¹ However, it has never been accepted in American constitutional double jeopardy jurisprudence. Nevertheless, it has been adopted by the Supreme Court of India which advanced the theory in an attempt to explain why an appeal against an acquittal does not amount to a violation of the Indian constitutional provision

¹The theory was first advanced by Mr Justice Holmes in a dissenting opinion in the early United States Supreme Court decision of *Kepner v US* 195 US (1904) 100, 135. See *infra* under 6.5.2 for a discussion of that decision.

against double jeopardy.²

Arguments against prosecution appeals are usually based upon constitutional grounds rather than considerations of public sentiment or ideas of logic. The main argument advanced against prosecution appeals is that the double jeopardy guarantee requires that the state (with all its power and resources) should as a rule only be allowed *one* opportunity to bring its case before a duly appointed tribunal.³ It is argued that if the adjudication by this tribunal results in an acquittal, it should be regarded as final even if it is based on incorrect application of prevailing law or flawed factfinding. It is explained that such an understanding of the double jeopardy prohibition serves the most important value which underlies the rule, namely the accused's interest in finality. A reconsideration of an accused's guilt or innocence at the *initiative of the state*, at a stage when the state has already had a fair opportunity to state its case before a duly appointed adjudicator of fact, amounts to oppressive state conduct. It arguably amounts to oppressive state conduct not because it necessarily enhances the possibility that an innocent person may be found guilty, or causes anxiety, embarrassment and expense to the accused, but because a due process system of criminal justice (requiring legal instead of factual guilt)⁴, vests ultimate authority to find culpability in

²See the decision of the Indian Supreme Court in *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131 (discussed *infra* under 6.4.2.).

³This is the approach generally followed in American constitutional jurisprudence.

⁴The doctrine of legal guilt (as opposed to factual guilt) is explained by Packer HL *The limits of the criminal sanction* 1968 (at 166) as follows. A person is not to be held guilty of crime merely on a showing that in all probability, based on reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Moreover, he is not to be held guilty, even though the factual

the initial factfinder.⁵ In the context considered in this chapter, the guarantee against double jeopardy arguably gives effect to these broader values of due process.

Between these extreme approaches, one may also identify a balanced approach which recognises the accused's interest in finality but allows for prosecution appeals against acquittals as an exceptional remedy in order to serve certain valid interests of the community. Champions of this approach argue, for instance, that the state should be granted at least one fair opportunity to present its case in an *error-free* trial. If an acquittal is based on an incorrect application of prevailing law, or the trial which ended in an acquittal was tainted as a result of a procedural irregularity (for example a breach of the rules of natural justice to the prejudice of the state), the interests of the community in legal certainty and in the proper administration of justice require that a higher tribunal should be empowered to intervene and set aside the acquittal on request of the prosecution. In general, this balanced approach is followed in the majority of legal systems under

determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect. These are, for instance, that he must not previously have been convicted or acquitted of the same offence; must have been presumed innocent until proven guilty and must have had access to legal representation. Packer explains that none of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offence against him. However, in a due process system of criminal justice based on the recognition of fundamental human rights, violation of rules designed to protect the accused will mean that he is legally innocent. Cf also the explanation of "legal guilt" as opposed to "factual guilt" by Joubert *et al Criminal Procedure Handbook* 2nd ed 1996 4-6.

⁵Thomas GC "An elegant theory of double jeopardy" *University of Illinois Law Review* 1988, 827 850-853 regards this as the only rational explanation why state appeals against acquittals are prohibited in terms of the constitutional guarantee against double jeopardy in America. See *infra* under 6.5.7 for a detailed discussion of his arguments.

consideration in this comparative study namely, England, Canada and South Africa. Models of this approach are the following

- (a) An appeal by the prosecution on a point of law only, which does not affect the acquittal afforded the particular accused in the court *a quo*. It only has prospective application for the future guidance of courts. This kind of appeal is known as a moot appeal, and prevails in English law against acquittals handed down in superior courts.
- (b) An appeal by the prosecution on a point of law only which, if successful, results in the setting aside by the court of appeal of the acquittal afforded the accused in the trial court and having it replaced with a conviction by applying the correct legal principles to the facts found by the trial court. This model is followed in Canada and South Africa. A prosecution appeal with this effect is also allowed in English law against acquittals handed down in lower courts. In the legal systems which allow a prosecution appeal on a point of law only, courts have been confronted with the problematic issue of identifying "questions of fact" on the one hand, and "questions of law only" on the other hand. As will become clear from the following comparative study, courts in the different legal systems under consideration have not always given the same content to the concept "question of law only". In the English legal system for instance, the ambit of the "question of law" appeal is much wider than in South African law. Therefore, the mere fact that the prosecution in a particular legal system is allowed only to appeal on a point of law, does not necessarily lead to the conclusion that the accused in that legal system is afforded more protection against double jeopardy than his counterpart in a legal system which allows for a prosecution appeal based on factual as well as legal questions. This is why it is important

to consider also what is understood in the different legal systems under the concept "question of law only".

- c) An appeal by the prosecution against sentence imposed on the convicted person. This form of prosecution appeal is permitted in all the legal systems considered in this comparative study.

- (d) Review by a superior court of proceedings which took place in a lower court which resulted in an acquittal; in other words, the setting aside of an acquittal by a higher tribunal on the basis that a procedural irregularity occurred during the proceedings in the trial court. This is allowed in the law of Canada, England and India. In Canada and England courts have justified the setting aside of acquittals on this basis by invoking the "nullity theory" and the concept of "absence of jurisdiction".⁶ In South Africa on the other hand, superior courts have been reluctant to set aside acquittals in terms of either statutory or inherent powers of review.⁷

6.2 ENGLISH LAW

6.2.1 General

As indicated in chapter five, the system of criminal appeal introduced in England at the beginning of this century was designated as an exceptional procedure to accommodate the interests of the

⁶See *infra* under 6.2.5 and 6.3.5 for a discussion of the courts' approach in these legal system.

⁷See *infra* under 6.6.2.6 for a discussion of South African law in this regard.

accused only.⁸ Save for exceptional circumstances where the accused was wrongly *convicted*, the general attitude was that no justification exists to disturb the finality of trial verdicts. In all probability the underlying idea was that the citizen's common law right against double jeopardy placed a prohibition on any challenge of an initial verdict of acquittal entered by a competent court of law.⁹

However, as indicated above, legislation as early as 1879 provided for a procedure known as "appeal by case stated"¹⁰ in summary trials.¹¹ This procedure, which provided for an appeal on a point of law by either the prosecution or the accused against a decision of a lower court, has been retained in the English system of criminal justice

⁸The creation of a system of appeal early this century was the direct result of the conviction and imprisonment of a person named Adolf Beck for an offence that he never committed. See Jackson RM *The Machinery of Justice in England* 3rd ed 1960 109.

⁹See Paliwala A and Cottrell J "Appeals by the prosecution against sentences and acquittals: A survey of the situation in some commonwealth countries" *Commonwealth Secretariat* 2. The authors of this survey quote the Australian case of *Thompson v Mastertouch TV Series Pty Ltd* (1978) TRRS 306, 115, 119-120: 19 ALR 547 which assessed the source of the English rule (prohibiting state appeals against acquittals) as follows: "The principle is ordinarily stated in abstract terms without specific reference to the underlying common law right which it embodies the right of a person who has been acquitted by a court of competent jurisdiction after a trial on the merits of a criminal charge, to be spared the renewed jeopardy of an appeal against acquittal".

¹⁰Appeal by case stated is an appeal on a point of law. The procedure followed in this kind of appeal is for the magistrates, through their clerks, to prepare a statement in a document (the case) setting out the point of law raised and explaining why they ruled on it as they did. This is why the process is described as "case stated". See Eddey K J *The English Legal System* 4th ed 1987 74.

¹¹Summary trials are trials before justices of the peace (presently called magistrates), which deal with minor criminal offences, eg, most road traffic offences. See *infra* note 12 for an explanation of criminal jurisdiction in England and Wales.

and is presently contained in the Magistrates' Courts Act of 1981.

Generally, the approach of according sanctity to a verdict of acquittal handed down in a trial on indictment¹² has been preserved in English criminal procedure. However, a number of modifications to this approach have taken place in recent decades. Amendments to legislation occurred which ostensibly purport to accommodate certain valid interests of the community; in particular the interest of the general public in the proper administration of justice. The first of these changes (or rather modifications) which took place was the introduction of a moot appeal procedure in superior courts.¹³ The second change that took place was the introduction in 1988 of legislation which provides for an appeal by the Attorney-General against the imposition of a too lenient sentence. These developments are discussed separately in the paragraphs that follow.

6.2.2 Appeals against acquittals handed down by lower courts

Section 111(1) of the Magistrates' Courts Act of 1981 provides

Any person who was a party to proceedings

¹²A trial on indictment is a trial by jury in a superior court (presently the Crown Court) for more serious offences. At present, criminal jurisdiction in England is established according to three classes of offences, listed in the Criminal Law Act 1977, namely, (a) offences triable on indictment before a jury eg serious crimes like murder and manslaughter; (b) offences triable only summarily by the magistrates eg most Road Traffic offences and (c) offences triable either way (eg theft) depending upon the seriousness of the offence in the particular case and also whether the accused consented to a summary trial. See in general Keenan D *Smith and Keenan's English law* 9th ed 1989 19-21.

¹³A moot appeal can be described as an appeal by the prosecution against an acquittal on a point of law to a higher tribunal. However, the decision of the higher tribunal has no effect whatsoever on the acquittal afforded the particular accused in the trial court.

before a magistrate's court, may apply to the magistrate to state a case for the opinion of the High Court¹⁴ on the ground that a conviction or acquittal¹⁵ or passing of sentence was wrong in law or in excess of jurisdiction.¹⁶

A question of law has been interpreted by the courts as to whether the magistrate was right to find that there was no case to answer, whether inadmissible evidence was received or admissible evidence excluded and also whether the verdict of the magistrate was correct in view of the facts which they found proved on the evidence.¹⁷ However, the lower court's decision as to which facts were established by the evidence, cannot be appealed by case stated; only a finding of fact which in the superior court's view is totally unsupported by evidence, or which no reasonable tribunal directing itself could have reached, is treated as revealing an error of law.¹⁸

¹⁴A divisional court of the Queen's Bench Division.

¹⁵As indicated in chapter three *supra* under 3.2.2 an acquittal in English law denotes a final determination on the merits of a case in favour of the accused.

¹⁶See Sprack 357-358 for a discussion of the interpretation of the courts of this section. The authors point out that, because it is very rare that a magistrate would pass a sentence which is wrong in law or in excess of jurisdiction, most appeals by way of case stated are aimed at overturning a summary acquittal or conviction. In *Tucker v Director of Public Prosecutions* [1992] 4 All ER 901 it was held that only if the sentence is, by any acceptable standard, "astonishing", will proceedings by way of case stated be entertained. See Walker RJ and Ward R *Walker and Walker's English legal system* 7th ed 1994 543 hereinafter referred to as Walker (1994) ed.

¹⁷Sprack 357.

¹⁸See *Bracegirdle v Oxley* [1947] KB 349 All ER 126 127F and 130D-F. Devlin P *Trial by Jury* 3rd impression with addendum 1966 61-63 explains that the question of whether evidence existed on which reasonable persons could convict essentially amounts to a matter of fact but came to be treated as a question of law as a result of judicial

Where the prosecution appeals by means of this procedure, the court of appeal may affirm the acquittal or remit the case to the magistrate with a direction that they convict and proceed to sentence.¹⁹ However, where it is plain what the sentence should be the court may replace the acquittal with a conviction and impose an appropriate penalty. Except where express provision is made in a statute for a prosecution appeal on the merits of a case²⁰ the prosecution is not allowed in terms of this procedure or any other procedure, to appeal from a magistrate's court to a superior court on any other basis than a point of law. Finally, it is essential also to discuss the consequences of a successful appeal by the accused against a conviction handed down in a summary trial. An accused

interference by judges with the deliberations of juries acting as judges of fact. As the jury changed from an accusatory organ into a fact-finding body, certain limitations were placed on the jury as a competent fact-finding institutions. This occurred because the view was held that certain questions of fact could be answered better by judges than juries. The underlying idea was that there should be some control exercised by people skilled in law over certain factual deliberations made by juries. These *factual* matters were labelled questions of law. The author points out that Lord Chief Justice Cockburn in 1879 protested strongly against the terminology which turned matters of fact into questions of law. The judge pointed out that the right mode of dealing with a question of fact (which should rather be considered by a judge) would be to say honestly that, although it amounts to a question of fact, it is a issue which has to be determined by a judge (at 61). However, this approach was not followed in English law and questions *for* lawyers were in fact incorrectly labelled as questions *of* law. This historical phenomenon explains (in my view) why a decision of a magistrate at the end of the prosecution's case that there is no case to answer (essentially a factual determination) came to be treated as a question of law in English criminal jurisprudence. *Cf* the discussion *infra* under 6.6.2.3 of the approach adopted in South African law in *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A).

¹⁹Sprack 360.

²⁰See Fellman D *The Defendant's rights under English law* 1966 89 note 84.

may appeal on the merits to the Crown Court against his conviction or sentence. If the conviction is overturned the prosecution may also appeal by means of the case stated procedure to the High Court. However, the prosecution may only appeal by means of this procedure on the ground that the Crown Court's reversal is wrong in law or in excess of jurisdiction. A further appeal to the House of Lords from the High Court is allowed by either party (prosecution or accused) if the High Court certified that there is a point of law of general importance involved and either the High Court or the House of Lords have granted leave to appeal.²¹

Given the wide scope of the concept "question of law" in English criminal procedure,²² it seems as if the accused in a lower court of summary jurisdiction is in fact afforded less protection against double jeopardy than an accused standing trial in a superior court. One can only speculate as to the underlying reason for this phenomenon in English criminal procedure. It would appear that the policies that underlie the double jeopardy principle have rarely received sufficient attention in England. The most likely reason seems to be that the administration of justice in the magistrates' courts is regarded as being of such a low standard that the interest of the public in the proper administration of justice necessitates or demands that the public should (at this level of legal administration), at least get one fair opportunity to bring an offender to justice.²³ In other words, the

²¹See Sprack 372.

²²As indicated above, a finding of fact which is unsupported by evidence, or which no reasonable tribunal directing itself could have made, is treated in English law as an error of law. *Cf* the narrow scope of a question of law as interpreted by the South African courts discussed *infra* under 6.6.2.3.

²³This view is supported by Friedland 298. Although the great bulk of criminal work is performed in the magistrates' courts (almost 98 percent of all criminal cases), most presiding officers in these courts

prosecution should at least get an opportunity to present its case in a trial free of errors, including errors concerning the proper evaluation of evidence.

Another possible explanation may be that, traditionally, sanctity was accorded only to jury verdicts of acquittals handed down in trials on indictments.²⁴ However, if this thesis is accepted as correct, the question may be raised why the English prosecutor is not allowed a full appeal on the merits against an acquittal handed down in a summary (non-jury) trial. It seems therefore that the recognition of an appeal by the prosecution upon a point of law against acquittals handed down in lower courts and the broad interpretation that the courts have given to the concept "question of law", can only be explained on the basis of the inferior standard of administration of justice in lower courts.

6.2.3 Appeals against acquittals handed down by superior courts

Until 1972, no procedure existed in English law to test the correctness of a statement of law made by a judge during the course

are lay people and have hardly any legal training. These are called lay magistrates as opposed to stipendiary magistrates (who have legal training). Although English magistrates deal with minor offences, they may (at present) impose a sentence of six months imprisonment for any one offence (or 12 months in case of consecutive sentences) or a fine of 5,000 pounds. See Walker 1994 ed 533-534.

²⁴*Cf* the views of Thomas *Modest proposal* 208-213. In considering the language contained in the double jeopardy provision of the American Constitution, the author suggests that the words used by the Framers, ie that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of *life or limb*" (my emphasis), originated in English law and denotes that the rule applied (in eighteenth century England) to most felonies but presumably not to misdemeanors.

of a trial on indictment which ended in the acquittal of the accused.²⁵ The absence of any method whereby a ruling by a Crown Court judge could be challenged left open the possibility that such a ruling, perhaps unduly favourable to the accused, could in fact have been based on the application of incorrect legal principles. The possibility also existed that such a case might be reported and become accepted as representing prevailing law. To promote the public interest in the proper administration of justice and legal certainty, the legislature created a mechanism whereby a perpetuation of the application of incorrect legal principles could be avoided without necessarily encroaching on the citizen's common law right against double jeopardy. This was done by means of the enactment of section 36 of the Criminal Justice Act of 1972²⁶ which provides for a procedure whereby the Attorney-General may refer to the Court of Appeal for their opinion any point of law which arose in a case where a person had been tried on indictment and acquitted. However, the opinion expressed by the Court of Appeal (even an opinion that the trial judge was wrong and the facts of the case were such that the accused clearly ought to have been convicted)²⁷ has no effect whatsoever on the acquittal accorded the accused in the trial court.²⁸ It only serves the purpose of stating the correct legal principles for future reference in order to prevent a perpetuation of the application of incorrect legal principles by the courts.

²⁵As indicated in chapter five *supra* under 5.3, the writ of error procedure was abolished in 1907.

²⁶See Archbold 1995 ed Vol 1 1259-1260 for the complete text of this provision.

²⁷This also qualifies as a question of law in English law. See *Bracegirdle v Oxley supra* note 18.

²⁸Section 36(7) of the Act.

The Act and the rules made in terms of it went to great lengths to protect the person who has been acquitted.²⁹ As indicated, the acquitted person is not put in jeopardy of conviction by the proceedings.³⁰ Furthermore, he has a right to be presented at the hearing by counsel and have his costs paid out of central funds.³¹ His identity may also not be disclosed at the proceedings except by his own consent.³² In one of the first matters so referred³³ Lord Widgery CJ stated that the procedure is not only available if "very heavy questions of law" arise, but also where "short but important points require a quick ruling ..."³⁴. Finally, it should also be mentioned that in terms of this procedure, the Court of Appeal may (following a reference under section 36) of their own motion or on application of either the prosecution or the accused refer the point of law to the House of Lords, if it appears that the point ought to be considered by that House.³⁵

It is clear that the institution of a moot prosecution appeal against an acquittal on a point of law cannot be criticised on double jeopardy grounds. In fact, the institution serves the valid interest of the community in the proper administration of justice without violating the common law right of the accused against double jeopardy.

²⁹Criminal Appeal (Reference of Points of Law) Rules 1973. See Archbold 1995 ed 1260-1261 for a discussion of these rules.

³⁰Section 36(7) of the Act.

³¹Section 36(5) of the Act.

³²Criminal Appeal (Reference of Points of Law) Rules 1973 Rule 6.

³³*Attorney-General's Reference* (No 1 of 1975) [1975] QB 773.

³⁴At 778.

³⁵Section 36(3). See Archbold 1995 ed 1259.

6.2.4 Prosecution appeals against sentence

In 1988 legislation was introduced which provides for an appeal by the Attorney-General against the imposition of a too lenient sentence.³⁶ The relevant legislation gives the Attorney-General power to refer to the Court of Appeal cases where it appears to him that the sentencing of an offender in the Crown Court has been unduly lenient.³⁷ Where a case is referred to the Court of Appeal according to these provisions, it has the power to review and alter the sentence passed, substituting such sentence as it thinks appropriate and which would not exceed the jurisdiction of the lower court.³⁸

Although a considerable section of the English legal profession (both inside and outside Parliament) strongly opposed any form of prosecution appeal against sentence,³⁹ the government was eventually swayed to adopt the present legislation by considerations

³⁶Sections 35 and 36 of the Criminal Justice Amendment Act of 1988. See Archbold 1995 ed Vol 1 1261-1264 for the text of these provisions and a brief discussion thereof.

³⁷*Id.*

³⁸Section 36(b) of the 1988 Act.

³⁹Those who opposed a prosecution appeal against sentence were of the view that, apart from double jeopardy considerations, it would interfere with the traditional freedom of Crown Court judges to exercise a broad discretion when passing sentence and also undermine the accepted view in English law that the prosecution's role in the sentencing stage of proceedings is limited to a fair and impartial presentation of the facts and does not include the power to argue for a particular or more severe sentence. See Emmins CJ and Scanlan GA *Guide to the Criminal Justice Act 1988* 1st ed 1988 162. *Cf* also Spencer JR "Do we need a prosecution appeal against sentence?" *Criminal Law Review* 1987 724 (discussing the controversy surrounding the proposed legislation, but, personally, favouring such an appeal) and Seabrooke S "Two timing the double jeopardy principle" *Criminal Law Review* 1988 103 criticising the proposed legislation on double jeopardy grounds.

put forward by those who favoured a prosecution appeal against sentence.⁴⁰

In dealing with these appeals, the Court of Appeal applied the normal principles of review of a discretion. It held that it could only increase sentences which were unduly lenient. In one of the initial references, the Court of Appeal laid down the following guidelines⁴¹

The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased - with all the anxiety that this naturally gives rise to - merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.

⁴⁰It was submitted, *inter alia*, that unduly lenient sentences outraged the public and that it was of no avail if such sentences could only be criticised but not altered by a superior court; that offenders whose crimes and characters were effectively indistinguishable might receive markedly different treatment and that this phenomenon undermined public confidence in the judiciary and the criminal law. See Emmins and Scanlan 162. It should be mentioned however, that these arguments are equally valid with regard to the need for an appeal against an acquittal - even on the factual merits of a case.

⁴¹*Attorney General's Reference* (No 4 of 1989) [1990] 1 WLR 41, 45-46.

From a double jeopardy perspective, the court added the following considerations⁴²

The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which the court might refuse to increase an unduly lenient sentence, we mention one obvious instance; where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned. Finally we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing the sentence.⁴³

In the majority of subsequent cases the Court of Appeal adjusted an appropriate increased sentence (decided upon in review proceedings), on the basis that the offender has had to face the prospect of being sentenced twice over. In other words, the court has mitigated the appropriate increased sentence (decided upon on review)

⁴²*Id.*

⁴³In this particular case the court of review found that an increased sentence would not be in the interest of the victim (a minor sexually abused by her father) and the family as a whole. Also, the court decided not to increase the sentence because it was accepted by counsel for the state that the risk of repetition of the offences was unlikely in view of the fact that the whole family were receiving intensive help from social workers and the probation service which was directed to attempt to rehabilitate and reunite them. In another early case, *Attorney General's Reference* (No 5 of 1989) *R v Hill-Trevor* [1990] 90 Cr App R 358, the Court of Appeal added that it would not intervene unless there was some error of principle in the Crown Court sentence, so that public confidence would be damaged if the sentence was not altered on appeal.

on the basis of consideration of the "element of double jeopardy".⁴⁴ For example, if the court of review found that a sentence of 12 months' imprisonment imposed by the Crown Court was unduly lenient, it would state that an appropriate sentence would be two years' imprisonment. However, taking into consideration the "element of double jeopardy", the court would then reduce the appropriate sentence, and, for instance, impose a sentence of 18 months' imprisonment. Therefore, in deciding on an appropriate sentence, English courts of appeal have taken into consideration the double jeopardy implications of a prosecution appeal against sentence.

6.2.5 Judicial review of an acquittal

One of the High Court's tasks is to supervise the work of inferior tribunals. In English law, judicial review of lower court proceedings is instituted by means of application for one or more of three prerogatory orders: *Certiorari*, mandamus and prohibition. An order of *certiorari* quashes a decision of an inferior tribunal; mandamus compels an inferior tribunal to carry out its duties and prohibition prevents an inferior tribunal from acting unlawfully or without jurisdiction.⁴⁵ The functions of mandamus and prohibition on the one hand and appeal by case stated on the other are quite distinct. The appellant by case stated argues that the magistrates have made a

⁴⁴See *Attorney-General's Reference No 6 of 1994 (R v Lee)* Crim LR [1994] 951, 952; *Attorney-General's Reference No 11 of 1994 (R v Hall)* Crim LR [1994] 953; *Attorney-General's Reference No 30 of 1993 (R v Saunders)* Crim LR [1994] 953, 954; *Attorney-General's Reference No 7 of 1994 (R v Chadwick)* Crim LR [1994] 954, 955; *Attorney-General's Reference No 14 of 1994 (R v Walker)* Crim LR [1994] 955; *Attorney-General's References Nos 17 and 18 of 1994 (R v Chamberlain and Chamberlain)* Crim LR [1994] 955, 956 & *Attorney-General's Reference No 49 of 1994 (R v Brown)* Crim LR [1994] 437, 438.

⁴⁵See Blackstone 1991 ed 1469.

mistake in exercising jurisdiction. The applicant for mandamus or prohibition argues either that the magistrates have failed to exercise their jurisdiction or that they should be prevented from exercising a jurisdiction which they do not lawfully have. *Certiorari* and appeal by case stated serve similar purposes. The effect of both remedies is to set aside the decisions of the court below. Blackstone points out that counsel advising a person aggrieved by a decision of a lower court may find the choice between the remedies difficult.⁴⁶ He summarises the position as follows⁴⁷

- (a) Where the magistrates have acted in excess of jurisdiction both *certiorari* and appeal by case stated are available.⁴⁸
- (b) Where an error of law has been made, but the inferior tribunal was acting within its jurisdiction, appeal by case stated is the obvious remedy. If the error of law is patent on the face of the record of the inferior tribunal's proceedings, *certiorari* could also be used, but most errors of law are latent rather than patent. The latent error will only be revealed by means of a case stated.
- (c) If the rules of natural justice have been broken, the appropriate remedy is *certiorari*. This is because the procedural irregularities which typically form the basis of an alleged breach of natural justice (eg a magistrate had an interest in the outcome of the proceedings or the defence had not been given the opportunity to present its case properly) would not emerge from a case stated, which deals essentially with the facts the magistrates find proved and the legal issues arising from the facts.
- (d) *Certiorari* is the only remedy if the defence wishes to quash a committal for trial. Appeal by case stated will not lie because there has not been a final determination in the case.
- (e) Where both *certiorari* and appeal by case stated are available, the latter is preferable because it enables the facts as found by

⁴⁶At 1479.

⁴⁷*Id.*

⁴⁸The meaning of the concept "excess of jurisdiction" will become clearer from a discussion of the case law in the following paragraphs.

the magistrates to be placed clearly before the superior court.

In the past, English courts have held consistently that review by a superior court of an acquittal accorded to an accused in an inferior tribunal amounts to a violation of the accused's rights against double jeopardy.⁴⁹ However, in *Regina v Dorking Justices, Ex parte Harrington*,⁵⁰ the House of Lords recently added a qualification to this principle. It held that judicial review of an acquittal would only be prohibited on double jeopardy grounds if the accused had in fact been *lawfully* acquitted.⁵¹

The facts of the *Harrington* case were as follows. The prosecution applied to the justices for an adjournment of a hearing on charges of assault on the ground that the principal prosecution witness was not available. The justices decided to adjourn the case to a particular date. However, defendant's counsel objected because the defendant would not be available on that specific date. Subsequently, without making any inquiry of the prosecution who had other witnesses and were prepared to go on with those other witnesses on the original day

⁴⁹*Regina v Russel* (1854) 3 El & Bl 942 118 ER 1394; *Regina v Duncan* (1881) 7 QBD 198 and *Regina v Middlesex Quarter Sessions (Chairman) ex parte Director of Public Prosecutions* [1952] 2 QB 758. In common law, the writ of *certiorari* was a means whereby the King's Court exercised jurisdiction over an inferior tribunal. Where it appeared to the Court of King's Bench that an insufficient or unsatisfactory trial would occur in the lower court, it could, in its discretion, remove the indictment out of the lower court by *certiorari* in order that the accused be tried before a judge of the King's Bench. *Certiorari* also lay to consider the validity of an indictment or conviction. Of importance however, is that *certiorari* did *not* lie to consider the validity of an acquittal. See Stephen *Criminal law* Vol 1 95-96.

⁵⁰*Supra*.

⁵¹At 752.

of hearing, the justices dismissed the information. The prosecution applied for judicial review by way of *certiorari* to quash the decision of the justices and mandamus which required them to hear the evidence against the defendant on the ground that the failure to afford the prosecution the opportunity to proceed forthwith by calling such witnesses as were available, was a breach of the rules of natural justice. The Divisional Court refused the application, holding that although the justices had acted in breach of natural justice, the dismissal of the charges against the defendant amounted to an acquittal and since the defendant had been in jeopardy, the Divisional Court had not power upon an application for judicial review to quash the acquittals and order a new trial.

The House of Lords reversed the decision. It held that the superior court could quash the acquittal by means of an order of *certiorari* and order a new trial. The reasons advanced by the court can be summarised as follows.⁵² In determining whether an acquittal is susceptible to judicial review, the test is not whether there had been a breach of the rules of natural justice, but whether the decision to acquit was a nullity. The jurisdiction of a magistrate's court is founded on statute. The relevant statute is the Magistrates' Courts Act 1981 of which, *inter alia*, section 9(2) provides that "[t]he court, after hearing the evidence and the parties, shall convict the accused or dismiss the information". In other words, this provision stipulates that the magistrates cannot dismiss any information until after they have heard the parties and whatever evidence the parties may properly lay before them, except where no evidence is tendered by the prosecution.⁵³ In the court's view, failure to comply with this section means that the court has acted without jurisdiction, thus

⁵²At 750.

⁵³*Id.*

rendering the proceedings a nullity.⁵⁴ The result is that the defendant was never in jeopardy of a conviction and could therefore be tried again.⁵⁵ The court made the following statement in this regard⁵⁶

An accused person is not, in the context of a plea of *autrefois convict* or *autrefois acquit* in jeopardy merely because that person is standing trial on a particular charge and in a popular sense is in jeopardy as being in peril of conviction. Jeopardy in the relevant sense only arises after a *lawful* acquittal or a *lawful* conviction.⁵⁷

In other words, if a magistrate purports to acquit when he is not empowered to do so (namely has no jurisdiction to do so), the trial is treated as a nullity which means that the acquittal may be quashed by a superior tribunal and a new trial ordered. The principle laid down in *Harrington* was recently applied in *Regina v Dorchester Justices, Ex parte Director of Public Prosecutions*,⁵⁸ where the court held that if a magistrate pronounces an acquittal without listening to the prosecution evidence and also without having any good reason, the verdict of acquittal may be quashed by means of *certiorari* because the magistrate acted without jurisdiction.

Therefore it may be said that because the concept of jurisdiction is often used in *certiorari* cases, the nullity theory has been used in these cases to effect a retrial after an acquittal. However, English courts have not as yet applied this approach in other instances of procedural irregularities except for the irregularity that occurred in both the

⁵⁴At 746.

⁵⁵*Id.*

⁵⁶At 752.

⁵⁷My emphasis.

⁵⁸RTR [1990] 369.

abovementioned decisions namely, the failure to give the prosecution an opportunity to present its case as required in terms of section 9(2) of The Magistrates' Courts Act of 1981.

6.2.6 Summary

* In English law, the understanding of the common law guarantee against double jeopardy has always been that it prohibits the state from challenging a verdict of acquittal handed down in a trial on indictment. However, in recent decades the English legislature has opted for a more flexible approach which also takes into consideration that the recognition of a prosecution appeal may serve certain valid interests of the public, namely interests in the proper administration of justice and legal certainty.

* In making provision for prosecution appeals against acquittals, the legislature has attempted to accommodate the abovementioned interests of the public without necessarily defeating the accused's right to be protected against double jeopardy. This was achieved by the introduction of a moot appeal against acquittals handed down in superior courts. The moot appeal procedure provides that the Attorney-General may refer to the Court of Appeal for its opinion any point of law which arose in a case where a person had been acquitted. However, the opinion expressed by the Court of Appeal has no effect whatsoever on the acquittal accorded the accused in the trial court; it only serves the purpose of stating the correct legal principles for future reference in order to prevent a perpetuation of the application of incorrect legal principles by the courts. The institution of a moot appeal serves the interests of the public in legal certainty and proper administration of justice without violating the common law right of the accused against double jeopardy.

* Traditionally, the accused acquitted in a lower court has never enjoyed the same protection against prosecution appeals as his counterpart in a superior court. From as early as 1879, legislation provided for an appeal *on a point of law only* by the prosecution against an acquittal handed down in a lower court, or sentence imposed on an accused convicted in such lower court. Moreover, the courts have given a wide meaning to the concept question of law. The reasonableness of a court's evaluation of evidence (essentially a factual issue) also qualifies as a question of law in English law.⁵⁹ This may be explained on the basis that questions which were traditionally regarded as matters which had to be decided by judges instead of by juries, in other words, *questions for lawyers*, came to be referred to as *questions of law*. Be that as it may, where the prosecution appeals by means of this procedure, the court of appeal may affirm the acquittal or remit the case to the magistrates with a direction that they convict and proceed to sentence. Justification for the recognition of a prosecution appeal on a point of law against an acquittal handed down in a lower court probably lies in the fact that the administration of justice in the magistrates' courts is of such an inferior standard that the interest of the public in the proper administration of justice requires that the state (at this level of legal administration) at least gets one fair opportunity to present its case in an error-free trial. However, this is mere speculation; the policies that underlie double jeopardy protection have rarely received sufficient attention in English law.

* The legislature also recently (in 1988) introduced a prosecution appeal against the imposition of an *unduly lenient* sentence imposed on a convicted accused in a superior court. Although there was

⁵⁹See the in depth discussion of this particular aspect in the discussion on South African law, in particular, the analysis of the decision of *Magmoed v Janse van Rensburg* (*infra* under 6.6.2.3).

strong opposition to any form of prosecution appeal against sentence, the government was eventually persuaded to adopt the legislation in view of the considerations that unduly lenient sentences outrage the public and undermine public confidence in the judiciary and the criminal law. The basic approach followed by the Court of Appeal is that a sentence may be interfered with only if the trial court acted on a wrong principle of law. In imposing a more severe sentence, the Court of Appeal has not altogether disregarded the accused's right to be protected against double jeopardy. To accommodate the accused's right, the court reduces an appropriate (increased) sentence on the basis that reconsideration of the sentence subjects the accused to double jeopardy. However, the Court has not explained why reconsideration of a sentence amounts to a violation of the guarantee against double jeopardy.

* The traditional premise that review by a superior court of an acquittal handed down in a lower court is prohibited in terms of the common law guarantee against double jeopardy, has recently also been eroded. The House of Lords held that judicial review of an acquittal will only be prohibited on double jeopardy grounds if the accused has in fact been *lawfully* acquitted. The court laid down the following principles in this regard: an acquittal is susceptible to judicial review where a decision to acquit can be regarded as a *nullity*. Where a court acted without jurisdiction, (for example by failing to comply with a rule which requires that the court hears both the prosecution and the defence on a matter before it proceeds to make a verdict), it renders the trial and subsequent "acquittal" a nullity. The acquittal may therefore be quashed and a new trial ordered; the accused was never in jeopardy of a conviction at the first trial.

6.3 CANADIAN LAW

6.3.1 General

In Canadian law, the prosecution is afforded a limited right of appeal (namely on a point of law only) against a judgment or verdict of acquittal of a trial court in proceedings on indictment. Introduced as early as 1930,⁶⁰ the right of the crown to appeal on a point of law against an acquittal has been described as "a fundamental departure from common-law principles".⁶¹ However, as Friedland points out, that which was once regarded as an extraordinary remedy of great concern (namely the crown appeal against an acquittal), gradually came to be accepted as a valid element of Canadian criminal procedure - in the author's view, largely as a result of the complacency of the legal profession.⁶² The prosecution's right to appeal against an acquittal handed down in summary proceedings has also recently been held in the Province of Ontario to include an appeal on the recorded facts. However, the Supreme Court of Canada has not as yet considered the constitutionality of prosecution appeals on questions of fact against acquittals handed down in lower courts. In the field of review of acquittals and appeals against sentence, Canadian courts have generally followed the same approach as English courts.

6.3.2 Appeals against acquittals handed down by superior courts

The present Criminal Code⁶³ provides that the Attorney-General or

⁶⁰SC 1930 c 11.

⁶¹*Morgentaler v The Queen* [1976] 1 SCR 616, 669.

⁶²At 295.

⁶³RSC 1985 C-46, section 676(1).

counsel instructed by him for the purpose may appeal to the Court of Appeal against a "judgment or verdict of acquittal of a trial court in proceedings by indictment *on any ground of appeal that involves a question of law alone*".⁶⁴ The crown's right of appeal on a question of law was approved recently by the Canadian Supreme Court.⁶⁵ After the incorporation of the Canadian Charter of Rights as part of Canada's written Constitution in 1982, the Ontario Court of Appeal was confronted in the case of *Regina v Morgentaler, Smoling and Scott*⁶⁶ with the issue of whether section 605(1)(a)⁶⁷ of the Criminal Code amounts to a violation of the guarantee against double jeopardy contained in section 11(h) of the Charter of Rights. As pointed out in chapter three,⁶⁸ the latter section provides that

[a]ny person charged with an offence has the right.... if finally acquitted of the offence, not to be tried for it again, if finally found guilty and punished for the offence, not to be tried or punished for it again.

Opting for a very limited approach, the court in *Morgentaler* held that the literal meaning of the words used by the framers of the provision namely, "finally acquitted", specifically envisages that the crown may take some form of appeal against a verdict of acquittal. Without giving any serious consideration to the policies and ideas which underlie the rule against double jeopardy, the court concluded that the relevant section in the Criminal Code which provides for a

⁶⁴My emphasis.

⁶⁵*Morgentaler, Smoling and Scott v The Queen* [1988] 37 CCC (3d) 449, 455 (SCC).

⁶⁶[1985] 22 CCC 353 (Ont CA).

⁶⁷The present section 676(1)(a), discussed *supra*.

⁶⁸*Supra* under 3.3.1.

crown appeal against an acquittal on a question of law alone, does not violate the provisions of section 11(h) of the Charter. The court based its conclusion on the intention of the framers of the Charter as expressed in the language used in the double jeopardy provision. In this regard, the court made the following statement⁶⁹

It is difficult to think that if they had intended to abrogate such a well-established part of the Canadian Criminal justice system as the Crown's right of appeal on a question of law alone from an acquittal, the framers of the Charter would have chosen the language they employed in s. 11(h). Rather the language of s. 11(h) leads to the opposite conclusion and differs significantly from the language of the Fifth Amendment [of the United States Constitution].

In allowing a crown appeal against an acquittal on a ground which involves "a question of law alone",⁷⁰ the courts as a natural consequence also had to deal with the problematic issue of defining the ambit of the concept "question of law alone". A Canadian legal commentator remarked in 1976 that⁷¹

the distinction between "law" and "fact" is a morass of irreconcilable precedents, *ad hoc* decisions and judgments which tend to state that "a question of law alone" must be interpreted in the strict sense and then ignore that advice.

⁶⁹At 409. This approach was confirmed by the Canadian Supreme Court in *Morgentaler, Smoling and Scott v The Queen supra*. Freeman CD "Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and a Current Controversy" *Criminal Law Journal* 1988 Vol 12 3, 26 comments that the court's approach of basing its judgment on "a highly artificial construct", namely the intent of the drafters of the Charter amounts to reasoning which "seems lacking in the extreme".

⁷⁰The wording of section 767(1)(a). See *supra*, text at note 63.

⁷¹Parker G "Jury reversal and the appellate court view of law and fact" *Osgoode Hall Law Journal* Vol 14 1976 287, 288.

The most difficult problems arise where the crown establishes the essential elements of the offence, but the trial judge nevertheless acquits, framing his reasons in terms of reasonable doubt. The following decisions of the Supreme Court illustrate what difficulties a court may encounter in attempting to distinguish between questions of facts on the one hand, and questions of law on the other hand.

In *Sunbeam Corporation Ltd v The Queen*⁷² the Supreme Court held that the reasonableness of the verdict on the strength of the evidence could not be a proper ground of appeal by the prosecution.⁷³ The court held that the *sufficiency or insufficiency of evidence* to convict the accused of the crime charged, was essentially a question of fact for the judgment of the court.⁷⁴ This approach was followed in *Lampard v The Queen*.⁷⁵ The court stated that where a trial judge made findings of primary facts and drew inferences from them, the court was making a finding of fact.⁷⁶ Therefore, a court of appeal may only substitute its view (as to what inference should be drawn) for that of the trial judge in legal systems which allow for appeals on factual as well as legal questions. Whereas the court's jurisdiction (in *Lampard*) was limited to questions of law alone, it had no such power.⁷⁷

⁷²[1969] 2 CCC 189 (SCC).

⁷³The same approach was followed by the South African Appeal Court in the case of *Magmoed v Janse Van Rensburg* (discussed *infra* under 6.6.2.3). *Contra* the approach followed in English law (discussed *supra* under 6.2.2).

⁷⁴At 197-198.

⁷⁵[1969] 3 CCC 249 (SCC).

⁷⁶At 256.

⁷⁷*Id.*

However, in *Wild v The Queen*⁷⁸ the Supreme Court held that a question of law was raised in the following circumstances. A trial judge acquitted an accused on a charge of causing death by criminal negligence on the basis that the evidence raised a reasonable doubt whether the accused was indeed driving the vehicle at the time of the accident. However, all the evidence indicated that the accused, found pinned down behind the steering wheel, was the driver at the time of the impact. Nevertheless, the trial judge speculated that someone else could have been the driver and consequently acquitted the accused. The question which faced the Supreme Court was whether the finding of the trial judge that there was reasonable doubt as to whether the accused had driven the car, amounted to a "question of law alone" which permitted an appeal by the state against an acquittal.

The Supreme Court held that on a proper view of the law, the evidence presented in the case was not capable of creating any doubt whatsoever that the accused was the driver of the vehicle.⁷⁹ In the court's view, a question of law alone is raised when a trial judge makes a finding of fact that certain specified evidence creates a reasonable doubt as to the accused's guilt, but on a proper view of the law, that evidence is not capable of creating *any* doubt as to his guilt.⁸⁰

However, in *Schuldt v The Queen*⁸¹ the correctness of *Lampard*

⁷⁸[1970] 4 CCC 40 (SCC).

⁷⁹At 52-53 of the majority opinion delivered by Martland, J. The court pointed out that the trial judge, in considering the facts, failed to appreciate their proper effect in law because he did not distinguish between a conjectural possibility, arising from those facts, and a rational conclusion arising from the whole of the evidence.

⁸⁰At 41.

⁸¹[1985] 23 CCC (3d) 225 (SCC).

was affirmed and the decision in *Wild* qualified. In the *Schuldt* case, the accused was found outside business premises in the early morning hours and charged with attempted breaking and entering. The evidence indicated that the accused or his companion had attempted to use a tyre bar to enter a gun shop. However, the trial judge acquitted him because he entertained a reasonable doubt concerning the accused's intention to enter and to commit the offence. The crown appealed against the acquittal on the basis that to entertain any doubt on the issue of intent was not reasonable and was fanciful, and constituted an error of law. The issue before the Supreme Court was whether the appeal could be regarded as one "on a point of law alone".

The court pointed out that in *Wild*, the court had previously held that the *total absence of a foundation for a finding of fact* amounts to an error of law.⁸² Lamer J (delivering the opinion in *Schuldt*) agreed with this premise. However, he did not agree "as to the *circumstances* [indicated in *Wild*] under which a finding that there is a total absence of evidence can properly be made".⁸³ In his view, a finding of fact which is made in the absence of any supportive evidence will only qualify as an error of law *as regards an acquittal*, if the accused by law carried some burden of proof.⁸⁴ The court explained that in the absence of a shifting of the burden of proof onto the accused, there would always be some evidence on which to make a finding of fact favourable to the accused, and, if such a finding was alleged to be erroneous, it would amount to an error of fact and not an error of law. In order to elucidate this point of view, the court referred to the opinion to the following effect of Cartwright CJC, in

⁸²My emphasis.

⁸³At 230. (My emphasis).

⁸⁴At 233.

*Lampard*⁸⁵

In a criminal case (except in the rare cases in which a statutory provision places an onus upon the accused) it can sometimes be said *as a matter of law* that there is no evidence on which the Court can convict but never that there is no evidence on which it can acquit; *there is always the rebuttable presumption of innocence.*⁸⁶

In other words, the presumption of innocence (coupled with the heavy onus of the state) has the effect that it can never be said that there is a *total absence of a foundation for a finding of fact* favourable to the accused. In *Schuldt*, the court concluded that because no onus of proof was placed on the accused concerning his intent to break and enter, there was *some evidence* on which the trial judge could rest his finding. In the court's view, that finding, if it had been erroneous, would be an error of fact and *not* an error of law.⁸⁷

Finally it needs to be mentioned that Canadian courts have followed the English approach that a discharge of the accused at the close of the prosecution's case amounts to a question of law which may be appealed by the crown.⁸⁸ In determining whether an accused should be discharged at this stage of the proceedings, the judge must consider whether there is any evidence on which a jury, acting reasonably, might convict the accused.⁸⁹ No explanation is

⁸⁵At 256 of the *Lampard* decision, cited by Lamer J at 237 in the *Schuldt* decision.

⁸⁶My emphasis.

⁸⁷At 238.

⁸⁸See *Feeley v The Queen* [1952] 104 CCC 255 (SCC) and *Regina v Paul* [1975] 27 CCC 2d 1 (SCC).

⁸⁹At 256.

advanced in the case law as to why this determination is considered to be a question of law only, instead of a question of fact or a question of mixed law and fact.

Be that as it may, in an attempt to clarify the law (regarding errors of law and errors of fact), the Supreme Court in *Regina v B(G)*⁹⁰ identified three areas which might constitute an error of law by the trial judge in assessing the facts as they apply to the law

- (a) where the trial judge has erred as to the legal effect of undisputed or found facts rather than the inferences to be drawn from such facts
- (b) where the trial judge misdirected himself as to the relevant evidence and his misdirection was based on a misapprehension of some legal principle and
- (c) where the trial judge failed to consider the totality of the evidence in order to determine whether the accused's guilt had been established beyond a reasonable doubt.

6.3.3 Appeals against acquittals handed down by lower courts

Similar to the position which prevails in English law, the right of the crown to appeal against a judgment favourable to the accused is somewhat different in summary proceedings than it is in proceedings on indictment. However, unlike English law which allows an appeal by the prosecution from summary proceedings on a point of law only, the Canadian prosecutor's right of appeal from these proceedings has recently been held by the Ontario Court of Appeal to include the right

⁹⁰[1990] 56 CCC (3d) 181 (SCC).

to appeal on questions of law as well as factual issues.⁹¹ In *Regina v Century 21 Ramos Realty*⁹² the appellant contended that the crown's right of appeal to the summary conviction appeal court on questions of facts in summary proceedings infringes section 11(h) of the Charter. However, referring to the same court's approach in *Morgentaler, Smoling and Scott*,⁹³ the court held that, since an appeal by the prosecution on the record of proceedings in the trial court on questions of fact as well as questions of law had also been an established part of the criminal process in Canada for almost a hundred years, such an appeal by the state would not be in violation of the double jeopardy provision of the Charter. However, as pointed out above, the Supreme Court of Canada has not as yet ruled on the constitutionality of crown appeals against acquittals handed down in lower courts on questions of fact alone.

6.3.4 Prosecution appeals against sentence

Canadian criminal jurisprudence provides for a crown appeal against sentence imposed on an accused in a trial court to the Court of Appeal, with the leave of that court or any of its judges.⁹⁴ Unless

⁹¹Presently contained in section 813 of the Criminal Code. The relevant section (813(b)(i) and (ii)) provides that the Attorney-General may appeal to the appeal court against an order which stays proceedings on an information or dismisses an information, or against a sentence passed on a defendant. No mention is made in the section that an appeal by the prosecution in terms of this provision is confined to a question of law only. Conversely, the provision does not provide expressly that the crown may also appeal on factual issues.

⁹²[1987] 58 OR (2d) 737 discussed by Friedland ML and Roach K in *Criminal Law and Procedure: Cases and Materials* 6th ed 1991 852-853.

⁹³*Supra*.

⁹⁴Section 676(1)(b) of the Criminal Code.

the sentence is one fixed by law, the Court of Appeal may consider the fitness of the sentence appealed against. However, despite wide powers to interfere with a sentence imposed by a trial court, the general approach of the courts has been that a sentence will only be altered on an appeal if the trial judge relied or proceeded on a wrong principle.⁹⁵ The general principle that the imposition of sentence is basically a matter for the discretion of a trial judge, has consequently also been honoured in the context of prosecution appeals against sentence.

6.3.5 Judicial review of an acquittal

Finally, it remains to discuss briefly whether an acquittal may be taken on review in Canadian criminal jurisprudence. Like its English counterpart, the general approach of Canadian courts has recently been that the extraordinary remedy of *certiorari* may only be invoked by the crown to quash an acquittal in circumstances where the acquittal had been granted without jurisdiction.⁹⁶ Justification for

⁹⁵*Regina v Carr* [1937] 68 CCC 343 (Ont CA) and *Regina v Lauzon* [1940] 74 CCC 37 (Que KB). See in general Salhany 9-33 and 9-34 and Bolton 126-127. The authors point out that it is unlikely that a sentence will be increased on appeal if it would prejudice the accused. The courts have held that an accused would be prejudiced if the crown (on appeal), repudiated a position taken by counsel for the state at the trial or where the accused had already served his sentence before the appeal is heard. Furthermore, Bolton points out that the crown is not permitted to introduce fresh evidence of aggravating circumstances on a sentence appeal.

⁹⁶Although it was stated in *Regina v Calvert* [1954] 110 CCC 93, 35 MPR (NBCA) that *certiorari* does not lie to remove an acquittal because it would amount to a violation of double jeopardy principles, the court in *Re Regina and Ritcey* [1979] 43 CCC (2d) 510 (Nova Scotia SC App Div) held that the order may be invoked to quash acquittals, convictions or sentences "made in the complete absence of jurisdiction" (at 516). *In casu*, a judge heard a matter on appeal at a stage after he had resigned from the Bench. In *Regina v Conley* [1979] 47 CCC (2d) 359 (Alberta SC App Div) the principle laid down

this departure of common law principles in all probability, has been the same as in English law, namely that the accused had never been in jeopardy of conviction in the first place because the initial trial was a nullity as a result of absence of jurisdiction.

In *Regina v Dubois*⁹⁷ the crown applied for *certiorari* to quash an order discharging the accused after a preliminary enquiry. Dubois had been charged with robbery and the unlawful use of a firearm while committing an indictable offence. The justice had discharged the accused because he had a reasonable doubt that the accused had been properly identified. The court held that *certiorari* may be invoked by the prosecution to quash a discharge at a preliminary hearing where there had been a jurisdictional error. According to the court, it would not constitute a jurisdictional error if the presiding justice came to the conclusion that there was not sufficient evidence to *continue* with the trial, but that a jurisdictional error in fact occurred where the justice dismissed the accused on the ground that he had reasonable doubt that the accused had been properly identified. The court explained that in doing so, the justice acted without jurisdiction; he decided an issue reserved to another forum, namely the trial court.

This principle (namely, that the remedy of *certiorari* may be invoked

in *Ritcey* was followed. In that case the court held that *certiorari* was available to the crown to quash a declaration of mistrial made by the presiding judge in the trial court at a stage after he had pronounced a conviction and, according to Canadian law, had no jurisdiction to do so at that stage because he was *functus officio*. In *Re Regina and Yanke* (1983) 4 CCC (3d) 24 the issue was also raised before the Saskatchewan Court of Appeal. Although the court held that it was not necessary to decide on the matter, it expressed the view *obiter* that the Attorney-General's argument that *certiorari* may lie in Canadian law to quash an acquittal, may be justified in view of the Canadian authorities (at 30-31).

⁹⁷(1986) 25 CCC (3d) 221 (SCC).

by the crown to quash an acquittal where the acquittal or discharge had been granted by the court acting *without jurisdiction*) was thereafter expanded by the British Columbia Court of Appeal in *Re Regina and Thompson*.⁹⁸ In that case the question was raised on appeal whether *certiorari* lies to quash a stay of proceedings, and whether *mandamus* lies to compel a magistrate to proceed with a preliminary hearing. The facts were that the magistrate presiding at the preliminary inquiry had stayed the proceedings against the accused on the basis that the constitutional rights of the accused, namely to be informed without unreasonable delay of the specific offence for which he is charged and also to be tried within a reasonable time,⁹⁹ had been violated. On application by the state to a higher tribunal for the abovementioned extraordinary remedies, the court held that when a judge stays proceedings in terms of section 24(1) of the Charter he declines to exercise jurisdiction.¹⁰⁰ The court expressed the view that "a decision which goes directly to the question of whether jurisdiction will be exercised is ... open to review".¹⁰¹ The court consequently quashed the decision to stay the proceedings on the basis that the presiding magistrate at the preliminary hearing made a jurisdictional error. The jurisdictional error made was that the presiding magistrate did not consider all the factors which had to be taken into account in considering whether a breach of the particular constitutional rights of the accused had taken place.

⁹⁸(1983) 8 CCC (3d) 127 (BCCA).

⁹⁹Section 11(a) and (b) of the Canadian Charter of Rights.

¹⁰⁰The relevant section provides that anyone whose rights or freedoms as guaranteed by the Charter have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

¹⁰¹At 140.

6.3.6 Summary

* The Canadian Criminal Code provides that the prosecution may appeal against an acquittal handed down in a superior court on "a question of law alone". The Constitutional Court of Canada held that the crown appeal on "a question of law alone" does not violate the constitutional provision against double jeopardy. The court based its conclusion on the language used in the double jeopardy provision, as well as the fact that the crown appeal on a "question of law only" has always been an accepted practice in the Canadian criminal justice system. The court did not consider whether the prosecution appeal "on a question of law alone" can be reconciled with the values which underlie the constitutional guarantee against double jeopardy.

* The boundaries of the concept "question of law alone" have vexed Canadian courts over many decades. Generally, courts have been *ad idem* that the following issues amount to "questions of law alone": where the trial judge has erred as to the legal effect of undisputed or found facts rather than the inferences to be drawn from such facts, or where the trial judge misdirected himself as to the relevant evidence because of misapprehension of some legal principle. However, it has been less easy to determine whether a "question of law alone" is raised in cases where the crown has established the essential elements of the offence, but the judge nonetheless acquits the accused framing his reasons in terms of reasonable doubt.

* The basic premise revealed in the case law, is that the reasonableness of the verdict on the strength of the evidence cannot be a proper ground of appeal by the prosecution. This premise is explained in the case law as follows. Total absence of a foundation for a finding of fact amounts to an error of law. However, in a criminal case where the accused is presumed innocent until proven guilty by

the state beyond reasonable doubt, total absence of a foundation for a finding of fact can *never* be the basis of an appeal by the prosecution. The reason is that the presumption of innocence has the effect that there will always be some evidence on which the trial judge could rest his finding of an acquittal. Conversely, total absence of a foundation for a finding of fact (for example, that the accused lacked the required intention) may be a proper ground of appeal by the prosecution in cases where the accused carries the burden to prove a given fact (for example, lack of intention). In other words, where the onus rests on the accused it is indeed possible for a decision of a trial judge to be challenged on the ground that there is total absence of a foundation for a finding of fact.

* Similar to the position in English law, the basis of a discharge at the end of the prosecution's case is regarded as a "question of law alone" which may be appealed against by the prosecution. No explanation is advanced in the case law why this is regarded as a question of law as opposed to a question of fact or a question of mixed law and fact.

* The Ontario Court of Appeal recently held that the prosecution may appeal against an acquittal handed down in a lower court on factual as well as legal questions. However, the Supreme Court of Canada has not as yet ruled on the constitutionality of crown appeals against acquittals on matters of fact.

* The crown may also appeal against sentence imposed on a person who has been convicted either in the lower or superior courts. The principles are the same as those applied in English law. A sentence will, as a rule, only be altered if the judges proceeded on a wrong principle of law.

* An acquittal may also be quashed by a reviewing court by means of the remedy of *certiorari*. The rationale advanced for this departure from common law principles is the same as that advanced in English case law. If the trial was a nullity because the court acted without jurisdiction, the acquittal may be quashed by the reviewing court; the accused was never *in jeopardy* of a conviction at the first trial. Unlike the position in English law (where reviewing courts have so far applied this principle only where the court acted in breach of the rules of natural justice), Canadian courts of review have applied the "absence of jurisdiction" criterion in a number of contexts. For instance, the British Columbian Court of Appeal applied the principle where the trial court had made a *jurisdictional error*; the reviewing court found that the trial court, in considering whether a proceeding should be stayed on constitutional grounds, had failed to take into account all the relevant factors.

6.4. INDIAN LAW

6.4.1 General

In the constitutional judicial system which came into force after India obtained full independence, the double jeopardy doctrine was not regarded as a bar to making provision for prosecution appeals against acquittals. This deviation from common law principles occurred despite the fact that the framers of the Indian Constitution had drawn profusely on the American Constitution.¹⁰² The approach of Indian courts is that because prosecution appeals amount to a continuation of the initial proceedings, the practice of prosecution appeal does not amount to a violation of double jeopardy principles. A right of appeal against an acquittal has not only been conferred on the state in terms

¹⁰²See Tope TK *Constitutional Law of India* 2nd ed 1992 1.

of the Indian Code of Criminal Procedure, but from the outset has also been recognised as a valid practice in terms of the Constitution itself.¹⁰³ Moreover, an appeal by the state based purely on the facts against acquittals handed down in lower as well as superior courts is regarded as a permissible practice in Indian criminal jurisprudence. The Code of Criminal Procedure also provides for judicial review of acquittals and a prosecution appeal against sentence. However, a study of the case law reveals that Indian courts have not altogether negated the accused's rights in respect of double jeopardy protection in this particular context. In general, Indian courts of appeal have been reluctant to interfere with acquittals handed down by trial courts in the absence of manifest errors of law or of fact which have resulted in a miscarriage of justice. In fact, closer scrutiny of Indian case law reveals that although the state may appeal on factual and legal questions, the courts have only interfered with factual determinations in favour of the accused if the trial court's evaluation of the evidence has been considered (by the court of appeal) to be unreasonable and legally unsustainable.

6.4.2 Appeals against acquittals

The Criminal Procedure Code of India¹⁰⁴ provides that the state may direct the public prosecutor to appeal to the High Court from an original or appellate order of acquittal passed by *any* court other than the High Court or from an order of acquittal passed by a court of

¹⁰³Article 134(1)(a) of the Constitution specifically provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court has on appeal reversed an order of acquittal of an accused person. See Tope 536.

¹⁰⁴Act 2 of 1974.

sessions in revision.¹⁰⁵

The Supreme Court of India held that this provision does not violate the constitutional guarantee against being put in double jeopardy. As indicated in chapter three, the double jeopardy provision of the Constitution of India only provides that "[n]o person shall be *prosecuted and punished* for the same offence more than once".¹⁰⁶ In *Kalawati v State of Himachal Pradesh*¹⁰⁷ the Supreme Court held that if there was no conviction and punishment for the offence as a result of the prosecution, the clause had no application. The court argued that an appeal against an acquittal, wherever it was provided for in legislation, basically amounts to a *continuation* of the prosecution. Therefore, it does not amount to a violation of the double jeopardy guarantee.¹⁰⁸

In determining the constitutional viability of prosecution appeals against acquittals, the courts have also not distinguished between legal and factual issues. An appeal by the state purely on the recorded facts is regarded as a permissible practice in Indian criminal jurisprudence.¹⁰⁹ Furthermore, the Code not only authorises the

¹⁰⁵This right of appeal can, however, be exercised only with the leave of the High Court. See in general Pillai 309.

¹⁰⁶Section 20(2) of the Constitution. See chapter three *supra* under 3.4.1 for a discussion of this provision.

¹⁰⁷*Supra*.

¹⁰⁸At 133.

¹⁰⁹In *Salim Zia v State of UP* (1979) 2 SC 648, the Supreme Court held that in terms of the Code of Criminal Procedure, the High Court has full power to review the evidence on which the order of acquittal was founded, and to reach the conclusion that on the evidence the order of acquittal should be reversed. See Pillai 311-312 for a detailed discussion of that decision.

High Court to reverse the finding of the lower tribunal, but to direct further inquiry, retrial or committal for trial or find the defendant guilty and pass sentence on him according to law.¹¹⁰

However, the Supreme Court indicated that, although the High Court is entitled to re-evaluate the entire evidence independently and come to its own conclusion, it would not ordinarily interfere with the trial court's conclusion "unless there are compelling reasons to do so, *inter alia*, on account of manifest errors of law or of fact resulting in miscarriage of justice".¹¹¹

6.4.3 Prosecution appeals against sentence

The Indian Code also provides for an appeal by the state against a sentence imposed on a person who has been acquitted. The government may, in any case of conviction on a trial held by any court other than a High Court, direct the public prosecutor to present an appeal to the High Court against the sentence imposed on the ground of its inadequacy.¹¹² The only limitation placed on the High Court

¹¹⁰Section 386(1)(a).

¹¹¹*Umed Bhai v State of Gujarat* AIR 1978 SC 424. This approach was confirmed in *Salim Zia v State of UP (supra)*, a case which emphasised that certain factors should be taken into account by the High Court before reversing an acquittal on the factual merits. In *S Murtaza Fazal Ali and AD Koshal, JJ* AIR 1981 SC 612 the Supreme Court held that the High Court is justified in reversing the trial court's order of acquittal when the trial court's approach in interpreting the evidence is totally wrong, unsound and legally unsustainable. See also Pillai 311-312, who concludes that although the High Court has considerable powers to interfere with an order of acquittal, it may usually refrain from interference as long as no miscarriage of justice has occurred.

¹¹²Section 377(1). Section 134(1)(a) of the Constitution also provides for a prosecution appeal against sentence to the Supreme Court.

is that it may not increase the sentence if the accused was not granted a reasonable opportunity of showing cause against such an increase.¹¹³ The general approach of Indian courts is that since the matter of sentence is at the discretion of the trial court, the High Court may not increase the sentence unless it is so inadequate that it offends the ordinary notions of what would amount to a just punishment.¹¹⁴

6.4.4 Judicial review of an acquittal

The Code of Criminal Procedure also makes provision for revisionary powers which may be exercised by the High Court¹¹⁵ in order to correct a miscarriage of justice as a result of misconception of the law or other irregularities which are deleterious to the due maintenance of law and order.¹¹⁶ Although the Code expressly prohibits the conversion by the High Court (in the exercise of its revisionary powers) of a finding of acquittal into one of conviction,¹¹⁷ the Supreme Court, nevertheless held that the High Court would not (in terms of the relevant provision) be prohibited from reversing a

¹¹³Section 377(3).

¹¹⁴See Ahmad 394. The general approach is that adequate reason must be given for interference with sentences imposed by trial courts.

¹¹⁵Section 401 of the Code. The Sessions Court may (in terms of section 399) exercise the same revisionary jurisdiction as has been provided for the High Court in terms of Section 401.

¹¹⁶Pillai 314. The Supreme Court has pointed out, however, in *Pranab Kumar Mitra v State of West Bengal* AIR 1959 SC 144 that these revisional powers of the High Court do not create any right in a litigant to take a matter on review, but only conserve the power of the High Court to see that justice is done in accordance with applicable rules and that the criminal courts do not act without jurisdiction or abuse their powers.

¹¹⁷Section 401(3).

conviction on review and directing a retrial of the accused.¹¹⁸ However, the court stated that, since the ordering of a retrial amounts to an indirect method of converting a finding of acquittal into one of conviction, it would only be allowed in exceptional cases. According to the court, such exceptional cases would exist in, *inter alia*, the following circumstances. Where the trial court had no jurisdiction to try the case in the first place, or had wrongly excluded evidence presented by the prosecution, or where material evidence had been overlooked, or where the acquittal was based on a compounding of the offence which is invalid under the law.¹¹⁹ The court indicated that, although there may also be other irregularities of similar nature which would justify interference with an acquittal by the High Court, the ordering of a retrial would only be permissible if a manifest error on a point of law or some glaring defect in the procedure which amounted to a flagrant miscarriage of justice had in fact occurred.¹²⁰

6.4.5 Summary

- * In Indian law, the prosecution appeal against an acquittal is justified in terms of the continuing jeopardy theory.

- * Appeals by the state against acquittals handed down in lower as well as superior courts on questions of law, or purely on the recorded facts, are a permissible practice in Indian criminal jurisprudence. However, the Supreme Court has indicated that although courts of appeal are entitled to re-evaluate the entire evidence independently

¹¹⁸*Chinnaswamy v State of AP* AIR 1962 SC 1788. See Pillai 315 note 120.

¹¹⁹At 1791-1792. See Pillai 317 for a detailed discussion of that decision.

¹²⁰*Id.*

and come to their own conclusion, they may not ordinarily interfere with the trial court's conclusion in the absence of manifest errors of law or fact resulting in a miscarriage of justice.

* The state may also appeal against sentence imposed on the person who has been convicted. However, in deciding whether to increase a sentence, the same principles apply as in English and Canadian law; the imposition of sentence is regarded as a matter at the discretion of the trial court. Therefore, a court of appeal may only increase the sentence if it is so inadequate that it offends an ordinary person's sense of justice.

* The Indian High Court may also review an acquittal in order to correct miscarriages of justice resulting from misconception of the law or other irregularities which injure the due maintenance of law and order. The High Court may not convert an acquittal into a conviction. However, it may reverse an acquittal and order a retrial of the accused in exceptional cases. These are, *inter alia*, where the trial court lacked jurisdiction, wrongly excluded evidence presented by the prosecution or overlooked material evidence. The basic approach is that the setting aside of an acquittal and the ordering of a retrial will only be permissible if a manifest error on a point of law or a glaring defect in the procedure occurred which amounted to a flagrant miscarriage of justice.

6.5 THE LAW OF THE UNITED STATES OF AMERICA

6.5.1 General

The United States Supreme Court interpreted the double jeopardy clause of the Constitution as prohibiting state appeals against

"acquittals".¹²¹ The court has, however, not always indicated clearly what is understood by the concept "acquittal". In the early cases, the court merely held that an "acquittal" bars an appeal by the state to a higher court without explaining the ambit of the concept "acquittal". Therefore, even a mid-trial dismissal qualified as a termination of proceedings which effected protection against double jeopardy; as long as the court described the termination as an "acquittal" further state-initiated proceedings were prohibited, including an appeal to a higher hierarchical court.¹²²

In an attempt to give effect to the policies which underly the prohibition against double jeopardy as identified in *Green*,¹²³ the Supreme Court suggested in the early 1970's that any termination of proceedings favourable to the accused at a stage after jeopardy has attached bars a state appeal "if further proceedings of some sort, devoted to the resolution of factual issues would be required upon reversal and remand [for a new trial by the appellate tribunal]".¹²⁴

In the 1978 Term, the court rejected this approach and gave an even narrower meaning to the concept "acquittal", holding that the double jeopardy clause primarily protects the sanctity of acquittals *on the merits*.¹²⁵ The court indicated that any termination of proceedings short of an adjudication of the guilt or innocence of the accused would *not* operate as a bar to further state-initiated

¹²¹See chapter three *supra* under 3.5.1, text at note 144 for the provisions of this clause.

¹²²See *Fong Foo v US* discussed *infra* under 6.5.3, text at note 151.

¹²³See the discussion of these policies in chapter three *supra* under 3.5.1, text at note 150.

¹²⁴See *US v Jenkins* 420 US 358, 370 (1975).

¹²⁵See *US v Scott* discussed *infra* under 6.5.5, text at note 193.

proceedings, even if further proceedings on factual issues would be required on reversal or remand. However, if the termination of proceedings amounted to an acquittal on the merits in the sense of an adjudication of the guilt or innocence of the accused which resulted in a discharge, the state would be prohibited to appeal to a higher court. This would be the case even if the acquittal was based on an incorrect application of the law.

This principle, namely that an acquittal on the merits bars an appeal by the state even if it is based on an erroneous understanding of prevailing law, still applies in American constitutional double jeopardy jurisprudence. Moreover, it has also been applied by the Supreme Court to determine whether an appeal by the state against the sentence imposed on a person who has been convicted amounts to a violation of the double jeopardy guarantee. In order to understand the current approach, it is necessary to give a detailed account of the development of the law in this particular field.¹²⁶

¹²⁶This study will not fully canvass the permissibility of state appeals against acquittals in the 50 American states before the double jeopardy clause contained in the Fifth Amendment of the US Constitution was eventually made applicable to all the states in *Benton v Maryland*. Suffice it to say the following. Early American state courts generally denied the prosecution the right of appeal in criminal proceedings. The few early state cases which allowed state appeals in criminal proceedings involved either pre-verdict quashed indictments or trial court decisions which set aside guilty verdicts. There was no understanding that the state had a general right to appeal against acquittals; in fact, most cases contain strong language to the contrary. This view continued throughout the 19th century; the only exception being the state of Connecticut which allowed an appeal by the prosecution against an acquittal on the basis of legal error only. According to an American Law Institute (ALI) survey done in 1935, decisions disallowing state appeals were based in some cases on the fact that there was common law or statutory authority for such procedure and in other cases on the fact that their constitutions did not allow it. This widely held understanding (ie that state appeal was impermissible in criminal proceedings), continued between 1935 and 1969, the year in which *Benton v Maryland* was decided. See in

6.5.2 The early cases

The first case considered by the Supreme Court in which the federal government challenged the prohibition against state appeals in criminal trials, was *US v Sanges*¹²⁷. In *Sanges* the defendant objected against an indictment of conspiracy on the basis that it revealed no offence. The court upheld the objection and consequently quashed the indictment. The federal government then issued a writ of error (namely appealed) against the termination of proceedings in favour of the accused. The issue before the Supreme Court was whether the writ of error procedure was available to the state to challenge a decision favourable to the accused. Mr Justice Gray expressed the view that "[a]lthough the law of England on this matter is not wholly free from doubt",¹²⁸ the majority of case law and legal commentaries indicate that the writ of error procedure was available, in English law, only to the defendant. The court also stated that¹²⁹

whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the State has no right to sue out a writ of error upon a judgment in favour of a defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon a determination by the court of a question of law.

general Office of legal policy 835, 878-885 (discussing, *inter alia*, the ALI survey); Miller J "Appeals by the state in criminal cases" *Yale Law Journal* 36 1927 486-490; Kronenberg J "Right of a state to appeal in criminal cases" *Journal of Criminal law and Criminology and Police Science* Vol 49 1959 473, 476-479; Titus DL "Commonwealth right of appeal in criminal proceedings" *Washington and Lee Law Review* 1986 295-316; *US v Sanges* 314-318.

¹²⁷*Supra*.

¹²⁸At 313.

¹²⁹*Id*.

This statement may be understood as implying that Congress could grant the state the right of appeal in criminal proceedings, by specifying in appropriate legislation that the state may bring a writ of error against a judgment of a court favourable to an accused. However, the court noted that such congressional legislation would constitute a serious and far-reaching innovation because the common law from which the American system of jurisprudence derived did not provide for state appeals in criminal proceedings.¹³⁰

Four years after its decision in *Sanges*, the Supreme Court was faced in *US v Ball*¹³¹ with two separate issues which did not directly involve the issue under discussion in this chapter. It is nevertheless essential to discuss this case at this stage in order to understand the development of the law in later decisions. The issues addressed in *Ball* were the following

- (a) the applicability of the double jeopardy clause to reprosecution in a new trial after an acquittal and
- (b) retrial after appellate reversal of a conviction.

The court's decision in respect of the first of these two issues greatly

¹³⁰At 311, 312 and 323. Since *Sanges* the federal legislative body had in fact moved away from the notion of an absolute prohibition on state appeals in criminal proceedings towards statutory authorisation thereof in certain defined procedural contexts. This was done primarily through enactment of the Criminal Appeals Act of 1907 which provided for Supreme Court review of dismissals of indictments, the granting of motions in arrest of judgments in cases involving the constitutionality of statutes and the review of cases sustaining pleas in bar in pretrial proceedings, before jeopardy attached. The most drastic or far-reaching amendment to this Act took place in 1971. The provisions of this important amendment will be discussed in the text that follows. See in general Titus 297.

¹³¹163 US 662 (1896).

influenced it in later decisions which dealt directly with the issue of whether prosecution appeals against acquittals ought to be regarded as unconstitutional. It is therefore apposite to discuss the decision of the Supreme Court in *US v Ball* in detail as regards the first issue mentioned above, namely the applicability of the double jeopardy clause to re-prosecution after an acquittal.¹³²

The facts of *Ball* were as follows. B and two others (C and D) were indicted for murder. B was acquitted but C and D were found guilty. C and D appealed against their convictions which were reversed by the higher court on the ground that the indictment was fatally defective.¹³³ On remand, the grand jury reindicted *all* three accused of murder. B relied on former jeopardy by raising the plea of *autrefois acquit*. C and D on the other hand, raised the plea of *autrefois convict*. The court rejected these pleas and the jury found all three defendants guilty of murder. The issue before the Supreme Court was whether the three accused were entitled to rely on the different pleas of former jeopardy.

With regard to the re-indictment and subsequent conviction of B (who had been acquitted), Mr Justice Gray rejected the English rule that a defective indictment could not legally place an individual in jeopardy.¹³⁴ The judge reasoned that the rule would unfairly grant a prosecutor a second opportunity to obtain a conviction whenever he

¹³²The court's decision with regard to the issue mentioned in (b) namely retrial after appellate reversal of a conviction, is discussed in detail in the chapter eight *infra* under 8.5.2 which deals with the double jeopardy implications of retrials on appellate reversal of convictions.

¹³³The indictment failed to allege that the victim died within a year and a day of the assault - an essential element of the offence charged.

¹³⁴At 668 the court rejected the English rule set out in *Vaux's case*, discussed in chapter two *supra* under 2.3.1.

discovered a defect in the original indictment. In the court's view, this would be a violation of the double jeopardy clause of the Fifth Amendment of the Constitution. In this regard, the court stated that "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy".¹³⁵ Therefore, the court concluded that a verdict of acquittal on the general issue of guilt on an indictment which is not objected to before verdict bars a second indictment for the same offence.¹³⁶

The court relied on *Sanges* for its conclusion, stating that

[t]he verdict of acquittal was final and could not be reviewed, on error or otherwise, without putting him twice in jeopardy and thereby violating the Constitution.¹³⁷

Justice Gray distinguished between a void judgment of acquittal before a court which lacked jurisdiction and a mere voidable judgment on a defective indictment. In the court's view, an accused may be tried again on a *void* judgment of acquittal. However, a mere *voidable* judgment on a defective indictment, although it could be challenged by the accused, had to be regarded as final in respect of the prosecution.¹³⁸

The next case in which the Supreme Court clearly addressed the double jeopardy status of federal acquittals, was *Kepner v US*.¹³⁹

¹³⁵At 669.

¹³⁶At 671.

¹³⁷*Id.*

¹³⁸At 669-670.

¹³⁹195 US 100 (1904).

This case arose out of a criminal prosecution in the Philippine Islands to which the principles of the double jeopardy clause had been expressly made applicable by an Act of Congress.¹⁴⁰ A trial judge sitting without a jury had found Kepner not guilty of embezzlement. The state appealed against the acquittal according to traditional Philippine procedure. Kepner was found guilty on appeal and sentenced to imprisonment. He then appealed to the United States Supreme Court which held that the double jeopardy clause of the Constitution was applicable also to the Philippines. The Supreme Court reversed the conviction on the basis that the prosecution appeal violated the constitutional prohibition against double jeopardy.¹⁴¹ The court made the following important statement¹⁴²

The court of first instance, having jurisdiction to the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again on the merits, even in an appellate court, is to put him a second time in jeopardy for the same offence".

It seems from this statement of the court, as well as from an analysis of the court's reasoning throughout this case, that the court in its interpretation of the double jeopardy clause in fact *equated* appellate proceedings (initiated by the state) after an initial determination in a court of law of the accused's guilt or innocence,

¹⁴⁰Because of absence of express statutory authority allowing the state to bring a writ of error against a judgment favourable to the accused at this stage in American legal history, the court was confronted with this question only in unusual circumstances, as were present in this case.

¹⁴¹The majority of the court relied on the dictum in *US v Ball* at 668 ie that the prohibition against double jeopardy "is not against being twice punished, but against being twice in jeopardy" and (at 671), that according to American law, "[a] verdict of acquittal could not be reviewed, on error or otherwise without putting [a defendant] twice in jeopardy, and thereby violating the Constitution".

¹⁴²At 133.

with reprosecution in a new trial of an offence of which the accused had been acquitted.¹⁴³

In dissent, Mr Justice Holmes formulated his famous "continuing jeopardy" theory¹⁴⁴

It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case.

Although, as Mr Justice Rehnquist remarked almost 70 years later¹⁴⁵ that "the concept of continuing jeopardy would have greatly simplified the matter of government appeals of acquittals", the theory has never been accepted by a majority of the United States Supreme Court.¹⁴⁶

6.5.3 Double jeopardy jurisprudence from 1950-1970

During the 1950's, the Supreme Court held in *Green v US*¹⁴⁷ that even an "implied acquittal" entitles an accused to protection from double jeopardy. Green was charged with first degree murder. The judge instructed the jury that it could convict Green of either first or

¹⁴³At 122, 126, 127, 128, 131 and 133 of the majority opinion delivered by Mr Justice Day.

¹⁴⁴At 135.

¹⁴⁵*US v Scott* 90 note 6.

¹⁴⁶*Id.*

¹⁴⁷*Supra.*

second degree murder. The jury then convicted Green of the lesser offence, namely second degree murder. Green appealed against his conviction which was reversed and the case remanded for a new trial. At the second trial, Green was charged and convicted of first degree murder. To this he objected on double jeopardy grounds, alleging that he could not be re-indicted for an offence of which he had previously been acquitted. The Supreme Court ruled in his favour. According to the court, although the first jury had not returned an express verdict of acquittal as to the first degree murder charge, the jury's conviction of the lesser offence constituted an *implied acquittal* of the greater offence.¹⁴⁸ Inasmuch as verdicts of acquittals are final, the court concluded that the acquittal, albeit implicit, barred a second trial for first degree murder.¹⁴⁹

As indicated in chapter three, *Green* presented the first case in which a serious attempt was made by the Supreme Court to identify the particular values which underlie the rule against double jeopardy.¹⁵⁰

Only in 1962 was the court once again confronted with the issue of appellate review of an acquittal in the case of *Fong Foo v US*¹⁵¹. In that case, the trial judge directed the jury to acquit at a stage when testimony was still being given on behalf of the prosecution. The judge's action was based on one or both of two grounds: supposed improper conduct on the part of the prosecutor and/or a supposed lack of credibility in the testimony of the witnesses for the prosecution who

¹⁴⁸At 190.

¹⁴⁹At 191.

¹⁵⁰See chapter three *supra* under 3.2.1 for a discussion of the values set out in *Green*.

¹⁵¹*Supra*.

had testified up to that point. A formal judgment of acquittal was subsequently entered by the jury; a so-called mid-trial acquittal. At the request of the prosecution, the Court of Appeals issued a writ of mandamus ordering the trial judge to vacate the acquittal and re-assign the case for trial. However, the Supreme Court reversed on double jeopardy grounds. It held that, even if the acquittal had been based on an "egregiously erroneous foundation"¹⁵², the verdict of acquittal by a court of jurisdiction on a valid indictment was final and, in the court's opinion, could not be reviewed "without putting (the petitioners) twice in jeopardy and thereby violating the Constitution".¹⁵³

The importance of this decision is that the court did not consider the meaning of the concept "acquittal", but merely assumed that because the trial judge described the termination of proceedings as an acquittal, the issue had to be regarded as final. In a dissenting opinion, Mr Justice Clark stated that when a trial court had no power to direct a verdict of acquittal, the ensuing judgment should be regarded as a nullity and, remarked that "[t]he word 'acquittal' in this context is no magic open sesame".¹⁵⁴

Shortly thereafter, the Supreme Court held in the landmark decision of *Benton v Maryland*,¹⁵⁵ that the provisions of the double jeopardy

¹⁵²At 143. It was doubtful whether the district court under the circumstances was empowered to direct a verdict of acquittal at that specific stage in the trial, rather than declaring a mistrial. See also the opinion of Mr Justice Harlan 144.

¹⁵³At 143, relying on *US v Ball supra*.

¹⁵⁴At 144.

¹⁵⁵*Supra*.

clause also applied to the states via the Fourteenth Amendment.

6.5.4 Statutory recognition of prosecution appeals - a reconsideration of constitutional protection against double jeopardy

In 1971, the Congress of the federal government of the United States introduced an Act which provides (*inter alia*) for a right of the state to appeal from any decision dismissing an indictment except where it would be prohibited by the double jeopardy clause of the Fifth Amendment.¹⁵⁶ The relevant section provides as follows¹⁵⁷

In a criminal case an appeal by the US shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment as to any or more counts, except that no appeal shall lie where the Double Jeopardy Clause (*sic*) of the United States Constitution prohibits further prosecution.

In *US v Wilson*¹⁵⁸ the court construed the new statute to mean that Congress intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit.¹⁵⁹ The facts of this case were as follows. A jury found

¹⁵⁶18 USC par 3731 (1971).

¹⁵⁷*Id.*

¹⁵⁸420 US 332 (1975).

¹⁵⁹At 337 of the majority opinion delivered by Mr Justice Marshall. Singer and Hartman 556 suggest that none of the earlier precedents were useful in determining the scope of prosecutorial appeal consistent with double jeopardy principles after the passage of the 1971 Act. These writers also suggest that because double jeopardy rules were not applicable to the fifty States until 1969 and precedents from state cases were therefore lacking, the law relating to prosecution appeals should be regarded as relatively recent. In my view, the earlier decisions dealing with the constitutionality of state appeals against acquittals cannot be disregarded for the very reason that the approach

Wilson guilty of unlawful conversion of union funds. However, the trial judge granted the accused's post-verdict motion¹⁶⁰ to dismiss on grounds of pre-indictment delay. The state appealed against this dismissal; the Court of Appeals rejected the appeal on double jeopardy grounds. However, the US Supreme Court reversed the judgment holding that the rule against double jeopardy does not bar a state appeal against a judge's post-trial discharge following a conviction by the adjudicator of fact.¹⁶¹

In reaching this decision, the court deemed it necessary to take a closer look at the policies underlying the double jeopardy provision in order to "determine more precisely the boundaries of the Government's appeal rights in criminal cases".¹⁶² In its assessment of the historical development of the double jeopardy clause from its common law origins, the court found that the protection against double jeopardy was directed rather at the threat of multiple prosecutions and not at state appeals as such, "at least where those appeals would not require a new trial".¹⁶³ Therefore, in *Wilson's*

adopted in those cases (in particular *Kepner's* case) was reconsidered by the Supreme Court in later cases (in other words, after 1971).

¹⁶⁰A post-verdict motion provides the defence with an opportunity to re-argue certain alleged mistakes made at a trial which resulted in a conviction. In such circumstances, an appeal by the accused may be possible, but the trial judge is first given the opportunity to change his mind if he is convinced that an adverse decision made against the petitioner was erroneous. A motion in arrest of judgment is one type of post-verdict motions. (The accused in *Wilson* asked the court in this post-verdict motion to reverse the decision of the jury on the ground of pre-indictment delay). See Schiffman *JD Fundamentals of the Criminal Justice Process* 1986 1st ed 110.

¹⁶¹At 352.

¹⁶²At 339.

¹⁶³At 342.

case it was held that since the "controlling constitutional principle" underlying double jeopardy protection focuses on prohibitions against multiple trials, a successful government appeal of a post-conviction judgment of acquittal would not violate the double jeopardy clause because the threat of a *second trial* was not present.¹⁶⁴

It must be pointed out at this stage that the criminal procedure model which prevails in America simply provides for the reinstatement of a jury verdict of conviction on reversal by an appellate court of a trial judge's post-verdict acquittal, *without* a second adjudication of the facts of the case. *Wilson's* case therefore involved a correction of an error of law and reinstatement of an already existing adjudication of fact.¹⁶⁵ In the court's view, such a procedure did not offend the purpose of the double jeopardy clause. The court concluded¹⁶⁶

Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing anxiety and expense, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected *without subjecting him to a second trial before a second trier of fact.*

Although not explicitly stated by the court, it seems that what the court had in mind in stating this principle, is that a reconsideration of factual issues, even in appellate proceedings, would amount to a violation of double jeopardy rules. In this sense, the approach of the court cannot be regarded as detracting from the principles adopted in

¹⁶⁴At 346.

¹⁶⁵*Cf* also the dissenting opinion of Mr Justice Brennan in *US v DiFrancesco* 449 US 117 (1980) 147 note 7 discussed *infra* under 6.5.6.

¹⁶⁶At 345 (My emphasis).

Kepner's case.¹⁶⁷ A *second trial* involves a successive adjudication on the facts of the guilt or innocence of the accused, even in if it occurs in appellate proceedings. However, it must be stated the Supreme Court has not been, in decisions which followed on *Wilson's* case, altogether clear on this issue.

In *US v Jenkins*¹⁶⁸ the Supreme Court held that any mid-trial discharge of a defendant (regardless of the character of such a mid-trial termination of proceedings), would bar further proceedings "if further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offence charged would have been required *upon reversal and remand*".¹⁶⁹ It is submitted that this statement may imply that double jeopardy protection is only afforded an accused if the termination of proceedings made in his favour (in the trial court) is reversed on appeal and, he is also remanded for a new trial. Furthermore, an important principle that emerges from *Jenkins* is that even if a mid-trial dismissal does *not* amount to an "acquittal" in the sense of an adjudication (correct or not) by the trial court of the factual merits of the case, an appeal by the government would nevertheless be prohibited in the event that a retrial would necessarily follow on reversal and remand.

The rule established in *Jenkins* was later described as follows by the Supreme Court in *Lee v US*¹⁷⁰

¹⁶⁷*Supra*.

¹⁶⁸420 US 358 (1975). In this case, the Supreme Court applied the principle enunciated in *Wilson* to criminal proceedings which take place in bench-trials (a trial without a jury).

¹⁶⁹At 370 (my emphasis).

¹⁷⁰*Supra* (per Justice Rehnquist in a concurring opinion at 36).

Dismissals ... if they occurred at a stage of the proceedings after which jeopardy had attached but prior to the factfinder's conclusion as to guilt or innocence, were final so far as the accused defendant was concerned and could not be appealed by the government because retrial was barred by double jeopardy.

However, in the same year that *Jenkins* was decided, the court held in *Serfass v US*¹⁷¹ that because a pre-trial dismissal of an indictment occurs before jeopardy attaches,¹⁷² the state may appeal against such a dismissal and also institute new proceedings against the accused. Of importance is the court's statement in this case that "*without risk of a determination of guilt, jeopardy does not attach and neither an appeal nor further prosecution constitutes double jeopardy*".¹⁷³ It is clear that the notion of "risk of a determination of guilt" has played an important role in American law in establishing a certain point in time during criminal proceedings when jeopardy attaches. Likewise, as will be seen from a discussion of cases that followed on *Wilson* and *Jenkins*, a determination by the trial court on the factual merits of the case eventually came to be regarded by the Supreme Court as decisive in determining whether an "acquittal" took place which bars further proceedings against the accused.

¹⁷¹420 US 377 (1975).

¹⁷²See the discussion of *Crist v Bretz* in chapter three *supra* under 3.5.2 which held that jeopardy attaches in a jury trial when the jury is empanelled and sworn in, and in a bench-trial at a stage when the judge begins to hear the evidence of the first witness.

¹⁷³At 391-392 (my emphasis).

6.5.5 The concept "acquittal" acquires exact limits - the 1977 and 1978 terms of double jeopardy jurisprudence

In *US v Martin Linen Supply Company*¹⁷⁴ the court had to decide whether an acquittal entered by a trial judge in terms of a rule which provides that a court could enter an acquittal after a deadlocked jury had been discharged by the court, was appealable by the state.¹⁷⁵ In delivering the court's opinion, Mr Justice Brennan confirmed the approach adopted in *Wilson's case*¹⁷⁶ that an appeal by the state which does not present a threat of successive prosecutions does not offend the double jeopardy clause.¹⁷⁷ However, the court explained more comprehensively that what in fact constitutes an acquittal, should not be controlled by the *form* of the judge's action,¹⁷⁸ and added that

[r]ather we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offence charged.

Applying the test to the "acquittal" entered by the court in terms of the deadlocked jury rule, the court held that it was an acquittal in substance because in entering the acquittal, the court of first instance

¹⁷⁴430 US 564 (1977).

¹⁷⁵A deadlocked jury is a jury which cannot agree on a finding of guilt or innocence of the accused. The relevant rule, Fed Rule Crim Proc 29(c) provided that in a case of a deadlocked jury "a motion for judgment of acquittal may be made ... within 7 days after the jury is discharged and the court may enter an acquittal".

¹⁷⁶*Supra*.

¹⁷⁷At 570.

¹⁷⁸At 571.

recorded that the state had failed to prove beyond a reasonable doubt the material allegations necessary for a conviction of the crime and that the defendant should consequently not be found guilty of the crime charged.¹⁷⁹

It is not altogether clear from Mr Justice Brennan's opinion whether he advanced the point of view that an acquittal in the sense of a finding as a matter of fact that the accused is innocent in itself brings into effect protection against double jeopardy which would mean that any further proceedings would be prohibited including proceedings on appeal initiated by the state, or whether he held the view that a prosecution appeal would only be prohibited if it would invariably lead to a new trial in the event of being successful. The statement made by Mr Justice Brennan that "a successful government appeal reversing the judgment of acquittal would necessitate another trial, or, *at least further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offence charged...*"¹⁸⁰ seems to imply that any re-evaluation of factual issues by a court of appeal on the record of the proceedings *a quo* could also be regarded as a violation of double jeopardy rules.

The concurring judgment of Mr Justice Stephens elucidates the aforementioned opinion.¹⁸¹ The judge researched the legislative

¹⁷⁹The District Court had in fact evaluated the state's evidence and determined that it was legally insufficient to sustain a conviction. The Supreme Court was of the opinion that such a determination of insufficiency of evidence brings into effect double jeopardy protection. See at 572 of the judgment.

¹⁸⁰At 570. (My emphasis). *In casu*, to have allowed an appeal by the state would, if successful, have necessitated a new trial.

¹⁸¹At 576-583.

history of the relevant legislation enacted by Congress¹⁸² and pointed out that Congress never intended to allow appeals from dismissals amounting to true acquittals. He reiterated that a "true acquittal" is based on the insufficiency of the evidence to prove an element of the offence regardless whether it is called a dismissal or an acquittal.¹⁸³ He concluded that "Congress was interested solely in expanding the Government's right to appeal from the dismissal of an indictment; it had no desire to allow appeals from acquittals and believed such appeals would be unconstitutional".¹⁸⁴ From the concurring opinion of Mr Justice Stephens it seems clear that the mere determination of innocence of the accused, whether by means of an acquittal or a mid-trial dismissal on insufficiency of evidence, triggers double jeopardy protection and prohibits an appeal by the prosecution regardless of the possible consequences of a successful appeal, in other words, regardless of whether a successful appeal would lead to a new trial.

*Sanabria v US*¹⁸⁵ furthermore illustrates that absolute finality is accorded to a termination of proceedings based on a determination of the guilt or innocence of the accused. In that case the Supreme Court was confronted with the issue of whether an acquittal by the trial court as factfinder bars a second trial when it is based on an erroneous legal judgment rather than on the fact-finding function. The course of events in this case can be summarised briefly as follows.

¹⁸²18 USC para 3731. See *supra*, text at note 157 for the text of this provision.

¹⁸³At 578-581.

¹⁸⁴At 581. From a discussion of a Senate Report preceding this Bill (at 578 - 581), the judge's assessment of the purpose of the Bill seems plausible.

¹⁸⁵437 US 54 (1978).

The trial judge directed an acquittal after the trial had commenced but before a final verdict was rendered. The judge based his ruling on a clearly erroneous interpretation of the statute in question (a federal anti-gambling statute) *and* on the insufficiency of evidence resulting from his erroneous exclusion of certain prosecution evidence at the defendant's request. The Supreme Court held that this misinterpretation of the statute and subsequent wrongful exclusion of prosecution evidence led to an erroneous resolution in the defendant's favour of the merits of the charge¹⁸⁶. However, the court nevertheless held that

[w]hen a defendant had been acquitted at a trial, he may not be retried on the same offence, even if the legal rulings underlying the acquittal were erroneous.¹⁸⁷

In other words, the state may not appeal against an acquittal, even if the acquittal is based on erroneous evidentiary or substantive legal rulings. The court justified its holding by stating that

[t]o hold that a defendant waives his double jeopardy protection whenever a trial court error in his favour on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests, ... and would vitiate one of the fundamental rights established by the Fifth Amendment.¹⁸⁸

¹⁸⁶At 78. At 60 the court recounted the trial judge's statement that he would have vacated the acquittal under the interpretation of the statute that ultimately proved correct.

¹⁸⁷At 65.

¹⁸⁸At 78. In *US v Scott* (see *infra*, text at note 193 for a discussion of that case) Mr Justice Brennan who delivered the minority judgment, remarked (at 84) that *Sanabria* teaches that the government's means of protecting its vital interest in convicting the guilty is its participation as an adversary at the criminal trial where it has every opportunity to dissuade the trial court from committing erroneous rulings favourable

Sanabria's case was followed by *Smalis v Pennsylvania*¹⁸⁹. In that case the Supreme Court held unanimously that a trial judge's granting of a demurrer (an objection) by the accused at the close of the prosecution's case on the basis of insufficiency of prosecution evidence constitutes a non-appealable acquittal. Mr Justice White stated that¹⁹⁰

a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt is an acquittal under the Double Jeopardy Clause ...

Mr Justice White explained that the double jeopardy clause bars a prosecution appeal against a dismissal at the close of the prosecution's case for the very reason that

subjecting the defendant to postacquittal fact-finding proceedings going to guilt or innocence violates the Double Jeopardy Clause.¹⁹¹

and that

[when] a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interests of the accused in having an end to the proceedings against him.¹⁹²

to the accused.

¹⁸⁹476 US 140 (1986).

¹⁹⁰At 144.

¹⁹¹At 145.

¹⁹²*Id.*

The last, and most important case decided by the Supreme Court during the series of judgments on double jeopardy issues (1977-1978) was *US v Scott*.¹⁹³ In *Scott* the Supreme Court qualified its holding in *Jenkins*.¹⁹⁴ As discussed above, *Jenkins* held that *any* midtrial dismissal, even one that does not amount to an acquittal on the merits of the case, would bar further proceedings initiated by the prosecution if any further proceedings directed at the resolution of factual issues related to the elements of the offence charged, would be required on reversal and remand.¹⁹⁵

In *Scott*, the issue before the court was whether a prosecution appeal against a dismissal by the trial judge granted on the ground of pre-indictment delay at a stage in the proceedings after jeopardy had already attached, ought to be prohibited in terms of the double jeopardy clause of the Constitution. It should be mentioned that if such an appeal had been allowed and the dismissal reversed on appeal, the result would necessarily have been a new trial; precisely that which had been prohibited by the Supreme Court in *Jenkins*. However, in *Scott* the court departed from its holding in *Jenkins* and held that the *Jenkins* principle cannot apply in those instances where the accused himself seeks to terminate the trial on grounds unrelated to his guilt or innocence.¹⁹⁶

In the court's view, *Jenkins* had placed too much emphasis on the accused's right to have his guilt determined by the first jury to try

¹⁹³*Supra*.

¹⁹⁴*Supra*.

¹⁹⁵See *supra*, text at note 168.

¹⁹⁶At 99.

him.¹⁹⁷ The court stated that if the prosecution is willing to continue with its production of the evidence in order to show the accused guilty before the jury impanelled to try him, and the accused himself seeks to terminate the trial on grounds unrelated to his guilt or innocence, he has

not been "deprived" of his valued right to go to the first jury; only the public has been "deprived" of its valued right to "one complete opportunity to convict those who have violated its laws" ...¹⁹⁸

The court furthermore reasoned that cases in which the accused seeks to terminate his trial on a ground unrelated to his guilt or innocence can be distinguished from true acquittals which, according to existing double jeopardy jurisprudence, may even result from erroneous evidentiary rulings or erroneous interpretation of governing legal principles.¹⁹⁹ In the court's view, the fact that an acquittal may result from erroneous evidentiary rulings or erroneous interpretation of governing legal principles will affect the *accuracy* of the determination but will not alter its *essential character*.²⁰⁰ Therefore (as held in *Sanabria*),²⁰¹ the prosecution will be prohibited in such cases from appealing against an acquittal. However, in the

¹⁹⁷At 87.

¹⁹⁸At 100 referring to the words used in *Arizona v Washington supra*, where the court applied this reasoning in holding that the declaration of a "mistrial" by the trial judge in that case did not bar further proceedings against the accused. See chapter three *supra* under 3.5.2.1, text at note 177 for a discussion of that case.

¹⁹⁹At 98, referring to the ruling in *Sanabria* discussed *supra*, text at note 185.

²⁰⁰*Id.*

²⁰¹*Supra.*

court's view, the dismissal of an indictment for pre-indictment delay represents only a legal judgment that a defendant, although perhaps criminally culpable, may not be punished because of a supposed constitutional violation.²⁰² The court explained that, while an acquittal on the merits by the trier of fact can never represent a determination that the defendant is innocent in any absolute sense, a defendant released by a court for reasons required by the Constitution or laws, but which reasons are *unrelated* to factual guilt or innocence, had not been determined to be innocent *in any sense of that word* absolute or otherwise.²⁰³

The court concluded that where the accused (in *Scott*) himself sought to terminate his trial on grounds unrelated to guilt or innocence, a second prosecution would not amount to oppressive governmental conduct. In this regard, the court made the following statement²⁰⁴

This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty, or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Therefore, at present, the controlling principle in determining whether a prosecution appeal against an acquittal or dismissal is permissible is whether there has been some determination by a judge

²⁰²At 98.

²⁰³*Id.*, note 11.

²⁰⁴At 96.

or jury relating to the factual guilt or innocence of the accused. As a matter of interest, it should, however, also be mentioned that Mr Justice Brennan who delivered the dissenting opinion in *Scott*, pointed out that there will be few instances indeed in which defences can be deemed unrelated to factual innocence, and that the majority's decision in *Scott* "may be limited to disfavoured doctrines like pre-accusation delay".²⁰⁵ He explained that this is so because defences which provide legal justification for otherwise criminal acts, for example entrapment and insanity, will in fact create double jeopardy bars. Therefore, only those defences that arise from unlawful or unconstitutional governmental acts such as pre-indictment delay, will not.²⁰⁶

6.5.6 Prosecution appeals against sentence

It remains to consider whether an appeal by the state on the issue of sentence only is regarded by the Supreme Court to be a violation of double jeopardy principles. Two decisions handed down by the court in the 1980's are of importance in this respect. These are *US v DiFrancesco*²⁰⁷ and *Bullington v Missouri*.²⁰⁸

The facts present in *DiFrancesco* were as follows. The state appealed against a sentence imposed on the accused who had been classified as a "dangerous special offender" on the basis that the trial court had abused its power in imposing too lenient a sentence. The accused was classified as a "dangerous special offender" in terms of the

²⁰⁵At 89.

²⁰⁶*Id.*

²⁰⁷449 US 117 (1980).

²⁰⁸451 US 429 (1981).

provisions of a specific federal Act, The Organised Crime Control Act of 1971. This Act defines a "dangerous special offender" and authorises the imposition of an increased sentence on an accused who has been classified in terms of this definition.²⁰⁹ It also grants the prosecution the right to appeal against the sentence imposed on such offenders by the trial court to the Court of Appeals. The Act also specifies that²¹⁰

[r]eview of the sentences shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous or the sentencing court's discretion was abused. The court of appeal on review of the sentence may, after considering the record, including the entire pre-sentence report, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed or remand for further sentencing proceedings and imposition of sentence...

The issue before the Supreme Court was whether the above provisions of the Act violate the double jeopardy clause of the Constitution. Writing for the court, Mr Justice Blackmun confirmed the view expressed by the court in earlier decisions that the prohibition against multiple trials is the "controlling constitutional principle" in double jeopardy jurisprudence.²¹¹ However, the judge pointed out that recent Supreme Court decisions had indicated that even the protection against retrial was not absolute in itself; it was an *acquittal* which prevents retrial.²¹² Therefore, an appeal of a sentence would

²⁰⁹See 18 USC par 3575(e) and (f) & par 3575(b).

²¹⁰Par 3575(b).

²¹¹At 132, relying on the *dictum* in *US v Wilson supra* text at note 163.

²¹²At 132.

only be a violation of double jeopardy rules

if the original sentence is to be treated in the same way as an acquittal is treated and the appeal is to be treated in the same way as a retrial.²¹³

The court came to the conclusion that the limited appeal against sentence provided for in the legislation under consideration "did not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence".²¹⁴ Relying on the famous *dicta* in *Green*,²¹⁵ the court expressed the view that an accused's primary concern relates to a determination of his innocence or guilt, and not to the sentence itself.²¹⁶ Furthermore, the court argued that an accused whose sentence is increased on appeal, is not subjected to the risk of being harassed and subsequently convicted, even if innocent.²¹⁷ The court accordingly upheld the constitutionality of the particular legislation.

In *Bullington v Missouri*²¹⁸ the Supreme Court applied to sentencing proceedings the principle confirmed in *DiFrancesco*²¹⁹ namely, that absolute finality is accorded to an initial determination of an accused's guilt or innocence. Bullington was indicted and found guilty for capital murder following the abduction and death by

²¹³At 133.

²¹⁴At 136.

²¹⁵See chapter three *supra* under 3.5.1.

²¹⁶At 136.

²¹⁷*Id.*

²¹⁸*Supra.*

²¹⁹*Supra.*

drowning of a young woman.²²⁰ He was found guilty of this crime. Missouri law provides for only two possible sentences in the circumstances: death or life imprisonment. Of importance is that a Missouri statute (valid at the time) contained substantive standards to guide the otherwise discretionary power of the sentencer; it afforded the defendant certain procedural safeguards, which included a pre-sentence hearing for the defendant convicted of capital murder, to be held before the same jury which had found the defendant guilty.²²¹ At the pre-sentence hearing the jury had to hear evidence presented by the prosecution concerning the existence of certain aggravating or mitigating circumstances specified by the statute. Only such evidence of aggravation as the prosecution had made known to the defence before trial was admissible. In order to impose the death penalty, the jury had to designate in writing the aggravating circumstances it had found and had to be convinced beyond a reasonable doubt that there had been circumstances sufficient to warrant the death penalty.²²²

Nevertheless, after this pre-sentence hearing was held, Bullington was sentenced to life imprisonment without eligibility for probation or parole for fifty years. He applied for a new trial by means of a post-verdict motion on the ground of constitutional defects in the jury selection process of Missouri. The motion was granted but the prosecution then notified Bullington of its intent to seek the death penalty again based on the same aggravating circumstances and evidence presented at the first trial. The United States Supreme Court had to decide whether this would be permissible. The court found in

²²⁰Capital murder is murder which may be punished by the death penalty.

²²¹See *Bullington* 432-433 for a discussion of the provisions of this particular statute.

²²²See *id.*

favour of Bullington and held that he was protected by the double jeopardy clause

because the sentencing proceeding at his first trial was like a trial on the question of guilt or innocence and the protection afforded by the Double Jeopardy Clause to one acquitted by a jury, also is available to him, with respect to the death penalty at his retrial.²²³

The court distinguished *Bullington* from its previous holding in *DiFrancesco* on the basis that the jury in Bullington's first trial did not have unlimited discretion to select a punishment from a variety of authorised sentences (as in *DiFrancesco*). The court pointed out that according to the prescribed sentencing proceeding for capital murder in Missouri, the jury had to determine whether aggravating circumstances sufficient to warrant the imposition of the death penalty were present and whether there were any mitigating circumstances that outweighed the aggravating circumstances. Since the jury could choose only between two possible sentences (the death sentence or life imprisonment) it had of necessity to consider whether to impose the death penalty.²²⁴ The court explained that by following this procedure and imposing a sentence of life imprisonment, the jury had in fact "acquitted" the defendant of the death penalty.²²⁵ In the court's view, the post-conviction hearing required in the state of Missouri for capital murder had the procedural "hallmarks of the trial on guilt or innocence".²²⁶

²²³At 446.

²²⁴At 438.

²²⁵At 439.

²²⁶*Id.*

A further consideration taken into account by the court was that the prosecution had not merely recommended an appropriate sentence in this case, but had undertaken to prove beyond reasonable doubt that certain aggravating facts were present which warranted the death penalty.²²⁷ According to the court, this sentencing proceeding (in contrast to that adopted in *DiFrancesco*) had amounted to an actual trial on the issue of guilt or innocence of the accused which afforded him protection against double jeopardy.²²⁸ The accused's punishment could not be increased on reconviction because the evidence had already been deemed insufficient to justify the harsher punishment.²²⁹

The approach adopted in *DiFrancesco* has been severely criticised on double jeopardy grounds by a considerable number of legal commentators.²³⁰ The general view expressed is that the court's approach in *Bullington* cannot be reconciled with its holding in *DiFrancesco*. It is pointed out that the court in the *DiFrancesco* case failed to acknowledge the trial judge's fact-finding role in sentencing

²²⁷*Id.*

²²⁸*Id.*

²²⁹At 444-445, relying on *Burks v US* discussed in chapter eight *infra* under 8.5.2.

²³⁰See Mesec MA "Government appeals of sentence: Double talk with the double jeopardy clause?" *Ohio Northern University Law Review* Vol 9 1982 385; O'Hanley RP "Double jeopardy and prosecutorial appeal of sentences: *DiFrancesco*, *Bullington* and the Criminal Code Reform Act of 1981" *Vanderbilt Law Review* Vol 35 1982 709; Doss MP "Re-sentencing defendants and the protection against multiple punishment" *University of Pennsylvania Law Review* Vol 133 1985 1409. *Contra* however Dewey EP "Appeals of sentences pursuant to Organized Crime Control Act do not violate double jeopardy clause" *Loyola Law Review* Vol 27 1981 634 and Stern RA "Government appeals of sentences: A constitutional response to arbitrary and unreasonable sentences" *American Criminal Law Review* Vol 18 1980 51.

proceedings.²³¹ In *Bullington* the fact-finding role of the jury was explicit and consequently the court afforded double jeopardy protection. In *DiFrancesco* the court arguably failed to recognise that a judge, in meting out a sentence, makes a similar factual determination. It is suggested that in determining whether a prosecution appeal against sentence violates the double jeopardy prohibition the general approach should be as follows: Failure to impose a higher penalty, like a failure to find guilt of a higher degree because of insufficient evidence, amounts to an acquittal of that degree of punishment and precludes an appeal.²³²

It is submitted that the abovementioned criticism of the holding in *DiFrancesco* case has merit. Appellate proceedings on the issue of sentence in essence amount to a reconsideration of factual issues. Any attempt to determine the constitutional permissibility of prosecution appeals against sentence by means of criteria such as the scope of the trial court's discretion in imposing sentence seems to amount to an overly-subtle exercise. In my view, however, the court in *DiFrancesco's* case was not concerned only with double jeopardy rules, but to a great extent was swayed in its final decision by the consideration of legitimate governmental interest in rationalising sentencing decisions.²³³

²³¹See O'Hanley 736.

²³²At 737. The commentator suggests that *Bullington* revived the implied acquittal doctrine suggested in *Green v US*. See *infra* under 8.5.4 for a discussion of that doctrine.

²³³*Cf* the majority of the court's views (at 142) on the need for reform in the area of sentencing and the problem encountered in the criminal justice system of too lenient sentences being imposed by trial judges for offences which involve organised crime. The court was also influenced considerably by the fact that historically the pronouncement of sentence has never carried the finality that attaches to an acquittal. See at 133 of the majority opinion.

6.5.7 Prosecution appeals and double jeopardy - a consideration of legal theories

In conclusion, it is necessary to consider briefly certain theories advanced by American legal commentators concerning the rationale underlying the prohibition on prosecution appeals against acquittals. The first of these theories, which finds considerable support in a number of Supreme Court decisions,²³⁴ is the "protection of the innocent against wrongful conviction" rationale. In terms of this theory, finality is accorded to acquittals in American criminal jurisprudence because paramount importance is attached in that system of criminal justice to the protection of the innocent against wrongful conviction.²³⁵ Permitting the prosecution a second opportunity to convince a factfinder of the accused's guilt "enhances the likelihood that an innocent defendant will be convicted by enabling the government to secure additional evidence, to restructure the presentation of its case, and to anticipate the evidence offered by the defendant at the first trial".²³⁶

It is clear that an appeal on a point of law only initiated by the state and considered by a court of appeal on the record of proceedings without the possibility of remand for a new trial (on reversal of the finding of the trial court), would not in any material sense offend this

²³⁴See *Green v US* at 188; *US v Wilson* at 343; *US v Martin Linen Supply Co* at 569; *US v Scott* at 91 and *US v Difrancesco* at 136.

²³⁵See Stern 69-72. The author points out that this interest is not only reflected in the double jeopardy clause, but also in the rigorous burden of proof that must be satisfied by the state to secure a criminal conviction and in the great amount of procedural and evidentiary rules designed to enhance the accuracy of the truth-finding process.

²³⁶See Stern 69. The author relies upon the Supreme Court decisions of *US v Scott* 91; *Green v US* 187-188 and *Burks v US* 11.

theory.²³⁷ The prosecution (except in exceptional circumstances), cannot generally secure additional evidence on appeal and the likelihood that an innocent person could be convicted as a result of an appeal on the record seems minimal.

Two prominent American legal commentators²³⁸ reject the idea that the rationale which underlies double jeopardy protection is the public interest in protecting the innocent against conviction. These writers argue that this theory does not explain why the state may not challenge a defendant's acquittal which is based on an erroneous application of law.²³⁹ They suggest that such a person's claim of innocence would remain seriously in doubt and question of why the prosecution should not be afforded the opportunity to present its case in an error-free trial. They argue that the reason cannot be that an innocent person may be convicted in such circumstances. It is suggested by these commentators that the only sound reason why acquittals are accorded absolute finality in American criminal jurisprudence is the recognised phenomenon in that system of criminal procedure that the jury may acquit against the evidence (better known as the jury-nullification rule).²⁴⁰

²³⁷The Supreme Court's approach in *US v Wilson* discussed *supra* text at note 158 supports this conclusion.

²³⁸Westen P and Drubel R "Toward a general theory of double jeopardy" *The Supreme Court Review* 1978 81 (hereinafter referred to as Westen and Drubel *General Theory*) and Westen P "The three faces of double jeopardy: Reflections on government appeals of criminal sentences" *Michigan Law Review* Vol 78 1980 1001 (hereinafter referred to as Westen *Appeals of criminal sentences*).

²³⁹See *Sanabria v US* discussed *supra*, text at note 185. In that case the Supreme Court held that the prosecution may not appeal against an acquittal even if it is based on an erroneous application of the law.

²⁴⁰Jury-nullification means that a jury may disregard the legal instruction of the judge and render a verdict purely on the basis of conscience or feelings. In terms of the Sixth Amendment of the

The rationale of this theory is explained as follows.²⁴¹ Acquittals may be erroneous for several reasons. An acquittal may, for instance, be erroneous because the verdict contradicts the overwhelming weight of the evidence. The acquittal may also be erroneous because of defective fact-finding as a result of either wrong exclusion of prosecution evidence or misdirection of the jury by the judge on the law. In American criminal jurisprudence, a jury acquitting an accused need not give reasons for doing so. A jury is also allowed to acquit against the evidence. In other words, the jury's role is not limited to simple fact-finding; it has the authority to acquit a defendant "in spite of the facts".²⁴² This means that it could, for instance, disregard the legal instructions of the judge or ignore the overwhelming evidence against the accused and render a verdict of not guilty purely on the basis of conscience or feelings.

Because a jury need not give reasons for its verdict and may acquit against the evidence, there is no clarity concerning the basis of the jury's decision to acquit. Even if it could be proved by a party wishing to challenge an acquittal entered by a jury that a defective or erroneous fact-finding process had taken place at the trial, it would be very difficult to prove that the jury would have reached a different conclusion if the errors had *not* occurred. It follows that because

Constitution, the accused in a criminal trial is guaranteed the right to a trial by jury. An accused, however, may surrender his right to a trial by jury by means of a waiver. He is then tried by a judge acting as the sole decision-maker in what is known as a bench-trial or waiver-trial. However, in jury trials jurors are the sole triers of fact; although they are sworn to follow the rules of evidence and law as charged by the judges, cases of jury-nullification exist where the jury disregards such controls. See Zalman M and Siegel L *Criminal Procedure: Constitution and Society* 1991 1st ed 634 and 636.

²⁴¹Westen and Drubel *General Theory* 129-130.

²⁴²See Westen and Drubel *General Theory* 130.

there are no *identifiable erroneous* acquittals, appellate review of acquittals entered by a jury would be inappropriate.

The legal commentators who express the view that the jury-nullification rule is the sole reason why prosecution appeals against acquittals are prohibited, explain that "[t]he Double Jeopardy Clause thus allows the jury to exercise its constitutional function as the conscience of the community in applying the law; to soften and in extreme cases to nullify the application of the law in order to avoid unjust judgments".²⁴³

It cannot be denied that the theory advanced by these writers sounds convincing. It provides a rational explanation why the American prosecutor is not even allowed to appeal against an acquittal on a point of law. However, it has one serious flaw. It fails to explain why the American prosecutor is also prohibited from appealing against a finding of not guilty by a judge, acting as the only factfinder in a bench trial.²⁴⁴ In *US v Jenkins* the Supreme Court rejected the notion that the double jeopardy clause permits a distinction between bench and jury trials.²⁴⁵

²⁴³Westen and Drubel *General Theory* 129.

²⁴⁴A judge in a bench trial cannot acquit against the evidence and must give reasons for his findings. The grounds on which a judge's verdict is based, is therefore identifiable. However, the state is not allowed to appeal against an acquittal handed down in a bench trial even if it is based on erroneous legal grounds. See in general *Office of Legal Policy* 896-897 which recommends that the Department of Justice should recognise a right of the state to appeal against acquittal based on errors of law in bench trials.

²⁴⁵See *supra*, text at note 168 for a discussion of that case. To overcome this flaw in their argument, Westen and Drubel *General Theory* 132-137 submit that the Supreme Court decision in *Swisher v Brady* 438 US 204 (1978) is authority for the proposition that the state may appeal against an erroneous verdict of not guilty in a bench trial and that this case in fact overruled *Kepner's* case (*supra*).

It is clear that neither the "jury-nullification" theory nor the "protection of the innocent against wrongful conviction" theory can explain entirely why finality is accorded to trial acquittals in American criminal jurisprudence. Therefore, there has to be other reasons why the Supreme Court has adopted this approach. Recent considerations by the Supreme Court of the constitutionality of state appeals against

However, this argument seems to be forced. *Swisher's* case involved a juvenile proceeding in Maryland in which the magistrate was only authorised to make proposed findings of delinquency or non-delinquency which had to be reviewed on the record by a judge in a juvenile court. In *Swisher*, the state filed exceptions to the magistrate's proposals pursuant to a state rule of criminal procedure; the judge in the juvenile court subsequently made an independent review of the records, and entered an acquittal. The issue before the Supreme Court was whether the double jeopardy clause of the Constitution prohibited the state from filing exceptions with the Juvenile Court to proposed findings and recommendations by the magistrate. The Supreme Court ruled that it did not. The court argued that the rules of procedure of the state of Maryland (at the time) provided that a "master" (a magistrate) should hear such cases as may be assigned to him by the Juvenile Court, and that he should thereupon, at the conclusion of the hearing, transmit his findings and recommendations to the Juvenile Court. If no party had filed exceptions to these findings and recommendations, they had to be confirmed, modified or remanded by the judge. However, if a party filed exceptions (and in delinquency matters, only the state had the authority to do so), the Juvenile Court judge would hear the entire matter *de novo*. The Supreme Court clearly distinguished its holding in this case (namely that the exceptions by the state were permissible) from that in *Kepner's* case. Unlike *Kepner's* case, the magistrate in *Swisher's* case was a mere "master" making *proposed findings* of not guilty. In *Kepner's* case on the other hand, the trial magistrate was authorised to enter a judgment of not guilty which (in the absence of an appeal) was binding and final. In *Swisher's* case, the "master" had no power to enter a final order of acquittal. The Supreme Court pointed out that the procedure in Maryland provided for a single proceeding "which begins with a master's hearing and culminates with an adjudication by a judge" (at 215). Therefore, the filing of exceptions by the state against the findings of the magistrate could not be regarded as a state appeal against an *acquittal* (which, according to the decision in *Kepner*, amounted to a violation of the constitutional prohibition against double jeopardy) because the magistrate had no power to enter an acquittal.

acquittals indicate that the double jeopardy prohibition in general, presupposes that²⁴⁶

- (a) in order to protect the public interest in ensuring that justice is meted out to offenders, the state should at least have one opportunity to present its case before a trier of fact and
- (b) in order to protect the valued right of the accused to have his trial completed by the particular tribunal summoned to sit in judgment of him, he should only be subjected to *one* determination of his guilt or innocence.²⁴⁷

This approach would not seem to focus exclusively on considerations such as "protecting the innocent from being convicted" or "anxiety, embarrassment or expense".²⁴⁸ It seems more plausible that the decisive underlying policy considerations are the following. A re-consideration of an accused's guilt or innocence at the initiative of the state, at a stage when the state already had an opportunity to state its case before a duly appointed trier of fact, amounts to oppressive governmental behaviour.²⁴⁹ However, the question of *why* it can be regarded as oppressive state conduct remains. One legal commentator argues that a re-consideration of an accused's guilt or innocence at the initiative of the state amounts to oppressive governmental conduct "because the [due process] system [of criminal justice] vests the ultimate authority to find culpability in the *initial*

²⁴⁶See *US v Scott* (99) relying on the approach adopted in the so-called "mistrial" cases ie *US v Jorn* and *Downum v US*. Both these cases are discussed in chapter three *supra* under 3.5.2.1.

²⁴⁷This right of the accused may be seen as a derivative of his legitimate interest in the finality of a verdict of acquittal. See *US v Wilson* 352.

²⁴⁸Even a retrial after a conviction is set aside by a court of appeal may cause these burdens.

²⁴⁹See *US v Scott* 99-100.

factfinder".²⁵⁰ He explains his thesis as follows²⁵¹

The crucial question is whether the double jeopardy clause permits the prosecutor to re-evaluate a jury's decision as to the degree (or existence) of culpability....The distinction between legal guilt and factual guilt is important for double jeopardy theory.²⁵² Defendants are presumed innocent until found guilty by a verdict of their peers and by proof beyond a reasonable doubt. Moreover, juries have the inherent power to nullify the evidence and return a verdict that is contrary to the physical facts. Thus, our justice system creates limitations on legal guilt that have nothing to do with whether, in fact, the defendant committed certain acts. One can say that X did Y conduct but in the absence of a criminal verdict, one cannot say that X is guilty of offense [*sic*] Y. Because the question for the criminal justice system is necessarily legal guilt, rather than whether X did [conduct] Y, the system must prefer the judgment of the fact finder to that of the prosecutor. Because this is so, it is nonsensical to speak of the prosecutor correcting "errors" made by the fact finder. *The fact finder's judgment is the defendant's culpability.* Thus the double jeopardy clause is simply an inevitable part of the system [of due process] that gives the ultimate decision-making responsibility to the [first] fact finder.

It is submitted that the rationale advanced above can be reconciled with current judicial precedents such as *Sanabria* and *Scott*.

6.5.8 Summary

* The basic approach followed in American constitutional double

²⁵⁰See Thomas *Elegant theory* 850 (my emphasis).

²⁵¹At 835. (My emphasis).

²⁵²Thomas refers to Packer at 166-167 where the author draws a distinction between due process and crime control theories by contrasting legal guilt and factual guilt. *Cf* chapter six *supra* note 4.

jeopardy jurisprudence is that the state is prohibited from appealing against an acquittal.

* In the early cases, the court did not define the concept acquittal. The result was that any termination of proceedings at a stage after jeopardy had attached and which had been referred to by the court as an *acquittal*, offered the accused protection against further state-initiated proceedings.

* In *Ball* the United States Supreme Court rejected the English rule that a defective indictment cannot legally place an individual in jeopardy. The court reasoned that it would be unfair to grant a prosecutor a second opportunity to convict whenever he discovered a defect in the original indictment. The rationale underlying the approach adopted in *Ball* is that the state should not benefit from its own mistakes.

* During the 1950's the court ruled in *Green* that even an "implied acquittal" entitles an accused to protection against double jeopardy. The court ruled that a conviction of a lesser offence constitutes an "implied acquittal" of a greater offence. The "implied acquittal" doctrine was later applied in the context of a prosecution appeal against sentence.

* During the 1970's, the Congress of the federal government introduced an Act which provided for a right of the state to appeal against any decision dismissing an indictment *except where it would be prohibited by the double jeopardy clause of the Fifth Amendment*. This provision was construed in *Wilson* to mean that Congress intended to remove all statutory barriers to state appeals and to allow appeals whenever the Constitution would permit. Therefore, the provision required the Supreme Court to consider more closely the

policies which underlie the constitutional guarantee against double jeopardy.

* In the first decisions which followed on the above-mentioned enactment, the court regarded the *consequences* of a state appeal to be the controlling principle in determining whether it should be prohibited in terms of the double jeopardy clause. In *Wilson* for instance, the court ruled that the most important purpose of the constitutional guarantee against double jeopardy is the prohibition of *multiple trials*. Building on this premise, the court ruled that the double jeopardy clause does not bar an appeal of a judge's post-trial discharge following a conviction by the trier of fact. The court reasoned that a successful state appeal of such a post-conviction judgment of acquittal (which acquittal, *in casu*, was based on pre-indictment delay), allows reinstatement of the guilty verdict *without subjecting the accused to a second trial before a second trier of fact*. In general, the court was of the view that an accused has *no legitimate claim to benefit from an error of law when that error can be corrected without a second trial before a second trier of fact*.

* The Supreme Court followed the approach adopted in *Wilson* (namely that the double jeopardy clause primarily protects the accused against *multiple trials*) also to bench trials in *Jenkins*. In that case the court held that *any* mid-trial dismissal of an accused (regardless of the *character* of such mid-trial dismissal) bars a state appeal *if further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offence charged are required upon reversal and remand*. *Jenkins* focused purely on the issue of whether a new trial would be required if the judgment favourable to the accused was reversed on appeal. *Wilson*, on the other hand, focused on the issue of whether the appeal itself would involve reconsideration of factual issues.

* During the 1977-1978 term, a shift in emphasis occurred in the court's approach to the constitutional permissibility of state appeals. Instead of focusing on the *consequences* of a state appeal, the court began to focus on the *character* of the termination of the proceedings in the trial court in favour of the accused.

* In *Martin Linen* the court stated that, in order to determine the constitutionality of a state-initiated appeal, it must be determined whether the ruling of the judge, *whatever its label, represents a resolution correct or not, of all of the factual elements of the offence charged*. In other words, the court ruled that it has to be determined whether the termination of proceedings was based on insufficiency of evidence to prove the offence. If this is the case, it amounts to a *true acquittal* which bars further state-initiated proceedings.

* In *Sanabria* the court took this approach even one step further. It held that an acquittal (a termination of proceedings on the basis of insufficiency of evidence to prove the crime charged) bars a state appeal *even if it was based on erroneous legal judgments* rather than flawed fact-finding. In other words, the court ruled that a termination of proceedings based on insufficient evidence still qualifies as an acquittal on the merits even if it is based upon erroneous evidentiary or substantive legal rulings. The court argued that to deny the accused protection against double jeopardy whenever a trial court error in his favour led to an acquittal, undercuts the adversary assumption on which the American system of criminal justice rests. This argument was explained in subsequent cases as follows. The state's means of protecting its vital interest in convicting the guilty is its participation as an adversary at the criminal trial where it has every opportunity to dissuade the trial court from committing erroneous

rulings favorable to the accused.²⁵³ The institution of appeal cannot be employed by the prosecution to serve the interest of the state to convict the guilty; it frustrates the interest of the accused in having the proceedings against him finalised.²⁵⁴ Therefore, it amounts to a violation of the guarantee against double jeopardy. The decision in *Sanabria* was followed in a subsequent decision (*Smalis*). The Supreme Court ruled in *Smalis* that a discharge of the accused at the end of the prosecution's case on the basis of insufficiency of evidence, constitutes a non-appealable acquittal. Building on the premise advanced in *Sanabria*, the court stated that *a ruling as a matter of law that the state's evidence is insufficient to establish the accused's factual guilt*, also amounts to an acquittal that bars a state appeal.

* In *Scott* the Supreme Court confirmed that a determination of the constitutionality of a state appeal involves an investigation into the *character* of the termination of proceedings in favour of the accused. Of importance is that the court rejected its previous holding in *Jenkins*, namely that *any* mid-trial dismissal (even one that does not amount to an acquittal on the merits) bars further proceedings by the state if further proceedings of some sort, devoted to the resolution of factual issues would be required on reversal and remand. The court explained (in *Scott*) that if the prosecution is willing to continue with its production of evidence, and the accused himself seeks to terminate the trial on grounds unrelated to his guilt or innocence (for example, a legal ground such as pre-indictment delay), *he has not been deprived of his right to go to the first jury; only the public is deprived of their valued right to one complete opportunity to present their case to a trier*

²⁵³See the dissenting opinion of Mr Justice Brennan in *Scott* at 84 discussed *supra* at note 188.

²⁵⁴See the judgment of Mr Justice White in *Smalis* at 145 referred to *supra*, text at note 191.

of fact. The court distinguished its decision in *Sanabria* on the following grounds. An acquittal resulting from erroneous evidentiary or substantive legal rulings, although it affects the *accuracy* of the determination, does not alter its *essential character*. A dismissal on the basis of pre-indictment delay on the other hand, does not amount to a finding of fact that the accused was innocent of the crime charged. In the court's view, an appeal against such a dismissal does not amount to oppressive state conduct; the issue of guilt has never been submitted to the first trier of fact.

* In a minority opinion in *Scott*, Mr Justice Brennan pointed out that there are few instances where defences could be deemed unrelated to factual guilt or innocence. He explained that most defences (for instance entrapment and insanity) provide legal justification for conduct which constitutes an offence. Thus, in most cases, dismissals on legal grounds would create double jeopardy bars.

* Finally, in *DiFrancesco*, the Supreme Court upheld the constitutionality of a prosecution appeal against sentence on the basis that *it does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence*. However, in *Bullington*, the court applied the very principle advanced in *DiFrancesco* to *prohibit* a state appeal against sentence on double jeopardy grounds. It held that because the sentencing proceeding adopted in *Bullington* *resembled a trial on the issue of guilt or innocence*, the double jeopardy clause barred the state from appealing against the sentence. The court also relied on the "implied acquittal" doctrine as previously suggested in *Green*: it held that by imposing a sentence of life imprisonment, the court impliedly acquitted the accused of the only other sentence it was empowered to impose, namely the death sentence. The court distinguished *Bullington* from its previous holding in *DiFrancesco* on the basis that the jury in *Bullington*'s first trial did not have unbounded

discretion to select a punishment from a variety of authorised sentences (as was the case in *DiFrancesco*). This distinction has been criticised by legal commentators on the basis that it is artificial. For instance, it is suggested that in deciding which sentence to impose, the trial judge *always* performs a fact-finding role, irrespective of the scope of his discretion. This means that failure to impose a higher penalty, like failure to find guilt of a higher degree because of insufficient evidence, amounts to an *acquittal* of the higher degree of punishment and precludes an appeal.

* Unlike the position in English and Canadian law, the criterion of "absence of jurisdiction" is not employed in American federal jurisprudence to effect a review and subsequent setting aside of an acquittal by a higher hierarchical tribunal. This is so because it is highly unlikely that a trial court will lack "jurisdiction" over a matter that proceeded through trial to a final verdict; the prosecution would have requested the court to declare a mistrial at an earlier stage of the proceedings. As indicated in chapter three, a retrial may follow on declaration of a mistrial on the motion of the prosecution, unless the motion can be viewed as prosecutorial overreach or an attempt to manipulate the trial.²⁵⁵

6.6 SOUTH AFRICAN LAW

6.6.1 Historical overview

As indicated in chapter five,²⁵⁶ the system of criminal procedure

²⁵⁵See chapter three *supra* under 3.5.2 for a discussion of the permissibility of retrials on declarations of "mistrials" by trial courts.

²⁵⁶*Supra* under 5.2.

introduced at the Cape during the occupation of the Dutch East India Company (1652-1795) was based on the Roman-Dutch law which prevailed in the province of Holland at the time.²⁵⁷ This system of criminal procedure survived the first British occupation (1795-1803) and the rule of the Batavian Republic (1803-1806).²⁵⁸

During the seventeenth and eighteenth centuries, criminal cases at the Cape were tried before the Court of Justice which sat in Cape Town.²⁵⁹ An appeal was possible in civil as well as criminal matters from this court to the Supreme Court of Batavia. As in Roman-Dutch law, the accused in the ordinary process²⁶⁰ could lodge an appeal against sentence only.²⁶¹ It would seem as though the prosecution had a similar right of appeal, namely only against sentence imposed on

²⁵⁷See Dugard 18.

²⁵⁸See Dugard 18; Snyman and Morkel 7 and Wessels JW *History of the Roman-Dutch law* 1908 362.

²⁵⁹Botha CG "Criminal Procedure at the Cape during the 17th and 18th centuries" *South African Law Journal* Vol 32 1915 319. In the country districts, lower courts of justice were established which, during this period, exercised jurisdiction in civil matters only. However, it has been suggested that in practice, they heard minor criminal cases as well, for example, "alle soort van huyslycke moeilikheid" and minor cases of assault. Punishments imposed were minor fines, warnings and awards of damages. See in general Ferreira JC *Strafprosesreg in die Landdroshof* 1967 6. From the examples given by this author (at 6 note 9), it seems as if these cases were not regarded to be purely criminal matters. Nevertheless, from the sentences imposed by the lower courts an appeal could be instituted to the Court of Justice in Cape Town (see a memo written by WS van Ryneveld which appears in Theal GM *Records of the Cape Colony* Vol I 1898 242. However, no record seems to exist of an appeal brought by a public prosecutor against a sentence imposed by these courts during this time.

²⁶⁰See chapter five *supra* under 5.2 note 28 for a discussion of the ordinary process.

²⁶¹See Botha 323.

the person who had been convicted.²⁶²

During the rule of the Batavian Republic at the beginning of the nineteenth century no significant changes took place in the system of criminal procedure.²⁶³ However, during the period 1806-1910 major changes based on English principles took place in the field of the law of criminal procedure. The most important changes which occurred for the purpose of this study will be mentioned briefly.

With the initial restructuring of the courts²⁶⁴ and the fact that limited criminal jurisdiction was conferred on Boards of Landdrosts and Heemraden during this time,²⁶⁵ the need arose to clarify the method of criminal procedure to be followed in these new court structures. A code of criminal procedure²⁶⁶ was accordingly issued in 1819, which

²⁶²A letter from the members of the Court of Justice addressed to General Craig (written on 16 October 1795) states, *inter alia*, the position with regard to appeals against sentences from the court of Justice to the Supreme Court of Batavia at the time before surrender to the British in 1795, and implies that the prosecutor might also have brought such an appeal. This letter appears in Theal Vol 1 203, 206.

²⁶³Wessels 376 indicates that General Janssen's Ordinance for the administration of the country districts and his instructions to Landdrosts and Heemraden clearly show that Roman-Dutch law still formed the basis of criminal practice at the Cape during this period. Cf chapter five *supra* under 5.2, text at note 18.

²⁶⁴In 1808 a High Court of Appeals was introduced and in 1811 a circuit court. The High Court of Appeals replaced the appeals to Batavia. See Dugard 20.

²⁶⁵See Dugard 20 for an exposition of the criminal jurisdiction of lower courts during this period.

²⁶⁶Entitled *Crown Trial: or Mode of Proceeding in Criminal Cases at the Cape of Good Hope* 1819. The text of this Code appears in Theal Vol XXV 90-122. The provisions of the Code was also considered in detail in 1827 in a Report of the Commissioner of Enquiry to Earl Bathurst upon Criminal Law and Jurisprudence, contained in Theal Vol XXXIII 1-31.

regulated the method of criminal procedure followed until 1828. Article 126 of this Code provided that *all* cases in which a sentence had been passed by a commissioner of the Court of Justice could be brought to a rehearing before the full court in Cape Town, or in the case of a sentence passed by courts of Landdrosts and Heemraden, to the full Board of such Landdrost and Heemraden of the respective districts.²⁶⁷ Despite the broad terms of this provision, the provisions of article 53 of the same Code seem to suggest that no appeal was allowed against an acquittal by the prosecution.²⁶⁸ In fact, the only case which could be traced which dealt with an appeal brought by the prosecutor during this period (*in casu* the Fiscal), was an appeal against sentence.²⁶⁹

In 1827 trial by jury was introduced, a restructuring of the court system took place once again and a Supreme Court established.²⁷⁰ Legislation which followed in the next year²⁷¹ introduced a system

²⁶⁷See Theal Vol XXV 117-118.

²⁶⁸The exact wording of this section appears in Theal Vol XXV 101-102: "After the witnesses on both sides have been examined in the manner before mentioned, and no further investigation is required, the Court shall declare the examinations closed; and in case it is found, by this investigation, that the Accused is innocent, ... the declaration of 'the investigation being closed' shall be made, accompanied by a Decree of Liberation of Imprisonment, or of Acquittal from personal Appearance, and from all further prosecution for the Crime set forth in the Indictment" (my emphasis).

²⁶⁹See Theal Vol XX1 244 which contains a letter from Sir Richard Plaskett to R Wilmot Horton Esqre in which reference is made to some concern shown by Lord Charles Somerset about an appeal brought by the Fiscal to the Full Board of the Court of Justice against a sentence imposed on a criminal accused, known by the name of Carnall.

²⁷⁰See Dugard 24-25.

²⁷¹Ordinance for Regulating the Manner of Proceeding in Criminal Cases in this Colony 40 of 1828.

of English criminal procedure, *inter alia*, granting review powers to the Supreme Court in respect of proceedings of all lower courts in the Colony.²⁷² In 1830, further legislation²⁷³ imported the principle of English criminal procedure that it would be permissible for *any* person aggrieved by the proceedings of a lower court in any case to bring the same under the review of the Supreme Court on the ground that such lower court had at the trial of such case, rejected legal and competent evidence. Despite the broad scope of the wording of the provision (namely, *any* aggrieved person), there is not a single reported case during this period or later (up to the 1880's) indicating that this power of review was exercised on application of the prosecutor.²⁷⁴ Since no provision was made in these enactments for an appeal either on the facts or on a point of law, the abovementioned rule *de facto* served the purpose of a disguised form of appeal on the facts, which could be utilised by the accused.²⁷⁵

²⁷²Section 4 of Ordinance 40 of 1828. The grounds on which proceedings could be brought under review of the Supreme Court (in terms of section 5 of this Act), were exactly the same as those which are provided for presently in terms of section 24 of the Supreme Court Act 59 of 1959.

²⁷³Ordinance 73 of 1830 - Ordinance for explaining, altering and amending the Ordinance No 40.

²⁷⁴This is also evident from the decision *Prince Albert Board of Management v Jooste and Others* 1886 4 SC 400, 402 discussed *infra* note 351.

²⁷⁵At a later stage, after the introduction of an appeal on a point of law, it was held in *R v Judelman* 1893 10 SC 12 that the question of whether there was any evidence of the crime charged could, on the request of the accused, be reserved by the judge as a question of law. *Cf* the discussion *infra* under 6.6.2.3 of the scope and nature of a question of law as recently examined by the Appellate Division in *Magmoed v Janse van Rensburg*.

Nevertheless, in 1879²⁷⁶ express provision was made for an accused convicted in a superior court who was of the opinion that an irregularity took place during his trial, to appeal by means of special entry on the record of the proceedings. Furthermore, it was provided that the court could reserve a question of law to the Court of Appeals in circumstances where the accused had been convicted. The relevant section provided as follows²⁷⁷

If any question of law shall arise on the trial of any person for any indictable crime or offence in the Supreme Court, Eastern Districts Court, or any Circuit Court, it shall be lawful for such Court to reserve such question for the consideration of the Court of Appeal in criminal cases. If the Court shall determine to reserve any such question, *and the defendant shall be convicted*, the Court shall state the question or questions reserved, and shall direct such case to be specially entered in the record, and a copy thereof to be transmitted to the Court of Appeal in criminal cases.²⁷⁸

At the time of the establishment of the Union of South Africa in 1910, these principles already formed part of the law of criminal procedure of the other colonies, Transvaal, Orange Free State and

²⁷⁶Administration of Justice Act 5 of 1879 Section 23.

²⁷⁷Section 25 of the Act. The wording of this section was similar to that enacted at a later stage in section 372 of Act 31 of 1917 except that, in contrast to the latter provision, it was not explicitly stated in this provision that the prosecution may reserve a question of law. A subsequent enactment, section 34 of Act 35 of 1896, also did not make explicit provision for the prosecution to reserve a question of law.

²⁷⁸My emphasis.

Natal.²⁷⁹ They were re-enacted in consolidating legislation in 1917 (sections 370 and 372 of the Criminal Procedure and Evidence Act 31 of 1917). If an accused was acquitted by a magistrate or a jury the prosecutor could not appeal from the judgment.²⁸⁰ In a trial in a superior court, the accused was allowed to request the court to make a special entry on the record of an alleged irregularity that took place at the trial as a basis for an appeal to the Appellate Division.²⁸¹ It

²⁷⁹This study will not purport to give a detailed account of the systems of criminal procedure which prevailed in the Voortrekker Republics and Natal from the period 1838 to annexation in 1900 and 1902. Suffice it to say the following in this regard. The system of criminal procedure in Natal was based on the law which prevailed in the Cape Colony; an appeal was allowed on a point of law to the Cape Supreme Court. In the province of the Zuid Afrikaansche Republiek (Transvaal), a system of criminal procedure was provided for in the Constitution of 1858 (Appendix 3 contained rules of criminal procedure which adopted a trial by jury and the accusatorial system). Only the accused could appeal in a criminal case and the state could not challenge a verdict of not guilty. This was, presumably, also the position in the Orange Free State. After annexation in 1901, Ordinance 4 of 1902 (O) was enacted in this province, of which section 37 provided, *inter alia*, for an appeal on a point of law from a superior court without stating explicitly who may apply for such reservation. Ordinance 1 of 1903 (T) (section 270) contained a similar provision for Transvaal, which stated explicitly that the prosecution may also reserve a question of law. A similar provision was, at this stage, contained in section 34 of Act 35 of 1896 (C) and Rule of Court XL 23 (N). See in general Dugard 28-31; Kahn E "The History of the Administration of Justice in the South African Republic" *South African Law Journal* 1958 244 *et seq*; Strauss SA "The development of the law of Criminal Procedure since Union" *Acta Juridica* 1960 157, 184 *et seq*.

²⁸⁰See Strauss 185. The author points out that in Transvaal the Attorney-General could, if he was dissatisfied with the finding of a magistrate's court on a point of law in a criminal case, bring the same in review before the Supreme Court for future guidance of magistrates' courts. However, the ruling of the Supreme Court in such review could in no way affect the finality of the finding of the magistrate's court in the particular case so reviewed. *Cf* also Nathan para 2752.

²⁸¹Section 370 of Act 31 of 1917.

was also provided for in this Act²⁸² that a question of law could be reserved on the court's own motion, on request of the accused, or on request of the prosecution,²⁸³ who was only allowed to appeal on a point of law if the accused had been *convicted*. The relevant section provided that "[w]hen the superior court reserves any such question *and the accused is convicted*, the court shall state the question or questions reserved ... " ²⁸⁴ In *R v Solomons*²⁸⁵ and *R v Herbst*²⁸⁶ the Appellate Division confirmed that the relevant section allowed an appeal by the prosecution only if it would result in some benefit to the accused; in other words, only in circumstances where the accused had been convicted.

In 1948, in terms of the Criminal Procedure Amendment Act²⁸⁷, the accused in a criminal trial in a superior court was for the first time afforded a full right of appeal on the merits of a case to the Appellate Division. Presumably as a result of the interpretation of the Appellate Division of section 372 of Act 31 of 1917 as allowing for an appeal on a point of law against a *conviction* only,²⁸⁸ this legislation now also expressly provided for an appeal by the prosecution on a point of law against an *acquittal*.²⁸⁹ Furthermore, this Act also made

²⁸²Act 31 of 1917.

²⁸³Section 372 of the Act.

²⁸⁴Section 372(2).

²⁸⁵1959 (2) 352, 359F-G (A).

²⁸⁶1942 AD 434, 436.

²⁸⁷Act 37 of 1948.

²⁸⁸See *R v Solomons* and *R v Herbst supra*.

²⁸⁹See section 10 of Act 37 of 1948, which left out the words "and the accused is convicted" (which appeared in the previous section 372), and section 12 which deals with steps to be taken by the court

provision for a mechanism by which the court, when deciding a point of law in favour of the prosecution in an appeal against an acquittal, could order a retrial of the accused.²⁹⁰

These principles were retained in terms of legislation introduced in 1955,²⁹¹ and still prevails today in terms of current legislation on criminal procedure.²⁹² The law it stands today will briefly be set

where " a question of law has been reserved on the application of a prosecutor in the case of an acquittal ...". For the sake of completeness it should also be mentioned that at that stage (namely in 1948), provision had already been made in terms of The Magistrates' Courts Act 32 of 1944 for an appeal by the prosecution on a question of law against a decision given by a lower court in favour of an accused (sections 103(2) and 104(1) of that Act).

²⁹⁰See sections 12(3) and 13 of Act 37 of 1948. In terms of section 12(3), the court, where a question of law had been reserved by the prosecution following an acquittal, could direct such steps as set out in section 13. Section 13 provided *inter alia* for the institution of proceedings *de novo* where a *conviction* had been set aside as a result of the court lacking jurisdiction, an invalid indictment, or any other technical irregularity or defect in the proceedings. The interpretation of this provision is discussed in chapter eight *infra* under 8.6.2.

²⁹¹Section 366 of the Criminal Procedure Act 56 of 1955 provided for an appeal, *inter alia*, at the request of the prosecutor on a point of law. Section 369(3) set out the provisions of the previous section 12(3) of the 1948 Act, section 370 the provisions of the previous section 13, and section 369(1) authorised the Court of Appeal when ruling in favour of the prosecution in an appeal on a question of law against an acquittal, to make an order for the institution of *de novo* proceedings. See *R v Gani* 1957 (2) SA 212 (A) 222B-E and Swift IL *Swift's law of Criminal Procedure* 2nd ed 1969 725 for a discussion of this power of the court of appeal. In *Gani* the court assumed that it would not be obliged, in every case, to order such proceedings. However, the court emphasised that without such an order, fresh proceedings in respect of the same offence could not be instituted.

²⁹²Section 319 of the Criminal Procedure Act 51 of 1977, read together with sections 224(3), 322(c) and 324. Section 310 provides for an appeal by the prosecution on a point of law from an acquittal afforded an accused in the lower courts.

out in the following paragraphs.

6.6.2 Current law

6.6.2.1 General

It is clear from the survey above that since the time that Roman-Dutch law formed the basis of criminal procedure in South Africa and throughout the period when English legal principles were applied in this field of the law, the principle was maintained that an acquittal could not be challenged by the prosecution on appeal. Moreover, in according sanctity to a verdict of acquittal, no distinction was drawn between proceedings in superior and lower courts.

Although, as indicated above, a moot appeal from an acquittal handed down in a lower court was allowed in the Transvaal at the beginning of this century,²⁹³ it was only in the 1940's that an appeal by the prosecution against an acquittal granted an accused in superior court proceedings on a point of law only, received the clear and unambiguous approval of the legislature.²⁹⁴

The present Criminal Procedure Act²⁹⁵ likewise makes provision for a limited right of appeal by the prosecution namely on a point of law. However, different principles apply to the permissibility of prosecution appeals from decisions of lower courts than to prosecution appeals emanating from proceedings which take place in superior courts. In fact, as will be seen from a discussion of these principles, the accused in a lower court, in terms of double jeopardy protection,

²⁹³See *supra* note 280.

²⁹⁴See *supra*, text at note 289.

²⁹⁵Act 51 of 1977.

finds himself in a slightly better position than the accused in proceedings in a superior court. No apparent rationale underlies this phenomenon; it can probably be explained simply on the ground that the different provisions (previously contained in different pieces of legislation), although similar in nature, developed historically and were interpreted by our courts on a different basis.

6.6.2.2 Appeals against acquittals

In terms of the Act, the prosecution may appeal from a decision of a lower court "given in favour of the accused on any question of law".²⁹⁶ The courts have interpreted these words as meaning that the prosecution may appeal against an acquittal and also against a conviction of a lesser offence than that with which the accused was charged, on the basis that the accused should have been convicted of the greater offence.²⁹⁷ If the appeal succeeds, the court may itself impose the sentence or make the order which the lower court ought to have made. However, the matter may also be remitted to the lower court concerned with instruction as to which steps should be taken. If neither of these options is chosen by the court of appeal, the case is referred to the lower court which dealt with the case in the first place. The case is then re-opened and dealt with in view of the

²⁹⁶Section 310 of Act 51 of 1977. This section provides that a question of law also includes successful objection to the charge raised by the accused before pleading, in other words, before jeopardy attaches. Cf section 106(4) of the Act discussed in chapter three *supra* under 3.6.2 which stipulates the stage in proceedings when jeopardy attaches namely, when the accused has pleaded to the charge.

²⁹⁷In *S v Zoko* 1983 (1) SA 871 (N), the court held that a conviction of a lesser offence (in terms of Chapter 26 of the Criminal Procedure Act), amounts to an acquittal of the more serious offence and therefore could be regarded as a decision in favour of the accused (876A-C).

question of law as decided by the court of appeal. The court *a quo* is limited to the record except if the court of appeal has granted special authority to hear new evidence. The court of appeal may not at its discretion order a retrial of the accused.²⁹⁸

From a superior court however, a question of law may be reserved at the request of the prosecution in the following circumstances only²⁹⁹

- (a) where the accused had been acquitted, which means an absolute acquittal and not an implied acquittal of a greater offence and a conviction of a lesser offence³⁰⁰

²⁹⁸See in general Du Toit *et al* Service 11 1993 30-42C for a comment on section 310 subsections (4) and (5) which contain these provisions.

²⁹⁹See section 319 of the current Act read with section 322(4) and section 324.

³⁰⁰Our courts have held that an acquittal, in the context of a prosecution appeal, amounts to an acquittal as described or meant in terms of section 322(4) of the Act. Provision is made in this section that "[w]here a question of law had been reserved on the application of the prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct". Again, section 324 deals with the power of a Court of Appeal to direct that *de novo* proceedings be instituted where a conviction is set aside on appeal on the ground of certain delineated irregularities (namely, incompetence of the trial court, invalid indictment or other technical irregularity) on the original or any other charge. According to our courts, section 322(4) could only refer to an *absolute acquittal* because the ordering of a retrial in terms of section 324 (which in terms of this section is the only way open to the Appeal Court) would give rise to unacceptable results in instances where the accused had been convicted of a lesser offence. See *S v Haarmeyer* 1970 (4) SA 113 (O) & *S v Seekoei* 1982 (3) SA 97 (A) 103A-C where the court seriously doubted that a retrial could be envisaged by the legislature in such circumstances. In *Seekoei* the court stated (103H) that although it had the discretion to order a retrial where an accused had been acquitted, the existence of such a discretion had no bearing whatsoever on the unlikelihood of an intention of the

- (b) where the accused had been convicted and the question of law might be decided in his favour³⁰¹
- (c) where an accused had been convicted and the question of law relates to the validity of the punishment which had been imposed.³⁰²

The Appellate Division may use its power pursuant to section 322(1) and deliver judgment and impose the sentence which should have been delivered and imposed by the trial court on the correct application of legal principles, if the record contains all the relevant information. If not, a retrial may be ordered by the Appellate Division which involves the adjudication of the matter by a new judge and new assessors. In *S v Rosenthal*³⁰³ the court held that it would not order such a retrial if it would not serve the interests of justice. It should also be mentioned in this context that no provision is made for remittance to the court *a quo* of a case heard on appeal by the Appellate Division from superior court proceedings.

Therefore, from a double jeopardy point of view, the position can be

legislature to sanction a retrial even in circumstances where an accused, *convicted of a lesser offence*, had already started serving his sentence. Note that no provision is made in the Act for the ordering of a retrial or *de novo* proceedings on a successful prosecution appeal against an acquittal from proceedings in lower courts; that is probably why the prosecution may also appeal against a conviction of a lesser offence (which was in *Zoko* held to be an implied acquittal of a greater offence), handed down in these proceedings.

³⁰¹See *R v Adams* 1959 (3) SA 753 (A) 764G-H. This rule is a remnant of the law which prevailed before 1948 and was interpreted as such in *R v Herbst supra* 436.

³⁰²In this instance, it is irrelevant whether the question is answered to the advantage or disadvantage of the accused. See *S v Ntuli* 1975 (1) SA 429 (A) 435A-E. See also, in general, Du Toit *et al* Service 7 1991 31-22.

³⁰³1980 (1) SA 65 (A) 83A-B.

summarised as follows

- (a) The prosecution may appeal only on a point of law against acquittals handed down in lower as well as superior courts.
- (b) A person who has been acquitted in a superior court is technically in a worse position than his counterpart in a lower court because a full retrial may be ordered by the Appellate Division on deciding a point of law in favour of the prosecution. However, there is no reported case where the Appellate Division had utilised this power. Neither is any such case known.
- (c) Conversely, a person who has been acquitted in a lower court finds himself in a worse position than his counterpart in a superior court because the prosecution may also appeal against a conviction of a lesser offence. This type of appeal is not allowed from proceedings which took place in a superior court.
- (d) The last anomaly is that from a *conviction* in a Supreme Court, the prosecution may appeal if such an appeal would be in favour of the accused. From a lower court, however, prosecution appeals are restricted to matters decided originally in favour of the accused. However, this anomaly has no double jeopardy implications.

The Minister of Justice is also empowered to submit a decision (including an acquittal) given by any superior court in any criminal case on a question of law to the Appellate Division of the Supreme Court and cause the matter to be argued before that court in order that it may determine such question of law for the future guidance of all

courts.³⁰⁴ Any decision given by the Appellate Division in such a case is a ruling for future guidance and does not alter any previous cases decided on a different basis. Therefore, this power of the Minister amounts merely to a moot appeal on a point of law.

6.6.2.3 The scope of the concept "question of law"

In dealing with the permissibility or prosecution appeals against acquittals, South African courts have given a narrow meaning to the concept "question of law". This approach has recently recently been confirmed by the Appellate Division in *Magmaed v Janse van Rensburg*.³⁰⁵ In this particular sense, the person who has been acquitted in a lower court in South Africa finds himself in a much better position than his counterpart in England.³⁰⁶ This is so because the English courts have given a broad meaning to the concept "question of law". However, since only a moot appeal is allowed by the prosecution against an acquittal handed down in a superior court in English law, the person who has been acquitted in a superior court in that legal system is absolutely protected against being placed in jeopardy again, namely against a reconsideration of his case before a higher tribunal which may be deleterious. Therefore, if one compares the position of a person who has been acquitted in a superior court in South Africa with his English counterpart, it is obvious that the *scope* of the concept "question of law" becomes largely immaterial.

³⁰⁴Section 333 of the Criminal Procedure Act.

³⁰⁵*Supra*.

³⁰⁶*Cf* the scope of the concept "question of law" in English law discussed *supra* under 6.2.2.

Nevertheless, as has been mentioned above,³⁰⁷ the issue of whether a court could reasonably have convicted or acquitted on the evidence presented at the trial, may be posed as a question of law in English law, even by the prosecution. In South Africa, in the case of *Magmoed v Janse Van Rensburg*³⁰⁸ it was argued by counsel acting on behalf of the prosecution bringing the appeal³⁰⁹ that in the days before a full right of appeal existed, the person who had been convicted could request the reservation of a question as one of law as to whether there was legal evidence on which the jury or other factfinder could properly or reasonably have convicted. Therefore, it was submitted that just as it was permissible for the accused in those days to pose a question of law of this nature, it was also permissible for the prosecution to request the reservation of a question as one of law as to whether, having regard to the weight of the evidence adduced, the trier of fact could properly or reasonably have *acquitted* the accused.

Although counsel were unable to refer to any case where such a question of law had been reserved at the instance of the prosecution, reliance was placed on an early decision of the court, *R v Lakatula*.³¹⁰ In that case the trial court on application of the defence counsel reserved a point of law under section 372 of Act 31 of 1917.³¹¹ The question had been formulated as follows³¹²

³⁰⁷Under 6.2.2.

³⁰⁸*Supra*.

³⁰⁹*In casu* a private prosecutor.

³¹⁰1919 AD 362.

³¹¹Presently section 319 of Act 51 of 1977.

³¹²At 363.

Whether the judge at the trial should not have withdrawn the case from the jury on the ground that there was no corroboration of the evidence of Notje [*sic*] who was an accomplice in the crime.

What in fact occurred in the court *a quo* in that case was that at the close of the prosecution's case counsel for the accused had applied for their discharge for lack of sufficient evidence. This application had been refused and the accused had not given evidence. The jury had convicted the accused of murder and the abovementioned question had then been reserved for decision by the Appellate Division. During the appeal, the Attorney-General queried whether this was strictly a question of law which could be reserved in terms of section 372 and whether the point reserved should not have been that at the close of the trial there had been no legal evidence on which the jury had been entitled to convict.³¹³

Solomon ACJ made the following important comment on this particular aspect³¹⁴

I agree with him [the Attorney-General] that if at the close of the case for the prosecution the judge refuses to withdraw the case from the jury because in his opinion there is evidence which would justify them in convicting, the exercise of his discretion cannot be called in question under s 372 That, in my opinion, is not a point of law within the meaning of s 372, seeing that it is left by s 221(3) to the discretion of the judge whether or not he should withdraw the case. If, however, at the close of the trial, there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised under s 372, and the question should be reserved in that form.

³¹³*Id.*

³¹⁴At 363-364.

Corbett CJ who delivered the judgment in *Magmoed*, did not agree with the line of reasoning advanced by counsel for the appellant. After comprehensively discussing the historical development of a right to appeal in South African law, the judge concluded that a question whether a jury could properly or reasonably have inferred the guilt of the accused from the evidence adduced, would not *inherently* amount to a question of law. He pointed out that it came to be treated as a question of law by reason of separation of functions (earlier in our law) between judges and juries - questions of law to be decided by the judge and questions of fact by the jury.³¹⁵

Mr Justice Corbett explained that in terms of Act 31 of 1917 (the old Criminal Procedure Act), it had been the function of the judge to decide at the end of the prosecution's case, as a matter of law, whether there was legal evidence on which the jury could have convicted. If the judge was of the opinion that there was sufficient evidence to go to the jury, then at the end of the trial the accused, if convicted, could apply for reservation as a question of law the issue as to whether there was legal evidence upon which the jury was entitled to convict.³¹⁶ In such a case, the test which had to be applied by the court was not whether the court of appeal would have drawn the inference which the jury drew, but whether "[a] reasonable

³¹⁵At 100f the court relied on *R v Slabbert and Prinsloo* 1945 AD 137 where the court had pointed out (at 144) that the rules relating to the burden of producing evidence, firstly, to satisfy the judge and then to satisfy the jury, have their source in the bipartite constitution of the common law tribunal. The court in that case referred to *Wigmore on Evidence*, 2nd ed Vol 5 par 2487 where the author remarked: "Apart from the distinction between Judge and jury these rules need have no existence". Cf also the discussion of English law *supra* under 6.2.2, text at note 18.

³¹⁶At 99b.

man would have drawn that inference".³¹⁷

However, in the court's view, there was "no historical or juristic basis for equating the position of an accused who complains that no legal evidence exists upon which a jury could convict with that of the prosecutor who complains that the evidence submitted to the jury was so strong that the jury could not reasonably have acquitted the accused".³¹⁸ From a historical point of view, no cases existed where such a question of law had been reserved at the instance of the prosecutor. From a juristic point of view, on the other hand, the court indicated that³¹⁹

the question as to whether a jury could properly or reasonably have inferred the guilt of the accused from the evidence adduced is not inherently a question of law, but it came to be treated as such by reason of the separation of functions between Judge and jury (questions of law being decided by the Judge and questions of fact by the jury) and the function of the Judge to decide whether there is any evidence upon which a jury could properly convict the accused.

Moreover, Corbett CJ expressed the view that the principle in *Lakatula* had been adopted because of concern that absence of a right of appeal on the facts would have been an injustice *to the accused*.³²⁰

³¹⁷At 99c.

³¹⁸At 100g.

³¹⁹At 100f.

³²⁰At 100h. The court also referred to *Hiemstra* 775 where the author stated that before an appeal purely on fact was recognized, the provision of section 372 was used as a "kunsgreep" to appeal on the facts; the author pointed out that a factual question was clothed as a question of law by asking whether there was any legal evidence to support a conviction.

In considering (earlier in the decision) the inherent nature of a question of law Mr Justice Corbett pointed out that in the field of income tax appeals on a question of law, facts may be classified as primary facts, namely those facts which are directly established by the evidence, and secondary facts, namely those which are established by way of inference from the primary facts.³²¹ According to the court, an inference drawn from primary facts that an accused had formed a common purpose to kill, amounts to a factual inference and not one of law.³²² Therefore, although such an inference amounts to a so-called secondary fact, it remains a factual issue because it deals with the question whether a *factual foundation* exists for the application of a legal rule. In other words, where the legal elements of the crime or a rule of law (for example a rule of evidence dealing with the admissibility of evidence) or its scope are not at issue, but merely the factual foundation for the application of the rule, it amounts to a question of fact and not inherently to a question of law.³²³ It follows therefore that the question as to whether the trial court made the correct evaluation or drew the correct inference from the primary facts amounts to a question of fact.

In *Magmoed* the Appellate Division expressed considerable concern for the interest of the accused not to be placed in jeopardy by being tried again after he had been acquitted.³²⁴ Corbett CJ emphasised that if the court were to accede to the appellant's contention

it would be opening the door to appeals by the prosecution against acquittals contrary to the traditional

³²¹At 96g.

³²²At 96h.

³²³At 96i.

³²⁴At 101a-j.

policy and practice of our law.³²⁵

In view of the principles relied on in *Magmoed* by the Appellate Court, it is also apposite to consider whether a discharge of the accused at the end of the prosecution's case amounts to a question of law which may be challenged by the prosecution on appeal.

6.6.2.4 Discharge of the accused at the end of the prosecution's case - a legal or a factual question?

In the year before the judgment in *Magmoed* was handed down by the Appellate Division, the Venda Supreme Court held in *Attorney-General v Molepo*³²⁶ that a discharge of the accused at the end of the prosecution's case in terms of section 174 of the current Criminal Procedure Act is appealable by the prosecution in terms of section 310 of the same Act.³²⁷ The question of law which was posed in this case by the prosecution was whether at the close of the case of the prosecution, "there was legal evidence upon which the trial court could have acquitted the accused".³²⁸ In holding that this constituted a question of law which may be appealed by the

³²⁵At 101h. The court referred to two earlier decisions of the Appeal Court (*R v Herbst supra* and *R v Gasa* 1916 AD 241) which confirmed the traditional policy and practice in South Africa that, in the absence of any special statutory provision to the contrary, an acquittal by a competent court in a criminal case should be treated as final and conclusive.

³²⁶1992 SACR 534 (V).

³²⁷Section 174 provides: "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty".

³²⁸At 535i.

prosecution, the court seems to have based its conclusion on the following considerations

- (a) The fact that *R v Thielke*³²⁹ and *R v Louw*³³⁰ are authority for the proposition that if there is some evidence on which a reasonable person may convict, the court has no discretion in the matter but is has a duty to refer the case to the jury. According to Le Roux J, the decision that there is *no* evidence on which a reasonable man could convict at that stage

is therefore one of law because the presiding officer has the duty to consider every bit of evidence presented by the State, to evaluate it and to test it against the essential elements of the crime which the State has to prove.³³¹

- (b) The fact that this process of evaluation, comparison and inference of evidence constitutes a "legal exercise".³³² To substantiate this statement, the court referred to the *dictum* in *R v Lakatula*³³³

If, however, at the close of the trial there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised under section 372, and the question should be reserved in that form.

³²⁹1918 AD 373, 379.

³³⁰1918 AD 344, 352.

³³¹At 538d.

³³²At 538b.

³³³*Supra*.

With regard to the abovementioned *dicta*, Le Roux J made the following comment³³⁴

Why otherwise would this process be categorised as a question of law which can be reserved under s 319 (the former s 372) at the end of the trial? *I can see no difference in principle between the mechanics of the two exercises although the rules governing the evaluation of the evidence differ radically and credibility plays a much more important role at the later stage.*

The court's view that no difference in principle exists between the mechanics of the two exercises can, in my view, not be questioned. It is submitted that no material difference exists between the question determined *ex post facto* whether any evidence existed on which a reasonable court could convict, and the question posed at the close of the prosecution's case as to whether any evidence existed at that stage on which a reasonable court may convict.

However, the purpose of this study is to point out that, in view of the decision in *Magmoed*,³³⁵ these similar exercises relate to a factual issue. A rule of law or the scope of such a rule is not at issue, but rather the factual foundation for the application of the rule. Inherently, the decision of a court to discharge amounts to an (albeit preliminary) factual determination of the guilt or innocence of the accused. The fact that such a determination takes place at an early stage in the trial does not in any material sense alter the nature of the determination. Moreover, it fully accords with the principle or legal tenet that in a criminal case all elements of the offence must be proved factually beyond a reasonable doubt by the prosecution. If the prosecution fails to do this, the defence does not have to present its

³³⁴At 538c (my emphasis).

³³⁵*Supra*.

own evidence in order to win an acquittal.

6.6.2.5 Prosecution appeals against sentence

It remains to consider whether current South African law provides for an appeal by the prosecution against sentence imposed on the person who has been convicted, and, finally, whether the prosecution may initiate a review by the Supreme Court of an acquittal accorded an accused in lower court proceedings.

In 1990, the legislature introduced the possibility of an appeal by the prosecution against sentence imposed on the person who has been convicted. This step was taken probably as a result of strong reaction in the press against lenient sentences imposed by white magistrates on white accused person convicted of assault on and culpable homicide of black victims during the era of apartheid. Section 310A provides that the Attorney-General may appeal against a sentence imposed on an accused in a criminal case in a lower court to a division of the Supreme Court, provided that an application for leave to appeal has been granted by a judge in chambers.³³⁶ No provision is made in the Act for a further appeal by the prosecution to the Appellate Division. Section 316B of the Act provides for a prosecution appeal on the same conditions against sentence imposed on a convicted person in a superior court to the Appellate Division. In *S v Maseti*³³⁷ the court held that section 310A does not restrict the right of the prosecutor to appeal where the sentence imposed is unfair to the state, but that the provision may also be utilised to appeal against a sentence which is unfair to the accused. However, the court stated

³³⁶This provision was inserted in the current Criminal Procedure Act by section 9 of Act 107 of 1990.

³³⁷1992 (2) SACR 459 (C).

that it would be more appropriate in such circumstances if the prosecutor brought the sentence to the attention of the Supreme Court by way of review.

To alleviate the invidious position of the person who had been convicted, it was furthermore provided in the Act³³⁸ that on application for leave to appeal or an appeal in terms of the Act, the judge or the court (as the case may be) *may* order that the state pay the accused the whole or any part of the costs which the accused may have incurred in opposing the application or appeal.

In *Attorney-General, Venda v Maraga*³³⁹ the court considered whether the fact that the Attorney-General has to apply for leave to appeal against the sentence imposed on an accused in a lower court is indicative of an intention on the part of the legislature that a stricter or more limited approach should be adopted by the court of appeal in the event of an appeal against sentence by the Attorney-General. The court expressed the view that the fact that the legislature had curtailed the right of the Attorney-General to appeal against sentence imposed upon an accused, was indicative of an intention on the part of the legislature that the accused should not be taken automatically through an appeal against sentence by the state.³⁴⁰ Therefore, the court concluded that the Attorney-General's right to appeal against sentence should be exercised sparingly and confined to those instances where, in the opinion of the Attorney-General, the sentence imposed by the trial court is "so disturbingly inappropriate or glaringly inadequate that

³³⁸Section 310A(6) and section 316(B)(3).

³³⁹1992 (2) SACR 594 (V).

³⁴⁰At 609a.

the trial court could not have exercised its discretion reasonably".³⁴¹ However, the court stated that the principles applicable in determining whether a sentence imposed by a trial court should be interfered with on appeal remain the same as those applied in an appeal against the sentence by the accused person. These principles are³⁴²

- (a) that the trial court possesses a wide discretion in respect of punishment
- (b) that the trial court must exercise this discretion regularly, reasonably, judicially, properly and with balanced consideration of all relevant facts, factors and circumstances
- (c) that when considering a sentence on appeal, the court of appeal has a strictly limited function which amounts to control over, and not to self-exercising, of the penal discretion
- (d) that the exercise of the trial court's discretion in imposing sentence is only vitiated because it was exercised unreasonably, unjudicially, improperly, irregularly or without a balanced consideration of the relevant factors, facts and circumstances which the court of appeal has the competence and the power to interfere with and
- (e) that the court of appeal is strictly limited to the record of the proceedings before the trial court and is, generally speaking, not entitled to take into account facts or factors beyond the record or outside of the scope of the record of the proceedings before the trial court.

The importance of this judgment is that the court was at pains to point out that the prosecution appeal against sentence should be regarded as a drastic measure in our law and that the courts should prevent "as far as is absolutely possible, an accused person from going unnecessarily through the ordeal of an appeal against his sentence by

³⁴¹At 609b.

³⁴²At 606-607.

the State."³⁴³ In the court's view, the fact that provision has been made which empowers the court to order that the state pays the whole or part of the costs incurred by the accused in opposing the application (if the state is unsuccessful), does not remove the duty on the Attorney-General and the court to consider the situation with great circumspection.³⁴⁴

6.6.2.6 Judicial review of an acquittal

Finally, the double jeopardy implications of a Supreme Court review³⁴⁵ of an acquittal accorded an accused in a lower court need to be addressed.

Current legislation in South-Africa dealing with review powers of the Supreme Court,³⁴⁶ provides for two methods of review. These are

³⁴³At 609d.

³⁴⁴*Id.*

³⁴⁵The review procedure differs from the appeal procedure in that a matter is brought before the Supreme Court by means of review proceedings if a party, dissatisfied with the outcome of a criminal trial, complains of the method followed at the trial, namely that an irregularity took place at the trial which influenced the outcome of the trial. Appeals on the other hand, deal with the factual merits of a case or questions of law. See Du Toit *et al* Service 14 1994 30-1. In the early stages of the development of these remedies, no clear distinction was made between a review and appeal on a question of law, which may explain why one of the grounds of review which is retained today in terms of section 25 of the Supreme Court Act 59 of 1959, namely the admission of inadmissible or incompetent evidence or the refusal of evidence, in actual fact does not inherently amount to a ground of review, but rather to a question of law or fact depending on the specific issue raised. See the discussion of *Magmoed v Janse van Rensburg supra*, text at note 308.

³⁴⁶The Appellate Division of the Supreme Court, apart from the special entry procedure which is a remedy which may be utilised by the accused, has neither statutory nor inherent review powers. See

the following

- (a) Review procedures in terms of section 304 and 304A of the Criminal Procedure Act³⁴⁷ before a magistrate's court or regional court. These procedures are available only after a person had at least been convicted of an offence and need therefore not be considered in detail for the purpose of this study.

- (b) Review procedures in terms of section 24 of the Supreme Court Act³⁴⁸ which is available in respect of both civil and criminal proceedings of any lower court on the specific grounds set out in this provision. These grounds are: absence of jurisdiction of the court; interest in the cause, bias, malice or corruption on the part of the presiding judicial officer; gross irregularity in the proceedings and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. When entertaining an application for review in terms of section 24 of the Supreme Court Act, the court may resort to its inherent review jurisdiction if the initial form of review before it is not appropriate to the circumstances of the case.³⁴⁹

Although, in terms of the wording of this provision (section 24 of the Supreme Court Act), the Supreme Court ostensibly may also

Snyman and Morkel 518.

³⁴⁷51 of 1977.

³⁴⁸59 of 1959.

See Taitz J *The Inherent Review Jurisdiction of the Supreme Court* LLD Dissertation 1983 Vol 1 342 (hereinafter referred to as Taitz LLD dissertation) citing *S v Taylor* 1979 (4) SA 185 (T) and *S v Mametja* 1979 (1) SA 767 (T).

review an *acquittal* on any of the grounds set out in the provision, not a single reported case could be traced in our law dealing with a situation where a court of law exercised its statutory review powers to the detriment of a person where he had been wrongly acquitted.³⁵⁰ This phenomenon can be ascribed to the fact that traditionally the review by the Supreme Court of proceedings which took place in lower court has, in practice, been utilised as a mechanism of control to protect the interests of the accused not to be wrongly convicted.³⁵¹

Apart from the above-mentioned statutory powers to review proceedings in lower courts, the Supreme Court in South Africa is also vested with an inherent review jurisdiction to correct errors occurring in proceedings which took place in lower courts.³⁵² In the case of

³⁵⁰In an unreported case, *S v Johannes Masekoameng* H454/78 of 23 October 1978, the court of review in fact was of the opinion that where a magistrate's action in the court *a quo* constituted an irregularity (*in casu* the stopping of proceedings during the presentation of the prosecution's case and a consequent discharge of the accused), the proceedings could not be set aside on review because the court of second instance was "not convinced that section 24(c) of the Supreme Court Act 59 of 1959 is available to the State as an aggrieved party". The court observed that the remedies available to the prosecution are narrowly circumscribed and should not be extended to cases of possible prejudice to the state in the same way as irregularities may affect an accused found guilty after an unfair trial" (cited by Taitz *LLD dissertation* Vol 1 343).

³⁵¹In *Prince Albert Board of Management v Jooste and Others* 1886 4 SC 400, De Villiers CJ, although conceding in *obiter dicta* that instances may exist whereupon a court of review may in fact interfere at the suit of a prosecutor with the judgment of a magistrate, stated that, in practice, review powers on the grounds set out in Ordinance 40 and 73 (currently section 24 of Act 59 of 1959), had never been exercised on application of the prosecution. It would seem as if this tradition had been maintained in our law up to present times.

³⁵²*Wahlhaus v Additional Magistrate Johannesburg* 1959 (3) SA 113 (A). Cf also Taitz J *The Inherent Jurisdiction of the Supreme Court* 1985 79.

S v Lubisi,³⁵³ the Supreme Court of the Transvaal Provincial Division relied on its inherent power "to correct the proceedings of an inferior court (*sic*) at any stage if it appears to be in the interest of justice"³⁵⁴ to set aside an acquittal in a criminal case before a magistrate's court. The somewhat complicated facts of this case were briefly as follows.

The accused stood trial in a magistrate's court on a charge of stock theft. At the conclusion of the state's case, he indicated that he wished to call a witness. The case was subsequently remanded but the accused failed to appear on the remand date and was arrested a few months later. He appeared before the same magistrate, but the case was further postponed. For some unexplained reason, the record of the evidence given at the first appearance or trial was mislaid and separated from the charge sheet. A new charge sheet was accordingly prepared and placed before a new magistrate. This charge sheet indicated that the accused had already pleaded not guilty. However, a different prosecutor, who was under the impression that no evidence had been led before, requested that the charge be withdrawn as he had no witnesses available. The presiding magistrate pointed out that the accused who had already pleaded, was entitled to a verdict and accordingly found him not guilty. When the true facts came to light, the magistrate requested the Supreme Court to set aside the proceedings and acquittal before him in order that the first proceedings may be finally concluded. Le Roux J, delivering judgment in review, regarded the proceedings before the second magistrate as a nullity which could have been met by a plea of *lis alibi pendens* and concluded that it would "not be in the interest of justice to allow the

³⁵³1980 (1) SA 187 (T).

³⁵⁴ 188H. A section 24 review was not applicable as no irregularity in terms of this section had taken place.

accused to escape the possible consequences of his conduct whether through guile or ignorance".³⁵⁵ The court accordingly set aside the acquittal.

In *S v Makriel*³⁵⁶ the Cape Provincial Division strongly disapproved of the practice adopted in *Lubisi's* case, of exercising inherent review powers without any notice whatsoever to the accused and regarded this procedure as fundamentally irregular and a breach of the rules of natural justice.³⁵⁷ However, no opinion was expressed on the question of whether and in what circumstances, the court would have the power in the exercise of its inherent review jurisdiction, to set aside an acquittal. In *S v Makopu*³⁵⁸ the Eastern Cape Division, assuming that it was vested with such a power, declined to exercise inherent review powers to set aside an acquittal in dealing with facts similar to those which were present in *Lubisi*. The accused in that case had pleaded not guilty to a charge of housebreaking with intent to commit an offence unknown. Another magistrate, not realising that the case had partially been heard, refused a postponement and acquitted the accused as the state witnesses were not available. Considering the acquittal as a gross irregularity, the magistrate submitted the matter for review to the Supreme Court. The Supreme Court disapproved of the approach adopted by the court in *Lubisi*. Jones J commented as follows³⁵⁹

While it is correct that the interests of justice include

³⁵⁵At 189A-B.

³⁵⁶1986 (3) 932 (C).

³⁵⁷At 933F.

³⁵⁸1989 (2) SA 572 (E).

³⁵⁹At 578b-c.

justice to the prosecution as well as the accused, there are a number of policy considerations which underlie our criminal law which may be raised to support an argument that even if the Court has the inherent power to make this sort of order, it should not do so. I refer, for example, to the policy considerations which require certainty and finality in criminal cases or which limit the State's right to appeal, or which preclude a second prosecution where fresh evidence is found.

The approach of the Court in *Makopu* was subsequently approved of by the same division in *S v Ntswayi*.³⁶⁰ In that case, the accused indicted on a charge of dealing in dagga was discharged at the end of the state's case because the state had failed to lead important evidence in respect of a link in the chain of events regarding the analysis of the substance in dispute.³⁶¹ This failure had arisen because of a lack of communication between two prosecutors who had handled the case at different times. The court in review, stating that this was not a case covered by section 24 of the Supreme Court Act,³⁶² or by any of the statutory mechanisms of review in terms of the Criminal Procedure Act,³⁶³ had to consider whether it could make use of its inherent powers to correct the error by setting aside the discharge and remitting the matter back to the magistrate to hear the evidence. The court refused to exercise its inherent review powers, stating that such powers could not be used to correct mistakes which any of the parties to the matter had made; the court was therefore not prepared to give the state a second opportunity to correct its mistakes and held the view that the approach adopted in

³⁶⁰1991 (2) SACR 397 (C) 402e.

³⁶¹No evidence was led that the sample, which was analysed to contain dagga, was connected with the accused.

³⁶²59 of 1959.

³⁶³51 of 1977.

Lubisi was, in view of the *dicta* in that case, confined to the specific facts in that case and could not be regarded to be of general application in all cases. Tebbutt, J expressed his views in the following terms³⁶⁴

Ek is ook van mening dat die inherente jurisdiksie wat die Hooggeregshof mag hê nie daarvoor gebruik kan word om foute wat enige party tot 'n geding mag begaan, reg te stel nie. Dit is in wese wat hierdie hof nou gevra word: Om die Staat die kans te gee om 'n fout wat hy gemaak het reg te stel ... Ek stem saam dat die hof inherente jurisdiksie het om, waar dit in die belang van geregtigheid is, die verrigtinge van 'n laerhof te korrigeer. Dit sluit egter myns insiens nie gevalle in waar die Staat in die voorlegging van sy saak fouteer of versuim het om 'n belangrike of essensiële deel van daardie saak te bewys nie, *al het die verdediging miskien tot daardie fout of versuim bygedra*.³⁶⁵

It is submitted that the approach adopted by the Cape Provincial Division in the above decisions reflects the true state of our law regarding the reviewability of acquittals in criminal cases. Any assumption based on *Lubisi* that as a general rule, the Supreme Court may resort to its inherent review powers to intervene, *inter alia*, " in regard to criminal cases where the accused had been acquitted, despite no recognised irregularity having taken place in the proceedings *a quo*"³⁶⁶ has therefore been shown to be ill-founded.

³⁶⁴At 401g and 402b.

³⁶⁵My emphasis.

³⁶⁶This assumption is made by Taitz J *The Inherent Jurisdiction of the Supreme Court* 1985 79, hereinafter referred to as *Taitz Inherent Jurisdiction*.

6.6.2.7 Summary

* In South Africa, the traditional policy and practice has always been that an acquittal in a criminal case by a competent court should be treated as final and conclusive. It was only in the 1940's that the legislature for the first time made provision for a limited right of appeal by the prosecution against an acquittal, namely on a point of law only. Apart from the introduction in the 1990's of a prosecution appeal against sentence, the legislature has not extended the right of the prosecution to appeal against an acquittal by also including the right to an appeal purely on the facts. In terms of present legislation, the prosecution's right to appeal against acquittals handed down in lower as well as superior courts is still limited to questions of law only.

* Unlike the position in English law, our courts have given a narrow meaning to the concept "question of law". The Appellate Division recently held in *Magmoed* that the reasonableness of an acquittal on the strength of the evidence cannot be a proper ground for an appeal by the prosecution. The court argued that the reasonableness of a verdict of not guilty (or even of a verdict of guilty), *inherently* amounts to a question of fact; it deals with the question of whether a *factual foundation* exists for the application of a legal rule. Of importance also is that the Appellate Division (in *Magmoed*) expressed considerable concern for the interest of the accused not to be placed in jeopardy of a conviction more than once. The court warned that a broad interpretation of the concept "question of law" may *open the door to appeals by the prosecution against acquittals contrary to the traditional policy and practice of South African law.*

* The court's reasoning in *Magmoed* leads this writer to believe that the question posed at the end of the prosecution's case, namely whether any evidence exists on which a reasonable court may convict,

essentially amounts to a question of fact instead of a question of law (as recently argued in *Molepo*).

* There are a number of differences between the legislative provisions which regulate prosecution appeals against acquittals handed down in lower courts and prosecution appeals against acquittals handed down in superior courts. These differences can be explained on the basis that the respective provisions (previously contained in different pieces of legislation) were interpreted differently by our courts. In sum, the differences which have an impact on protection against double jeopardy are the following

- The prosecution may appeal from a decision of a lower court *given in favour of the accused on any question of law*. Our courts interpret these words as meaning that the prosecution may appeal against an acquittal and also against a conviction of a lesser offence on the basis that the accused should have been convicted of the greater offence. In other words, the prosecution may also appeal against an implied acquittal. If the appeal succeeds, the court may make the order which the lower court should have made or remit the matter to the lower court with instruction as to which steps should be taken. If neither of these options is chosen, the case is returned to the lower court which heard the matter in the first place. The lower court then has to deal with the matter in view of the question of law as decided by the court of appeal. The "rehearing" by the trial court is limited to the record, except if the court of appeal granted special authority to hear new evidence. However, in deciding a question of law *in favour* of the prosecution, the court may *not* order a new trial.

- The prosecution appeal against an acquittal handed down in a superior court on the other hand, is limited to an appeal against an *absolute* acquittal. This means that the state may not appeal against conviction of a lesser offence (in other words, an implied acquittal of a greater offence). The reason for this limitation is that the present Criminal Procedure Act specifically provides that, in deciding a point of law in favour of the state, the Appellate Division *may* order a new trial. South African courts therefore argue that if the legislature empowered the Appellate Division to order a new trial, it is most unlikely that the legislature intended that the prosecution may also appeal against conviction of a lesser offence for which the person convicted has perhaps already started serving his sentence.

* In 1990, legislation was enacted which provides for an appeal by the prosecution against sentence imposed on the convicted accused in superior as well as lower courts. South African courts regard this legislation as a drastic measure. The premise is that since the imposition of sentence is a matter at the discretion of the trial judge, it should only be interfered with by a court of appeal on the grounds that it was exercised unreasonably, unjudiciously, improperly, irregularly or without a balanced consideration of all the relevant factors, facts and circumstances. An indication of the awareness (even by the legislature) of the double jeopardy implications of a prosecution appeal against sentence, is the fact that it is also provided for in the legislation that on application for leave to appeal or on an appeal in terms of the Act, the judge or the court (as the case may be) *may* order that the state pay the accused concerned the whole or part of the costs which the accused may have incurred in opposing the application or appeal.

* The Criminal Procedure Act does not provide for a superior court to review proceedings of lower courts which have resulted in an acquittal of the accused. Section 24 of the Supreme Court Act provides for review by the Supreme Court of proceedings conducted in lower courts on certain specified grounds. These are: absence of jurisdiction of the court; interest in the cause, bias, malice or corruption on the part of the presiding judicial officer; gross irregularity in the proceedings and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. However, South African courts have not as yet exercised their powers of review in terms of this section to set aside an *acquittal*.

* In *Lubisi*, the Transvaal Provincial Division of the Supreme Court held that it has inherent powers of review in terms of which the court is also empowered to set aside an acquittal. The court set aside an acquittal in that case on the basis that the proceedings in the lower court (which resulted in an acquittal) amounted to a nullity.

* In two subsequent decisions, the Cape Provincial Division of the Supreme Court refused to exercise inherent powers of review to set aside an acquittal. In both these cases the court argued that on the specific facts before it, it would amount to a violation of double jeopardy principles to set aside an acquittal. Of importance is that the court emphasised that a number of policy considerations require that certainty and finality be achieved in criminal cases. The court expressed the view that the interests of justice are not served if the state is given an opportunity (in a second trial) to correct mistakes which it made at the first trial. It is suggested that the line of argument adopted in these two decisions has its origins in the traditional policy of South African courts, namely that an acquittal in a criminal case should be treated as final and conclusive.

PART FOUR

REPROSECUTION FOLLOWING AN APPEAL BY THE ACCUSED AND RELATED ISSUES

CHAPTER SEVEN

HISTORICAL OVERVIEW

7.1 ROMAN LAW

In chapter five it was indicated that the Romans introduced and developed the institution of appeal in the course of the second century AD, during the period of the Principate.¹ A consideration of Roman texts in that chapter led to the conclusion that in the field of criminal law, the institution of appeal mainly served the interests of the person who had been convicted.² However, it is not altogether clear on what basis the accused was allowed to appeal against his conviction.

Most of the texts compiled in the *Digest* of Justinian refer only to appeals against sentence imposed on the person who had been convicted.³

¹See *supra* under 5.1 for a discussion of the development of the institution of appeal in Roman law.

²See *supra* under 5.1. However, as pointed out in that discussion it is also suggested in certain texts that an accuser could appeal to a higher tribunal against an acquittal.

³See *D*49.1.6; 49.1.3; 49.1.18; 49.4.1; 49.4.2.3 & 49.7.1. Strachan-Davidson states (at 177-178) that "the main interest of the subject [of appeal] concentrates itself on cases of life and death". He explains that the question from the prisoner's point of view was whether he could be put to death without the Emperor's consent.

There are nonetheless indications that the accused could also appeal against his conviction on a basis other than sentence only. In the *Codex* of Justinian it is recorded that the Emperors Constantius and Constans stipulated that⁴

justice requires that where witnesses have been called, instruments produced, and other evidence offered, and a judgment has been rendered against the culprit and the latter does not confess his guilt, or, terrified by fear of torture, states anything against himself, he shall not be denied the right of appeal.

The Roman-Dutch writer Voet explains these orders in terms which suggest that the accused was also allowed to appeal on the factual merits of a case in Roman law. He states⁵

In the absence of an admission from the accused himself, and if you assume a persistent denial on his part, there still remains a question of fact, namely whether he who denies that he is guilty is guilty. Even the wisest of men can generally be deceived in the interpretation of facts, and can pronounce one guilty who is really innocent. It was therefore just for the remedy of appeal to lie open against such a burden imposed by the judge.

Moreover, an order issued by the Emperors Theodosius, Arcadius and Honorius suggests that a person was allowed to appeal from "any injurious decision" rendered against him by a judge "whom he regards as suspicious";⁶ words which may be construed as providing a

⁴See *Codex* 7.65.2. (Scott's translation.)

⁵See Voet 49.1.9. (Gane's translation). The author relies upon *DXXII.6.2*.

⁶See *Codex* 7.62.30. (Scott's translation).

ground of appeal⁷ based on malice or prejudice of the presiding officer.

The question of whether a higher tribunal was empowered to order a retrial of the accused before the same or a different tribunal is not addressed in commentaries on Roman law. This may be explained on the basis that the institution of appeal in Roman law probably amounted to a trial *de novo* which rendered the ordering of a retrial by an appellate tribunal unnecessary.⁸

7.2 ROMAN-DUTCH LAW

The principle that emerges from Roman-Dutch authorities on criminal procedure is that the accused could only appeal against sentence imposed in the ordinary process.⁹ However, Van der Linden adds that the accused could also appeal against sentence handed down in the extraordinary process in the following circumstances¹⁰

- (a) when he was convicted on no confession or at least not a sufficient confession

⁷A matter could also be taken on review in Roman law. However, unlike the appeal which was instituted to a superior court, the same judge that gave the judgment or his successor in office again acted as judge on review. An investigator of the sacred palace was however "attached" to the prefect of the praetorium who gave the judgment so that they might rehear the case together. Their decision was final. See Voet 49.2.4.

⁸See *Codex* 7.62.6 (sections 1 and 2) and *Codex* 7.63.4.

⁹See Van der Linden 3.2.5.4 (Henry's translation) and Decker *Van Leeuwen's Commentaries* 5.25.14, 5.27.13 & 5.27.19. See also chapter five *supra* note 28 for an explanation of the difference between the ordinary and extraordinary process of criminal procedure applied in Roman-Dutch law.

¹⁰*Id.*

- (b) when there was a manifest nullity in the proceedings or
- (c) when the punishment was too severe and out of proportion to the crime.

It is not clear from the commentaries of Voet whether an accused (as opposed to an accuser) was allowed to appeal on any other basis than sentence.¹¹ His writings may perhaps also be interpreted in the sense that the accused was allowed to appeal on the basis of non-culpability for the crime charged and convicted. The author makes the general statement that "an accused just as much as an accuser is allowed to appeal from a conviction [handed down in the ordinary process]".¹² He then explains that the public prosecutor may nevertheless appeal against sentence handed down in the extraordinary process "if he considers that the punishment ordained by the decision is not quite appropriate to the wrongdoing".¹³ According to Voet, an appeal by the prosecutor against sentence handed down in the extraordinary process would have the following effect¹⁴

[T]he extraordinary criminal suit is converted thereupon into an ordinary suit, and ... everything must thereafter be debated with due regard to the established order of judicial proceedings. There is also the effect that liberty of appealing is then open in turn to the very man

¹¹As indicated in chapter five *supra* under 5.2 the accuser could apparently only appeal against sentence.

¹²Voet 49.1.10. (Gane's translation).

¹³*Id.*

¹⁴*Id.* However, Voet notes that an appeal from a punishment made more severe by the Court of Holland has sometimes been dismissed by the Supreme Court when it was clear to the court that the accused had confessed.

convicted also, *whether he thinks himself aggrieved by that same decision from which the prosecutor has appealed*, or he has afterwards been sentenced by a judge of appeal to a harsher penalty, and wishes to appeal from such a sharpening of his punishment.

The issue of whether the accused could be tried again on appellate reversal of a conviction is also not addressed by Roman-Dutch authorities. Similar to the position in Roman law, the hearing on appeal probably also amounted to a trial *de novo*.¹⁵

A number of Roman-Dutch writers suggest that the *exceptio rei judicatae* could not succeed unless based on a final judgment on the merits.¹⁶ Writings to this effect have already been discussed in previous chapters and need not be repeated here.¹⁷ Suffice it to say that the South African Appeal Court relied *inter alia* on these authorities in order to sanction reprosecution after an appellate reversal of a conviction on a basis other than the factual merits of the case.¹⁸

¹⁵See Voet 49.7.2. The author states that "in appeals what has not been proved can be proved, and conclusions not drawn can be drawn". (Gane's translation.)

¹⁶See a discussion of the writings of Van der Keessel (chapter two *supra* under 2.2) which suggest that the accused could be tried again if discharged on the basis that there had been some contravention of a matter which relates to the procedure, and Carpzovius (chapter three *supra* under 3.6.2, text at note 281) which suggest that the accused could only rely on the plea if previously declared not guilty and not merely if he had been discharged as a result of a technical defect in the proceedings.

¹⁷See *id.*

¹⁸See *S v Moodie* (1962) SA 587 (A). See chapter eight *infra* under 8.6.2. text at note 363 for a detailed discussion of that case.

7.3 ENGLISH LAW

It was pointed out in chapter five that certain commentators on the law which prevailed during the eighteenth and nineteenth centuries implied that the crown could, in limited circumstances, bring a writ of error to a Court of Error in order to effect a reversal of a judgment of acquittal.¹⁹ Apparently an accused whose acquittal had been reversed by a Court of Error, could be tried again in a new trial during this period.²⁰ Be that as it may, no provision was made in legislation enacted at the beginning of the twentieth century for a prosecution appeal against an acquittal handed down in a trial on indictment.²¹ Therefore, the question of whether a higher tribunal could order a trial *de novo* after reversal of an acquittal handed down in a trial on indictment became insignificant.

The permissibility of a new trial after reversal by a higher tribunal of

¹⁹See chapter five *supra* under 5.3 for the circumstances in which the Court of Error could in the opinions of these writers, reverse an acquittal.

²⁰Although the writings of Blackstone 1829 ed 361 indicate that such a procedure did not exist in practice ("But there hath yet been no instance of granting a new trial where the person was acquitted on the first") Chitty 756 states that "[i]f indeed, the reversal proceeded expressly on the ground that there was a technical error in the original indictment, or subsequent process, the defendant remains liable to a second prosecution his life has never been in jeopardy ... even in his conviction or acquittal". Hawkins 528 states that "I take it to be settled at this day that whenever the indictment, or appeal, whereon a man is acquitted, is so far erroneous either for want of substance in setting out the crime, or of authority in the judge before whom it was taken ... the acquittal can be no bar to a subsequent indictment or appeal ...". Hale 247 seems to hold the view that unless the judgment was reversed by writ or error, the prisoner could not be indicted *de novo* and could plead *autrefois acquit*.

²¹The Criminal Appeal Act of 1907 only provided for an appeal against a conviction.

a *conviction* on the other hand, became one of the most vexatious issues in English criminal procedure. In order to throw some light on the development of English as well as South African law in this regard, it is necessary to give a detailed account of the history of this particular aspect of English criminal procedure.

Unlike the rather uncertain position regarding the appealability of acquittals handed down in trials on indictment in eighteenth and nineteenth century English criminal procedure, legal commentators state categorically that an initial conviction handed down in a trial on indictment could be challenged by the defendant, albeit on legal grounds only.²² Not only were there several recognised methods

²²However, a defendant convicted in summary proceedings could, from as early as 1670 (in terms of the individual Act creating the offence) appeal on the merits to the Court of Quarter Sessions. In 1879 provision was made in terms of the Summary Jurisdiction Act of that year for a general right of appeal against conviction entered in courts of summary jurisdiction. Of importance is that the proceedings on appeal amounted to a rehearing of the whole case (a trial *de novo*). Neither the respondent nor the appellant was confined to the evidence given in the magistrate's court. See *R v Hale* 1891 1 QB 747 and Friedland 263-264. Baker 271 explains how it came about that a full appeal on the merits was accorded the accused in summary proceedings. The foundation of review of summary convictions was the ability to remove records from inferior courts to the King's Bench by means of the remedy known as *certiorari*. These convictions were quashed if patent defects were found. However, the King's Bench could not re-examine the merits of the conviction and the procedure did not necessitate the presence of the accused. Some thought that the work of the King's Bench undermined the authority of the justices. Therefore provision was made for an appeal to quarter sessions by way of a rehearing of the whole matter. According to Baker, this gave the accused a better chance of making his point and saved the justices' faces by keeping the matter within the county. See also chapter five note 34 for a discussion of section 33 of the Summary Jurisdiction Act 1879 which provided for a right of appeal on a point of law to a superior court by means of the case stated procedure. A superior court could, in terms of the Summary Jurisdiction Act of 1857 reverse, affirm or amend the judgment, remit the matter to the justices with the court's opinion thereon or make such an order as the

whereby a conviction could be reversed, but a second proceeding in the sense of a trial *de novo*, was also a recognised practice.²³

The most important method of challenging a conviction was by means of the writ of error procedure to a Court of Error. The discussion that follows will show that the Court of Error was only prepared to order new trials in certain defined circumstances. Despite more comprehensive legislation introduced in 1907, this practice continued during the better part of the twentieth century.

As indicated in chapter five, the writ of error as a remedy for reversing convictions was not very useful because it was available only for errors which appeared on the face of the record.²⁴ Mistakes such as the improper reception or rejection of evidence or misdirections on the law by the judge to the jury did not appear on the record. Whereas the Court of Error had no discretion in the matter,

court might seem fit. Although the court sent back cases to the justices to rehear matters, retrials were apparently not ordered by a superior court (see Friedland 263-267 who expresses the view that the possibility of second trials was apparently not of great significance because the court would normally confirm the conviction, in spite of error, if the conviction appeared to be correct).

²³Blackstone 1829 ed 392 explicitly states that "when judgment pronounced upon conviction is falsified or reversed, all former proceedings are absolutely set aside and the party stands as if he had never been at all accused ... But he still remains liable to another prosecution for the same offence; for, the first being erroneous, he never was in jeopardy thereby". Archbold 1900 ed 159 states that "[a] plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment is not a good bar to another indictment for the same offence". See also Chitty 756 and sources to the same effect cited by Friedland 240-241 and Goodhart AL "Acquitting the guilty" *Law Quarterly Review* Vol 70 1954 515, 522 (hereinafter referred to as Goodhart *Acquitting the guilty*).

²⁴See *supra* under 5.3.

the anomalous situation existed that the court could reverse a conviction as the result of a minor procedural error which occurred at the trial, and order a retrial of the defendant, but could not reverse a conviction as a result of a serious error if it did not appear on the record of the proceedings.²⁵

As will become clear from the discussion that follows, the Court of Criminal Appeal (established at the beginning of the twentieth century) continued to follow this practice. Furthermore, it held that a retrial could be ordered only if the first trial amounted to a mistrial or a nullity.²⁶ Friedland criticised this position. He remarked that²⁷

there was no intrinsic limitation in the use of the *venire de novo*,²⁸ only limitations imposed by the type of error which could appear on the record. It was not a rule of law that the *venire de novo* was limited to cases where the trial was a nullity. Whenever a writ of error was brought successfully, the Court of Error, according to the later cases, could award a *venire de novo*. Hence if the bill of exceptions had been incorporated into the criminal procedure, there seems little doubt that a new trial (or, as it was called when ordered by a Court of Error, a *venire de novo*) would have been ordered.

²⁵See Friedland 238-239. At 244-245 the author points out that the reason why a retrial could not be had on the basis of misreception of evidence or misdirection by the trial judge was simply because the Bill of Exceptions never took root in the criminal law. In civil law, if a party took exception to a ruling, the party would write down the alleged error or exception on a bill which, according to a statute of 1285, had to be included in the record of the proceedings. This procedure was never adopted in criminal law.

²⁶The criterion was first introduced by the Court of Criminal Appeal in *Crane v Director of Public Prosecutions* 1921 [AC] 299.

²⁷At 247.

²⁸Abbreviation of the writ of *venire facias de novo juratores*, namely an order to summon and swear a fresh jury to retry the case.

Nevertheless, at the time when the previous informal body known as the Court of Crown Cases Reserved²⁹ was placed on a statutory basis,³⁰ a person who had been convicted was no longer forced to approach a Court of Error but could reserve a point of law to that court which was empowered *inter alia*, to reverse his conviction. The relevant section in the Act provided that when a question was so reserved³¹

the said Justices and Barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Justices and Barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time give, as they shall be advised, or to make such other order as justice require....

As is evident from the wording of the section, the court was not explicitly granted the power to order a retrial of the accused.³² Although the words "or to make such other order as justice may require" could easily have been interpreted by the court as

²⁹See *supra* chapter five under 5.3 for a discussion of the development of this informal body into a court of law in English law.

³⁰In terms of the Crown Cases Act 1848.

³¹Section 2 of the Crown Cases Act 1848.

³²However, if the court arrested the judgment in terms of this section, it was held that the accused could be reindicted. See Friedland 251 citing the cases of *Reid* (1851) 2 Den 88 169 ER 429 and *Moss* (1856) Dears & Bell 104, 169 ER 936.

manifesting a legislative intention to confer a power to order a retrial in the event of reversal of a conviction as a result of an error of law or irregularity at the first trial, the court did not give such a wide interpretation to these words. Opting for a "compromise solution"³³ the court held that, in terms of the section, a *venire de novo* could be ordered only if a Court of Error could in the same circumstances order a *venire de novo*. The result of this approach was that the court laid down the rule that a *venire de novo* could only be ordered if the trial could be described as a so-called "mistrial".³⁴ However, the concept of a mistrial was not clearly explained by the court.

In 1907, the writ of error procedure was abolished and all functions of the Court for Crown Cases Reserved vested in the Court of Criminal Appeal.³⁵ As pointed out in chapter five the Act provided for an appeal by the accused on matters of law as well as on the factual merits of a case.³⁶ In order to understand why the Court of Appeal still continued to apply the mistrial criterion in order to determine whether it could order a retrial, it is necessary to set out in detail certain provisions of the 1907 Act.

In terms of section 4(1) of the Act the Court of Criminal Appeal was empowered to

allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be

³³Friedland 253.

³⁴See *R v Mellor* (1858) Dears & B 468 and *R v Yeadon* (1861) L & CCC 81 discussed in detail at a later stage by Lord Atkinson in *Crane v Director of Public Prosecutions supra* 325-329.

³⁵In terms of section 20(4) of the Criminal Appeal Act 1907.

³⁶See *supra* under 5.3.

supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal, *provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.*³⁷

Section 4(2) provided that

subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered.

Section 20(4) vested in the court

all jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials ...

No specific provision was made in the Act for the ordering by the court of a retrial of the accused. In fact, the Act seemed to exclude such a power; on reversal of conviction, a judgment of acquittal had to be entered.³⁸ Friedland³⁹ expresses the view that the absence of such a provision could be ascribed to a legislative intent, manifested

³⁷My emphasis. This qualification will hereinafter be referred to as "the proviso".

³⁸See section 4(2) discussed above.

³⁹At 233-236.

in all the abovementioned provisions, to confer wide powers on the Court of Criminal Appeal to reconsider the merits of a case and make its own determination of the guilt or innocence of the accused.⁴⁰

However, from its inception the court was reluctant to retry the case or to substitute itself for the jury. At first it refused to reconsider cases where the defendant argued, in the absence of any failure of due process, that his conviction was wrong because of his innocence.⁴¹ Concerning itself exclusively with appeals based on the failure of due process of law, the court usually quashed the conviction without consideration of the guilt or innocence of the accused. Also, the application of the proviso which empowered the court to "dismiss the appeal if they consider that no miscarriage of justice has actually occurred" hardly ever led to a conviction; the court interpreted it to mean that a conviction could only be upheld "where a reasonable jury, after being properly directed, would on the evidence properly admitted, without doubt convict".⁴²

⁴⁰Spencer JR "Criminal Law and Criminal Appeals - The tail that wags the Dog" *Criminal Law Review* 1982 260, 263-264, expresses the opinion that, subject to the provision that the court could uphold the conviction if it thought that the appellant was guilty notwithstanding, the court had to quash a conviction if a miscarriage of justice occurred in the sense that the accused was not guilty, or if the appellant failed to get due process of law. The author argues that the court was supposed to investigate the merits of the case even if a failure of due process was the basis of the defendant's appeal. In his view, if the new court was not meant to examine the merits, but merely to quash the conviction when the defendant was deprived of due process, (as were the powers of its predecessors), Parliament would explicitly have provided for a mechanism to order a retrial.

⁴¹See Spencer 264. The author points out that the court had to make an exception where the defendant could produce fresh evidence of his innocence, because the Act conferred a power on the court to hear fresh evidence (in terms of section 9).

⁴²See Spencer 265 citing from the case of *Stirland v DPP* [1944] AC 315, 321.

In order to solve the court's dilemma of entering an acquittal in *all* cases where a conviction has been reversed as a result of an error (and it was, perhaps, convinced of the guilt of the accused but reluctant to apply the proviso), the court effected a retrial by utilising the provision contained in section 20(4) of the Act.⁴³ As pointed out above⁴⁴ section 20(4) stipulated that all jurisdiction and authority under the Crown Cases Act 1848, in relation to questions of law arising in criminal trials, now vested in the Court of Criminal Appeal. In *Crane v Director of Public Prosecutions*,⁴⁵ the House of Lords held that since the Court for Crown Cases Reserved considered itself empowered to order a *venire de novo* when setting aside a conviction on the basis of the first trial being a mistrial, the Court of Criminal Appeal, in terms of section 20(4), could exercise the same power in cases in which the procedure of a case stated had been followed.⁴⁶

Although the court in *Crane* did not elaborate on the concept mistrial, the general approach seems to have been that it denoted a trial which could, as a result of the alleged failure of due process, be regarded as void *ab initio*⁴⁷ in the sense that the accused had as a result of the error never been in peril of a conviction at the first trial, or that "no trial at all occurred"⁴⁸ in the sense that the trial could be described as a nullity. Following the practice adopted by the Court of Error, the Court of Criminal Appeal was not prepared to regard

⁴³See *supra* text at note 38.

⁴⁴*Id.*

⁴⁵*Supra.*

⁴⁶See the judgments of Lord Atkinson 325-330, Lord Sumner 330-335 and Lord Parmoor 335-338.

⁴⁷See the judgment of Lord Parmoor 336.

⁴⁸Per Lord Atkinson at 330 of the judgment.

misdirection to the jury or misreception of evidence (errors which would *not* have been patent from the record of proceedings in the time of a Court of Error), as irregularities which tainted the trial to such an extent that it could be described as an irregularity which rendered the trial a nullity. Accordingly, the court refrained from ordering a rehearing by the trial court or a retrial in such cases.⁴⁹ Moreover, the court refrained from laying down specific guidelines to determine whether a trial amounted to a mistrial or a nullity.⁵⁰ Instead, it identified certain procedural irregularities as causing a mistrial on an ad hoc basis.⁵¹

The court's approach, which unfortunately seems to have involved a degree of arbitrariness, was subjected to severe criticism by legal commentators. The main objection was that the legislation as interpreted by the Court of Criminal Appeal was unjust and unsatisfactory inasmuch as the ordering of a retrial after acquittal was

⁴⁹See *Neal* [1949] 2 KB 590, 599 cited by Friedland 237 note 3.

⁵⁰Cooke RB "Venire de Novo" *Law Quarterly Review* Vol 71 1955 100, 128 states that "[t]he authorities in their present state seem to provide no touchstone for determining when a irregularity is so serious as to cause a mistrial".

⁵¹Cooke identifies seven categories of irregularities on the basis of which the court had been prepared to declare a mistrial. These are: where there was an error as to the true plea of the defendant or some doubt about the nature of his plea, whether guilty or not guilty; where there was misjoinder of defendants (*Crane v Director of Public Prosecutions supra*); where there was failure to take the verdict of the jury on a change of plea from not guilty to guilty (*Hancock* (1931) 23 Cr App R 16); where there was some irregularity in the committal proceedings (*Gee* [1936] 2 KB 442); where there was impersonation of a juror (*Wakefield* [1918] 1 KB 216); where there was denial of the right to challenge a juror (*Williams* (1925) 19 Cr App R 67) and where the judge was unqualified to act as such. In 1982 the Court of Appeal in *Rose* [1982] 1 WLR 614 (CA) identified an eighth category, namely, where the verdict of the jury was so ambiguous or ill-expressed that no judgment could properly be given on it.

made dependent on whether the court regarded the failure of due process as one which rendered the trial a "mistrial", and not on whether it would be in the interest of justice to order a retrial. Goodhart⁵² points out that the effect of the application of the mistrial-criterion was that many persons whose convictions had been reversed by the Court of Appeal would have been unjustly acquitted as a result of an error of law which occurred at the first trial. The learned author explains this unsatisfactory state of affairs as follows⁵³

If the error is too great, it may make the trial no trial at all and so enable a *venire de novo* to be awarded; if the error is too small, the conviction may be sustained by the application of the proviso..... only if it is just right will the prisoner get a verdict of acquittal in place of a new trial or a conviction.

Spencer on the other hand points out that although the concept mistrial ostensibly amounts to the occurrence of a procedural error so severe that it makes the proceedings a nullity from the start rather than something which is valid for the present but liable to be set aside if challenged, the practice seemed to have been exactly the opposite:⁵⁴ things were held to be the cause of a mistrial if what

⁵²Goodhart AL "R v Leckey" *Law Quarterly Review* 1944 Vol 60 33.

⁵³At 36. In a research done by Goodhart at a later stage (See Goodhart *Acquitting the guilty*), it was found that a considerable number of convictions were quashed because some evidence, regarded as essential by the prosecution, had been improperly introduced or that there had been misdirections to juries. This state of affairs obliged the author to conclude that "the administration of justice is not a game and it would occasionally be in the public interest that an accused person should have to undergo two trials before a verdict is properly reached, rather than that a guilty man, whose guilt or innocence has never been properly ascertained, should go free" (at 526).

⁵⁴*Supra* 167.

went wrong was "so preposterously technical, that it would be outrageous to let the accused free".⁵⁵ A retrial was accordingly ordered in such cases - a clear example, in my view, that the history of the criminal appeal in English law has often been based on procedure rather than merit.

Despite these valid objections to the continuation of an archaic and anomalous procedure and the general feeling that the court should be granted a general discretion in awarding new trials a Departmental Committee, appointed in 1952 to consider whether the Court of Criminal Appeal should be empowered to order a new trial of a convicted person who has appealed to the court, declined to make such a recommendation.⁵⁶ The opponents of a power conferring on the court a general discretion to order a retrial argued that the accused ought not to be prejudiced by judicial errors and that such a general power would make an inroad into the present rights of the accused not to be put in double jeopardy.⁵⁷ In an informative assessment of these arguments, Nokes pointed out that this humane consideration to spare the accused the anxiety and possible expense of a second trial has, in practice, already given way to superior claims of the administration of justice: the accused may be convicted in a second proceeding when a jury disagrees⁵⁸ or when a *venire de novo* is

⁵⁵*Id.*

⁵⁶See Goodhart *Acquitting the guilty* 514-526 for a critical analysis of the reasons advanced by the Department to maintain the *status quo* in respect of the ordering of retrials by the Court of Appeal.

⁵⁷See Nokes GD "The Criminal Appeal Act 1964" *Criminal Law Review* 1964 565, 566-567.

⁵⁸As indicated in chapter three *supra* (under 3.2.2) a second proceeding may be instituted against the accused if the jury disagreed on the verdict in the trial court. See also Baker 300 for a discussion of the development of this practice in English law.

ordered on the basis that the first trial amounted to a nullity.

However, the Departmental Committee recommended that the Court of Appeal may order a new trial when fresh evidence is admitted on appeal.⁵⁹ Nevertheless, as the proportion of criminal appeals where fresh evidence is sought to be adduced has always been small, it was envisaged that the new provision would have very little operation but " may pave the way for more extensive legislation on new trials".⁶⁰ The *venire de novo* procedure nevertheless remained the only avenue of effecting a retrial (in the absence of fresh evidence being introduced in the Court of Appeal) for another two decades. During this period legal commentators continued to criticise the illogical limits of the procedure.

Spencer, in a "jaundiced bird's eye view"⁶¹ of the English system of criminal appeals referred to a number of decisions where the Court of Appeal, in order to avoid quashing a conviction, held that an alleged misdirection by the trial judge was in fact legally sound.⁶² In other words, cases in which misdirections were given, in his view obtained "retrospective validity to the subsequent confusion of the law".⁶³

⁵⁹Section 1(1) of the Criminal Appeal Act of 1964 provided that "[w]here an appeal against conviction is allowed by the Court of Criminal Appeal by reason only of evidence received or available to be received by that court under section 9 of the Criminal Appeal Act 1907 and it appears to the Court that the interest of justice so requires, the Court may, instead of directing the entry of a judgment and verdict of acquittal as required by section 4(2) of that Act, order the appellant to be retried."

⁶⁰Nokes 572.

⁶¹Spencer 261.

⁶²*Id.*

⁶³At 268.

Samuels expressed the view that the absence of a general power to order a retrial meant that every convicted person had an incentive not to appeal on the merits, but on some technical defect in the procedure, in the hope that it would lead to a quashing.⁶⁴ He suggested that where the court would not be prepared to quash but would rather apply the proviso,⁶⁵ a retrial should instead be ordered "if there is any reason to think that in a properly conducted trial there might be a conviction".⁶⁶ The author's views seems to have been that the interest of the accused would be better served if a retrial is ordered rather than that the appeal is dismissed in terms of the proviso.

These criticisms most probably led to the eventual introduction in 1988 of more extensive legislation. The reforms introduced in this legislation are considered in detail in chapter eight.

⁶⁴Samuels JP "Appeal Against Conviction: Reform" *Criminal Law Review* 1984 337, 342-343.

⁶⁵For the proviso see section 4(1) of the Criminal Appeal Act 1907 discussed *supra*, text at note 37.

⁶⁶At 343.

CHAPTER EIGHT

NEW TRIALS - A COMPARATIVE ANALYSIS OF CURRENT LAW

8.1 INTRODUCTION

It is generally recognised that an unreversed verdict of a conviction is protected against further state action: if a conviction becomes final because an accused chooses not to appeal, or if it becomes final after the accused's appeal has failed, the state is prohibited from instituting further proceedings for the same offence.

The issue addressed in this chapter is whether the state may institute new proceedings¹ against the accused if the accused has succeeded in having his conviction reversed on appeal. The question posed is whether the guarantee against double jeopardy necessarily implies that an accused who succeeds in having his conviction reversed, has been *finally acquitted* by the court of appeal and therefore protected against further state-initiated proceedings. The answer to this question should furnish the answer to a further question, namely whether a new trial may be justified in certain instances. If the answer to the latter question is in the affirmative, it becomes essential to investigate the grounds on which the conviction was set aside in order to determine precisely what type of appellate reversal may lead to a new trial.

As indicated in the historical overview in chapter seven, English

¹The institution of new proceedings is referred to either as a "trial *de novo*", a "new trial" or a "retrial". In other words, these terms are interchangeable.

courts regarded the ordering of new trials as an exceptional rather than a general practice. At present, the approach in all the legal systems considered in this chapter is that new trials on appellate reversal of a conviction do not *per se* offend the rule against double jeopardy; it must simply be determined on what grounds the conviction was set aside. If the conviction was set aside on the basis of insufficient evidence, the general premise is that the double jeopardy principle prohibits a new trial. The underlying theory as revealed by a study of the case law is that the guarantee against double jeopardy requires the state to bring all its evidence against the accused *in the first trial*. Therefore, new trials should not to be ordered to enable the prosecution to cure deficiencies in its case by bringing additional evidence which it failed to produce at the first trial.

However, reversals based on procedural errors and irregularities have not attained the same status of finality. In all the legal systems under consideration in this chapter new trials are, in principle, allowed if a conviction is reversed on the basis of procedural error. Justification for new trials in these instances seems to be that the proper administration of justice requires that the accused should not escape justice on a mere technicality. Where an accused has been proven guilty beyond reasonable doubt but complains only that an error has been committed at the trial which may have influenced the result, it is not unfair to have a new trial to re-determine the guilt or innocence of the accused. A second *error-free* trial is allowed because it serves the interests both of the state and the accused in the proper administration of justice. Therefore, the permissibility of new trials in these cases is explained not so much in terms of abstract theories of double jeopardy, as in terms of policy considerations.

The distinction between procedural error and insufficient evidence offers an apparently simple solution to the problem of the permissibility

of new trials. However, the classification of the United States Supreme Court of erroneous admission of state evidence as one of trial error as opposed to insufficiency of evidence, demonstrates that a distinction on this basis does not always "[honor the notion] that the State should be given one fair opportunity to offer whatever proof [it can assemble]".² Moreover, it is doubtful whether new trials serve due process values in general if errors had occurred at a trial which may be viewed as serious violations of fundamental human rights. Although courts of appeal in Canada and England have expressed concern for the accused's right to a fair trial in this regard, a general tendency in favour of permanent stay of proceedings on this basis (infringement of the accused's right to a fair trial) is not reflected in the case law.

A number of related issues are also considered in this chapter. One of these is whether an *appeal* by way of trial *de novo* violates the double jeopardy principle. An appeal by way of *trial de novo* in actual fact amounts to a new trial before an *appellate tribunal*. This means that the subject matter of the appeal is not confined to the record of the proceedings in the trial court; in an appeal by way of *trial de novo* both the accused and the state may bring additional evidence not considered in the trial court. Legal systems which provide for these kind of appeals are India, and in exceptional cases, Canada. The Indian Supreme Court does not regard the production of fresh prosecution evidence on appeal *per se* as a violation of the accused's right against double jeopardy. The Canadian Supreme Court indicated that such a procedure may be viewed as a new trial disguised as an appeal; the court expressed the point of view that the appeal by way

²Per Mr Justice Marshall who delivered the minority opinion in the United States Supreme Court decision *Lockhart v Nelson* 109 SC 285 (1988) 293.

of trial *de novo* may be viewed as giving the state a second (undeserved) opportunity to procure a conviction.

Further issues which may involve the rule against double jeopardy are whether the court may, on appeal or on retrial, substitute the conviction appealed against for a conviction of a more serious offence of which the accused had previously been acquitted (explicitly or implicitly) or impose a more severe sentence than the sentence which had been imposed at trial. In the majority of legal systems namely, English, Canadian, Indian and American law, the substitution of a conviction for a conviction of a more serious offence is not allowed.³ The basic premise is that a conviction of a lesser offence should be regarded as an acquittal of a greater offence. In South African law, legislation provides that courts of appeal may substitute convictions appealed against for convictions of more serious offences. As will be discussed below, the Appellate Division of the South African Supreme Court recently criticised this legislation on the basis that it violates the principle recognised by our courts that an acquittal ought not to be disturbed. However, the particular legislation has not as yet been challenged on constitutional grounds.

Different approaches are followed regarding the imposition of a more severe sentence on appeal. Although this is not allowed in English and Indian law (if the accused appealed and the prosecution did not also file an appeal),⁴ it is not *per se* regarded as unconstitutional in

³It is, however, uncertain whether courts of appeal in the English legal system may substitute a conviction for a conviction of a more serious offence if the accused appealed against a conviction handed down in a *summary* proceeding as opposed to a conviction handed down in a trial on indictment.

⁴However, an English court disposing of an appeal against a decision handed down in summary proceedings may impose a higher sentence than that imposed by the magistrate's court.

American and Canadian law. The Supreme Court of the United States has nevertheless held that the imposition of a more severe sentence on appeal or retrial may be regarded as unconstitutional in certain instances. The court ruled, for instance that if the particular sentencing proceeding followed by the trial court resembled a trial in the sense that it amounted to an adjudication of the guilt or innocence of an accused in relation to a *particular sentence*, the double jeopardy clause of the Constitution of the United States prohibits the imposition of a more severe sentence on appeal or retrial. The court argued that if such a comprehensive sentencing proceeding took place, it may be said that the accused had been acquitted (albeit impliedly) of the more severe sentence (or sentences) that the court could have imposed.

The constitutionality of the imposition of a more severe sentence on appeal (brought by the accused) or on retrial of an accused upon appellate reversal of his conviction, has also recently been considered by a South African court. As will be indicated below, the particular division of the Supreme Court rejected outright the submission that legislation which provides for imposition of a more severe sentence on appeal by the accused is unconstitutional; the court refused to refer the matter to the Constitutional Court for consideration, arguing that there is no merit in the contention that legislation which provides for the increase of sentence on appeal if only the accused appealed (in other words, in the absence of an appeal by the state), may be regarded as unconstitutional. The court *inter alia*, relied on a waiver theory (namely that by appealing, the accused re-opened the case and could consequently not complain). Only time will tell whether this particular aspect of double jeopardy will be considered in future by the Constitutional Court of South Africa.

The issues identified above are all considered in detail on a comparative basis in the paragraphs that follow.

8.2 ENGLISH LAW

8.2.1 General

It was indicated in chapter seven (the historical overview) that the English legislature never vested the first Court of Criminal Appeal with a power to order new trials. In order to effect *de novo* proceedings, the court had to revert to the common law procedure known as *venire de novo*. The arbitrariness inherent in this procedure eventually resulted in the introduction of statutory powers to order new trials; initially in fresh evidence cases only and subsequently (in 1988) in all cases if "it appears to the court of appeal that the interests of justice so require".⁵ However, no guidance was given in the provision as to whether it was intended to serve the interests of the accused rather than that of the state or vice versa. Moreover, the Court of Appeal failed to give proper consideration to the concept "interests of justice". Instead of formulating a clear policy in this regard, the court adopted a narrow approach which focused on the issue of whether there could be doubt that the jury would in any case have convicted if the irregularity or error relied on by the appellant had not occurred at the original trial.

In cases arising from appeals against decisions handed down in lower courts, there are indications that a court of appeal should, in deciding upon the appropriateness of a retrial, take into account *all* relevant considerations, including the nature of the error vitiating the original conviction. The various approaches followed by the courts of appeal are considered in detail in the following paragraphs.

⁵Section 7(1) of the Criminal Appeal Act 1968 as amended by section 43 of the Criminal Justice Amendment Act of 1988.

8.2.2 New trials on appellate reversal of convictions handed down in superior courts

The jurisdiction, powers and procedures of the Criminal Division of the present Court of Appeal are principally contained in the Criminal Appeal Act of 1968. Apart from the recently acquired general power of the court to order a retrial,⁶ the powers of the Criminal Division are basically the same as those which were vested in the old Court of Criminal Appeal.

A person convicted on indictment may, subject to obtaining leave to appeal when that is necessary, appeal to the Court of Appeal against his conviction either on a point of law or a question of fact, or a mixed question of law and fact.⁷

The Court of Appeal will allow the appeal if it thinks

- (a) that the conviction of the court of trial should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory
- (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law or
- (c) that there was a material irregularity in the course of the trial.

If none of the above apply the court must dismiss the appeal. However, there is the following proviso

The Court may, notwithstanding that it is of the opinion that the

⁶See *infra*, text at note 11 for a discussion of the court's power to order a retrial as provided for in section 43 of the Criminal Justice Amendment Act of 1988.

⁷Section 1 of the Criminal Appeal Act 1968.

point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.⁸

The Act furthermore provides that

- (a) in the case of an appeal against conviction the court shall, if they allow the appeal, quash the conviction, and that⁹
- (b) an order of the Court of Appeal quashing a conviction shall, except when the appellant is ordered to be retried (in terms of section 7 below) operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal.¹⁰

Again, section 7(1) now provides

Where the Court of Appeal allows an appeal against conviction and it appears to the court that the interests of justice so require, they may order the appellant to be retried.¹¹

The appellant may only be retried for an offence of which he has been convicted or could have been convicted on the indictment on which

⁸Section 2(1) of the Criminal Appeal Act 1968.

⁹Section 2(2).

¹⁰Section 3.

¹¹As amended by section 43 of the Criminal Justice Amendment Act of 1988.

he has been tried.¹² Furthermore, if a person ordered to be retried is again convicted on retrial, the court before which he is convicted may not pass a sentence of greater severity than that passed on the original conviction.¹³

In cases decided before 1988 (when the power to order a retrial arose only in fresh evidence cases), the court refused to order a retrial where a very long time had elapsed since the crime had been committed¹⁴ or where the accused had already served a substantial part of his sentence.¹⁵

As for more timely appeals, Pattenden identifies certain principles which the court has applied in determining whether a retrial should be ordered in fresh evidence cases.¹⁶ The writer points out, in the first place, that the Court of Appeal has been reluctant to order a retrial

¹²Section 7(2) of the Criminal Appeal Act 1968. In terms of the section, this includes an offence charged in an alternative count of the indictment in respect of which the jury was discharged from giving a verdict in consequence of convicting him of the first-mentioned offence.

¹³Item (1) and (3) of Schedule 11 of the Criminal Appeal Act 1968. For the sake of completeness, it should also be mentioned here that this policy is also upheld in the context of an appeal against sentence by the accused. If an accused appeals against sentence imposed in the trial court (which is provided for in section 9 and 10 of the Criminal Appeal Act 1968), the Court of Appeal may not increase the sentence beyond a sentence passed at the trial taken as a whole (section 4(3) read together with section 11(3) of the Criminal Appeal Act 1968. Cf the position in Canadian law discussed *infra* under 8.3.2.

¹⁴*R v Flower* [1966] 1 QB 146 and *R v Saunders* [1973] 58 Cr App R 248.

¹⁵*R v Newland* [1988] 2 All ER 891 (CA).

¹⁶Pattenden *R Judicial Discretion and Criminal Litigation* 2nd ed 1990 368-370.

where the court has been sure that, in view of the new evidence, a conviction would not be "safe".¹⁷ In such circumstances, the court would rather enter an acquittal. If fresh evidence could not serve to induce any reasonable doubt regarding the guilt of the accused, the court would simply dismiss the appeal.¹⁸ However, in in-between cases where the court would not feel "sure one way or the other",¹⁹ the court has been inclined to order a retrial.²⁰ Pattenden furthermore observes that

a further trial is also in order if (a) the evidence is significant and the Court of Appeal is not satisfied that it is true, but thinks a jury *might* believe the evidence or (b) the prosecution wishes to introduce evidence in rebuttal of fresh defence evidence. A retrial in the latter situation enables the Court of Appeal to avoid adjudicating between opposing witnesses.²¹

In exercising its discretion to order a new trial in terms of section 7(1), the Court of Appeal also relies on these principles. The court is

¹⁷At 368. The author cites the cases of *R v Egerton* [1970] Crim L R 92 (C) and *R v Chioneye* [1988] 138 NLJ 258 (CA).

¹⁸At 369. The author relies *inter alia* on the case of *R v Scudder* [1965] Crim LR 36 (CA).

¹⁹At 368. The author cites from the case of *Stafford v DPP* (1973) 58 Cr App R 256, 283 (HL).

²⁰At 368. *Cf* also the recent decision of *Michael Gordon* (1995) 1 Cr App R 290. In that case the court ordered a retrial on the basis that the court could not be sure that the jury would necessarily have reached the same result had they heard the additional expert evidence which had been put before it during the appeal.

²¹This principle was applied in the case of *Kiranjit Ahluwalia* (1993) 96 Cr App R 133. A retrial was ordered on the basis that the crown did not have a proper opportunity to consider the fresh evidence and obtain its own advice and evidence on the issue raised for the first time on appeal, namely that the accused (who had killed her husband) suffered from a major depressive disorder.

inclined to order new trials if it is not sure one way or the other if the trial court would have convicted the accused in any case if the error or irregularity had not occurred at the original trial.²² As pointed out above, the grounds for allowing an appeal are not only that the Crown Court judge erred in law or that there was a material irregularity in the course of the trial, but also that the conviction is unsafe or unsatisfactory. However, in practice it is very rare that an appellant relies solely on the ground that the conviction is unsafe or unsatisfactory only because the evidence, on paper, is very thin. The vast majority of appellants refer first to specific legal or procedural errors which have occurred at the trial and then supplement these specific grounds with a general claim that the conviction was therefore unsafe or unsatisfactory.²³ Moreover, misdirections about law in the judge's summing-up to the jury (a ground of appeal in most cases), can be classified as either a wrong decision on a question of law or of facts tending to make the conviction unsafe or unsatisfactory.²⁴

²²See *inter alia* the decisions of *Note Mehmet Bey* [1994] 98 Cr App R 158 (retrial ordered where judge failed to direct the jury that there could be an innocent explanation for lies of accused); *John Dickie Spellacie Baillie* [1995] 2 Cr App R 31 (retrial ordered where the judge failed to direct the jury sufficiently on the issue of provocation); *Imteyaz Ashghar* [1995] Cr App R 223 (retrial ordered where the judge failed to give a full accomplice corroboration direction to the jury); *Fitzroy Derek Pommell* [1995] 2 Cr App R 607 (retrial ordered where the judge misdirected the jury on the defence of necessity); *Barry Henry Durbin* [1995] 2 Cr App R 84 (retrial ordered where the judge failed to give a good character direction to the jury); *Dean Pattinson Warren Exley* 1996 1 Cr App R 51 (retrial ordered on the basis that no sufficient warning had been given to the jury as regards identification evidence) and *Vincent Joseph Wood* [1996] 1 Cr App R 207 (retrial ordered on the basis of the combined effect of prejudicial material in the press and the unfair tone and content of the judge's summing up).

²³See Emmins 322.

²⁴See Emmins 321.

However, an appellant hardly ever relies solely on the ground that the conviction, evaluated on the merits only, is unsafe or unsatisfactory. The reason is that the court has always been reluctant to interfere with the factual findings of juries because (unlike the juries), they have not heard or seen the witnesses. In other words, if the trial had been legally error-free, the appellant will only succeed if he can point to something "exceptional in the overall circumstances which absolutely drives the court to the conclusion that an injustice may have been done".²⁵

So far, there has been no reported case where the court ordered a retrial where the original trial had been legally error-free; in other words, where no procedural or other irregularity tainted the proceedings. As explained above this cannot be ascribed to an underlying policy that the accused should be protected against double jeopardy. The real reason is that in practice, the quashing of a conviction solely on the basis of its factual merits is exceptional; it hardly ever happens.

Certain writers on English criminal procedure express the view that the new power of the court to order a retrial has not replaced the

²⁵See Emmins 322. The author relies on the case of *R v Cooper* (1969) 1 QB 267 where the court laid down the principle that it would not lightly interfere with the factual findings of a jury. In *Cooper* the exceptional factors which led to the quashing of the accused's conviction on the basis solely of being unsafe or unsatisfactory were the following. The case rested on a dubious identification by the victim. There was also evidence that X (who closely resembled the accused and had a record of violence) had privately confessed to the crime. Cooper called the third person to whom X had made his confession, but was unable to call X himself. In the light of these exceptional factors, the court of appeal set aside his conviction on the basis that it was unsafe.

inherent power of the court to order a *venire de novo*.²⁶ According to these writers, *venire de novo* cases and "ordinary appeals"²⁷ are, in fact, mutually exclusive. This argument can briefly be explained as follows. According to the wording of section 2(1)(c)²⁸ a court may, *inter alia*, allow an appeal if it thinks that there was a material irregularity *in the course of the trial*. However, if the irregularity caused the trial to be a "mistrial" in the sense that there was "no trial that had been validly commenced",²⁹ the court cannot allow the appeal in terms of section 2(1) and order a retrial in terms of section 7(1). In the case of a so-called "mistrial", no material irregularity *in the course of the trial* as envisaged in section 2(1) has occurred. Instead (so the argument goes) no valid trial *has even commenced*. If no valid trial has even commenced, the court must rely on its *inherent powers* to quash the conviction and order a retrial. In practice, the difference would be that if a retrial is ordered by the Court of Appeal in terms of its statutory powers,³⁰ the court itself would direct a bill of indictment. However, if the appeal is allowed in terms of its inherent powers, the effect of *venire de novo* would be "to return the proceedings to the point immediately before the irregularity occurred so that the prosecution can cure the defect and the trial may take place".³¹

Furthermore, these authors point out that only if the appeal is under

²⁶Emmins 326-327 and Blackstone 1991 ed 1408-1411.

²⁷Meaning appeals in terms of the Criminal Appeal Act 1968. See Blackstone 1991 ed 1410.

²⁸Criminal Appeal Act 1968. See *supra* text at note 8.

²⁹*Per* Lord Dipcock in *R v Rose* [1982] AC 822, 833 (HL).

³⁰In terms of section 7(1).

³¹See Blackstone 1991 ed 1410.

statute, will the court have the additional power to dismiss the appeal by application of the proviso.³²

In 1996, in the case of *Paul Anthony O'Donnell*³³ the Court of Appeal recognised that it is vested with inherent powers to order a *venire de novo* in instances where it cannot invoke its statutory powers to order a retrial. The issue before the court was whether a retrial could be ordered after a conviction had been set aside in the following circumstances. A trial had taken place to determine the guilt or innocence of the accused in respect of the offences charged, and a verdict of guilty by a jury followed on a determination that the accused was unfit to be tried. Counsel for the appellant argued that once the court determined that the procedure was irregular, there is no valid conviction which could be set aside by the Court of Appeal in terms of the Criminal Appeal Act 1968. Therefore, a retrial could also not be ordered in terms of the court's statutory powers. However, the court held that it might order a retrial in terms of its inherent common law powers. Hutchinson LJ laid down the following principles. The Court of Appeal may order a new trial in terms of its inherent powers if³⁴

- (a) the trial had not validly commenced in the sense that it was a nullity from the outset (a so-called "mistrial") or
- (b) the trial, although validly commenced, had not been validly concluded by a properly constituted jury bringing an unequivocal verdict of guilty or not guilty followed by a sentence or discharge of the defendant by the court.

³²See *supra*, text at note 8 for the wording of the proviso.

³³[1996] 1 Cr App R 286.

³⁴At 296D.

The court pointed out that in both the above situations the 1968 Criminal Appeal Act would have had no application since there would have been no "conviction" within the meaning of that Act. The court observed that its power to order a *venire de novo* was not limited to cases where the proceedings were shown to be vitiated *ab initio* by some irregularity, but also where the trial had come to an end without a properly constituted jury ever having returned a verdict.

8.2.3 New trials on appellate reversal of convictions handed down in lower courts

At present, there are three ways of appealing against convictions handed down in magistrates' courts. These are

- (a) Appeal to the Crown Court. This remedy involves an appeal on the factual merits of the case and is available to the accused only.³⁵
- (b) Appeal to the High Court by way of case stated (on a point of law). Unlike the position in trials on indictment, this remedy may be utilised in summary proceedings by

³⁵ Section 108 of the Magistrates' Courts Act 1981. The unsuccessful party in the Crown Court (whether it be the prosecution who has seen a summary conviction overturned or the defence who had the same result before the Crown Court as they had in the magistrate's court), in terms of section 28 of the Supreme Court Act 1981, may bring a further appeal by case stated to the High Court. Similar to an appeal direct from the magistrate's court to the High Court (discussed in (b) above), the Crown Court decision may only be questioned on the ground that it was wrong in law or in excess of jurisdiction and not on the ground that it was against the weight of the evidence. The decision of the High Court, in terms of section 1(1)(a) of the Administration of Justice Act 1960, may further be appealed against by either party to the House of Lords if the case involves a point of law of general public importance.

both the accused and the prosecution.³⁶

- (c) Application to the High Court for judicial review of a decision of the trial court.³⁷ This remedy (*certiorari*) is in principle available to the accused only. However, the prosecution may also utilise this remedy in limited circumstances.³⁸

In the text that follows these different remedies will be dealt with in the chronological order set out above.

The accused convicted in a magistrate's court may, as of right, appeal against conviction and/or sentence to the Crown Court.³⁹ If the accused pleaded guilty, he may appeal only against sentence, except if he argues that the plea is equivocal; in other words, if he argues that it was not a genuine admission of guilt.⁴⁰ Where the appeal is against conviction, the hearing on appeal amounts to a rehearing of the whole case.⁴¹ Exactly the same steps are being

³⁶Section 111 of the Magistrates' Courts Act 1981. See *supra* chapter six under 6.2.2 for a discussion of this remedy in the context of prosecution appeals. A further appeal to the House of Lords is possible if the High Court certifies that there is a point of law of general public importance involved.

³⁷This remedy is available in respect of decisions by magistrates and in respect of decisions by the Crown Court when it is not exercising its jurisdiction in matters relating to a trial on indictment (section 29(3) of the Supreme Court Act 1981). However, there is no power to grant judicial review of any decision of a judge of the High Court. See Blackstone 1991 ed 1478.

³⁸See *supra* chapter six under 6.2.5 for a discussion of cases where the High Court was prepared to review an acquittal.

³⁹Section 108 of the Magistrates' Courts Act 1981.

⁴⁰See in general Blackstone 1991 ed 1458-1460 for a discussion of an appeal against conviction following a plea of guilty.

⁴¹Section 79(3) of the Supreme Court Act 1981.

gone through as were gone through at the summary trial. Moreover, the parties (including the prosecution) are not limited to the evidence called at the summary trial but may rely on material which has only become available to them since. The hearing of appeal therefore amounts to a complete trial *de novo*.⁴²

The court may dispose of the appeal by confirmation, reversal or variance of "any part of the decision appealed against" or may remit the matter to the magistrates with its opinion⁴³ or make any such order as it thinks fit.⁴⁴ The last-mentioned includes the power to increase the sentence up to the maximum sentence which the magistrate could have imposed.⁴⁵ Commentators explain that the reason the Crown Court is vested with the power to increase sentence, is that leave is not required to appeal to this court and such a provision would therefore "inhibit unmeritorious appeals".⁴⁶

Previously, it was merely provided that the Crown Court could vary "the decision appealed against".⁴⁷ The words "any part of the decision appealed against" were inserted in 1988 to enable the court to review, not only the part of the decision against which the accused

⁴²However, the Crown Court may not amend the information on which the appellant was convicted. See *Garfield v Maddocks* (1974) QB 7.

⁴³This would, apparently, usually be a direction to enter a plea of not guilty and hear the case if it thought the plea was equivocal. See Inns of Court School of Law *Criminal litigation and sentencing* 5th ed 1993 74 (hereinafter referred to as Inns of Court: *Criminal litigation*).

⁴⁴Section 48 of the Supreme Court Act 1981 as amended by section 156 of the Criminal Justice Act 1988.

⁴⁵See Inns of Court: *Criminal litigation* 74.

⁴⁶See Blackstone 1991 ed 1461 and Inns of Court: *Criminal litigation id.*

⁴⁷Section 48(2) of the Magistrates' Courts Act 1981.

appealed, but the whole decision of the court of trial.⁴⁸

The legislature felt obliged to bring about this amendment in view of the decision in *Dutta v Westcott*.⁴⁹ In that case D had been convicted by magistrates of (a) having used a vehicle without insurance and (b) other road traffic matters which also carried the penalty of endorsement of the licence and penalty points. The magistrates had disqualified him from driving a motor vehicle for the insurance offence but had not ordered penalty points for the other matters; the fact that he had been disqualified was regarded as sufficient punishment for all the offences. On appeal, the conviction for using a vehicle with no insurance was quashed. The result was that the accused was no longer disqualified from driving a motor vehicle and the issue arose on a further appeal whether the court was empowered to impose a sentence for the other offences (by endorsing penalty points) as the magistrates' decisions in those matters had not been the subject of appeal. In order to achieve a just result, the court gave a broad interpretation to the words "the decision appealed against" and held that it meant that the whole of the decision by the magistrates may be reconsidered by the court of appeal. This "remarkably convoluted"⁵⁰ interpretation of the court of the section had obliged the legislature to amend the section so as to explicitly provide for cases such as *Westcott*.

In practice, the amendment has the effect that if the accused appeals only against conviction, the Crown Court may dismiss the appeal and increase the sentence imposed by the magistrate for that

⁴⁸Section 48(2) as amended by section 156 of the Criminal Justice Amendment Act of 1988. (My emphasis).

⁴⁹[1987] QB 291.

⁵⁰See Emmins and Scanlan 170.

offence or allow the appeal but increase the sentence for any other offence of which the trial court had convicted the accused even if the accused did not appeal against such a conviction.⁵¹ Moreover, if the new provision is interpreted literally, the court is also empowered to substitute a conviction (appealed against and quashed) for a conviction of an offence of which the magistrate *acquitted* the accused; the acquittal is also "part of the decision appealed against!"⁵²

The potential effect of these powers on double jeopardy rights of the convicted accused are extraordinary. The prosecution gets a second opportunity to obtain a conviction of an offence for which the accused has previously been acquitted on the merits. Nevertheless, it remains to be seen whether the court will in fact give such a broad interpretation to this provision, namely that it may also substitute an acquittal for a conviction.

The appeal by means of the case stated procedure, namely on a point of law, was discussed in detail in chapter six.⁵³ As indicated, both the prosecution and the accused may in terms of this procedure appeal to the High Court on a point of law. The High Court may affirm, reverse or vary the decision of the court below, make any other order it thinks fit or remit it back to the original court with its opinion.⁵⁴

⁵¹However, the sentence imposed by the Crown Court may not exceed that which the magistrate could have imposed. See section 48(4) of the Act.

⁵²See Blackstone 1991 ed 1462 and Emmins 356 who both express the view that the court should use these powers sparingly.

⁵³See *supra* under 6.2.2 for a discussion of section 111 of the Magistrates' Courts Act 1981.

⁵⁴Section 6 of the Summary Jurisdiction Act 1857.

The High Court's decision is enforced as if it was the decision of the lower court. Therefore, if the High Court thinks that the acquittal is incorrect, it can refer it back to the magistrates with a direction to convict and sentence. In the discussion that follows, the powers of the court to order a rehearing after reversal of an acquittal or reversal of a conviction is considered.

In *Rigby v Woodward*⁵⁵ the question whether a retrial may be ordered by the High Court arose in the context of a successful appeal by the accused against his conviction. The facts were as follows. The magistrates had refused to allow counsel for R to cross-examine a co-accused who had given evidence in his own defence which had implicated R. R had been convicted and his co-accused had been acquitted. On appeal, the decision to refuse the cross-examination was held to be plainly wrong in law. The High Court subsequently quashed R's conviction. The prosecution asked them to remit the case for a rehearing on the ground that it was more than likely that the verdict would have been the same even if R's counsel had been able to cross-examine the co-accused. The court refused the application. Lord Goddard CJ stated that the power "to remit" a case to the magistrates includes sending a case back with a direction to convict if it is plain on the facts stated that that would be the correct verdict, or setting an acquittal aside and instructing the magistrates to *continue* with the hearing if the acquittal had followed the erroneous upholding of a submission of no case to answer at the end of the prosecution's evidence.⁵⁶ However, his Lordship concluded that "there is no power to order a retrial in the ordinary sense of the

⁵⁵[1957] 1 WLR 250.

⁵⁶See *Emmins* 360.

expression".⁵⁷

In a subsequent case, *Griffiths v Jenkins*⁵⁸ it was suggested by counsel for the appellant that the above words of Lord Goddard in *Rigby* meant that a court of appeal may not send a case back for a *rehearing*, regardless of whether it would be before the same or a different bench and regardless of whether the prosecution or the accused brought the appeal. In *Griffiths* the prosecution appealed against a dismissal of an information by the justices on the basis that the defendants had no case to answer. The High Court held that the justices had erred in law and quashed the dismissal. The matter could not be remitted to the same bench to *continue* the hearing (which would have been allowed in terms of *Rigby*) because two of the three justices who were party to the decision had since retired. The issue was whether the High Court had the power to remit the case for rehearing before a *differently* constituted bench of justices; in other words, whether the accused could be tried *de novo*. The High Court held that it had no such power. On a further appeal to the House of Lords, that court concluded that there is always power vested in the High Court to order a rehearing before either the same or a different bench if the court, in its discretion, decides that it would be the appropriate course to take.⁵⁹ In the court's view, the *dicta* in *Rigby* ought to be confined to the particular facts of that case.⁶⁰

⁵⁷At 254.

⁵⁸1992 AC 76 (HL).

⁵⁹At 84.

⁶⁰Emmins points out (at 360) that a retrial would have been unfair in *Rigby's case* because he would not have been able to insist on the prosecution's calling the co-accused and if he called him himself he would have been disadvantaged by the rule that one cannot cross-examine one's own witness. Emmins concludes (at 360) that "*Rigby v Woodward* was merely saying that retrials should not be directed

The court added that the question of whether the High Court has power to order a rehearing before either the same or a different bench could not receive different answers depending on whether it was the prosecutor or the defendant who was appealing.⁶¹ The court then made the following important statement⁶²

It is axiomatic of course, that a rehearing will only be ordered in circumstances where a fair trial is still possible. But where errors of law by justices have led to an acquittal which is successfully challenged and where the circumstances of the case are such that a rehearing is the only way in which the matter can be put right, I apprehend that the court will normally, though not necessarily, exercise its discretion in favour of that course. I recognise that very different considerations may apply to the exercise of discretion to order a rehearing following a successful appeal against conviction by the defendant in circumstances where the error in the proceedings which vitiated the conviction has left the issue of the defendant's guilt or innocence unresolved. In some such cases to order a rehearing may appear inappropriate or oppressive. But this must depend on how the proceedings have been conducted, the nature of the error vitiating the conviction, the gravity of the offence and any other relevant consideration.

On the facts before it the court refused to exercise its discretion in favour of a retrial because the offences were relatively trivial. The fact that the retrial would take place more than three years after the date when the offences were alleged to have been committed, was also considered to be a sufficient reason for not ordering a retrial which would not be fair in the case at hand.

where the successful appellant by case stated would be in a worse position at the retrial than he was at the original trial".

⁶¹At 83.

⁶²At 84B-D. (My emphasis).

Although no explicit reference was made in this important decision to the double jeopardy rights of the accused, the court seems to have recognised that the ordering of retrial on reversal of either a conviction or acquittal is an extraordinary measure which should not be implemented in circumstances where it would deny the accused the right to a fair trial.

The final method whereby a conviction or acquittal handed down in a magistrate's court may be challenged is an application for review by means of *certiorari*. In disposing of such an application, the High Court has the powers of

- (a) remitting the case to the lower court with a direction to reconsider it and reach a decision in accordance with the High Court's findings and
- (b) replacing an unlawful sentence which it has quashed with the sentence it considers fit.⁶³

If a conviction is quashed by *certiorari*, it seems as if the High Court will be prepared to order a retrial if it finds that as a result of the irregularity the accused "has never been technically in peril"⁶⁴ and if it would be in the interests of justice in the sense that it would not be

⁶³Section 31(5) and 43 of the Supreme Court Act 1981.

⁶⁴See *Regina v Kent Justices. Ex parte Machin* [1952] 2 QB 355, 361. In that case the High Court held on review that the justices acted "without jurisdiction" because they failed to comply with a rule which required that they explain to the accused that if he was tried by them for an indictable offence and convicted, he might be committed to Quarter Sessions for sentence. The court stated that the accused could be tried again because he had never been technically in peril of a conviction. However, the fact that the accused had already been in custody for seven months, persuaded the court that a retrial would not serve the interests of justice and would not be right.

unfair to the accused in the circumstances of the particular case.⁶⁵

In chapter three the appeal by means of *certiorari* against an acquittal was discussed in detail. It was pointed out that the High Court holds the view that review of an acquittal is prohibited in terms of the rule against double jeopardy, but that the court has recognised an exception to this rule, namely where the presiding officer at the trial court acted "without jurisdiction".⁶⁶ Therefore, where the trial, as a result of the fact that the presiding officer acted "without jurisdiction", is treated as a "nullity",⁶⁷ the accused may, according to recent cases, be tried again.⁶⁸

Therefore, the anomalous situation now exists that, in respect of appeals on a point of law, the superior court has a discretion to order a retrial but, where a conviction or acquittal is taken on review by means of the remedy *certiorari*, a retrial may only be ordered if the alleged irregularity which occurred in the court of trial was of such a nature that the trial could be described as a nullity. It would appear that no logical rationale underlies this phenomenon. The remedies of *certiorari* and appeal by case stated serve similar purposes in English law. These remedies are interchangeable in the following

⁶⁵*Id.* Blackstone 1991 ed 1471 points out that the ordering of a retrial on reversal of a conviction by means of *certiorari* is most unlikely to happen in practice.

⁶⁶In common law, the position was that an acquittal could not be quashed by *certiorari*. See chapter five *supra* under 5.3 for the position in common law.

⁶⁷Because the concept of jurisdiction is often used in *certiorari* cases, the nullity theory has been used to effect a retrial. See Friedland 265.

⁶⁸See *In re Harrington and Regina v Dorchester Justices, Ex parte Director of Public Prosecutions* discussed in chapter six *supra* under 6.2.5.

circumstances: (a) where the Magistrate's or Crown Court acted in excess of jurisdiction (b) where an error of law was made and the error was patently revealed in the record of the inferior tribunal's proceedings. However, a latent error would only be revealed through the statement of case procedure. The effect of both these remedies is to set aside the decision of the court below. Apparently, counsel advising a person aggrieved by a decision of an inferior court may find the choice between these remedies difficult. In my view, the discrepancy in English law in this respect can only be seen as a historical accident.

8.2.4 Summary

The following principles apply with regard to appeals against convictions handed down in superior courts.

* The accused convicted in a *superior court* may appeal against his conviction to the criminal division of the Court of Appeal either on a point of law, a question of fact, or a mixed question of law and fact.

* In terms of its statutory powers, the Court of Appeal may set aside a conviction and order a new trial whenever "the interests of justice so require".⁶⁹ The court has so far given little indication of what it understands by the concept "interests of justice". The basic criterion which the court applies in order to determine the appropriateness of a new trial is whether it can find with certainty that the accused would in any case have been convicted had the error or irregularity not occurred at the original trial. If the court cannot make this finding with

⁶⁹See section 7(1) of the Criminal Appeal Act 1968 discussed *supra*, text at note 11.

certainty, it usually orders a new trial. However, a study of the case law reveals that the court also takes into consideration the following factors

- (a) the nature of the offence charged (if serious, the court may be inclined to order a retrial)
- (b) the time which has elapsed since the appellant was convicted (if a long time has elapsed, the court may be inclined to quash the conviction without ordering a retrial) and
- (c) whether the accused has already served a substantial part of his sentence (if so, the court may be inclined to quash the conviction without ordering a retrial).

* The court has not indicated whether an error or irregularity which amounts to a serious breach of fundamental human rights should operate as a bar to *de novo* proceedings. In other words, the court has not yet used its new powers to quash more convictions and prevent multiple prosecutions on the basis of violations of fundamental human rights.

* If a new trial is ordered, the appellant may only be retried for an offence for which he was convicted or could have been convicted on the indictment on which he was tried. Moreover, the court that tries him again may not impose a more severe sentence than that which could have been imposed in the original trial.

* Apart from its statutory powers, the court may also revert to inherent powers to order a new trial. The court may exercise these powers not only in circumstances where the trial had not validly commenced (in other words, had been *ab initio* null and void), but also where it had not been validly concluded.

The following principles apply with regard to appeals against convictions and acquittals handed down in *lower courts*.

* A person convicted in a *lower court* may appeal against his conviction to the Crown Court on the factual merits of the case. The appeal amounts to a *trial de novo*. The accused who appeals on this basis has very little (if any) protection against double jeopardy. If the relevant provisions are interpreted literally, the court may even substitute the conviction appealed against for a conviction of an offence of which the accused had been acquitted in the trial court.

* Both the prosecution and the accused may appeal by way of case stated (on a point of law) to the High Court against a decision handed down in a lower court. The High Court has wide powers to dispose of the appeal, including the power to order a new trial. In deciding whether to remit the matter for a rehearing to the same bench, or before a differently constituted bench, the general principle is that a court of appeal must consider whether a fair trial is still possible. Although the High Court may order a rehearing regardless of whether the accused or the prosecution appealed, different considerations *may* apply to the exercise of the discretion to order a rehearing after a successful appeal against conviction by the accused in circumstances where the error in the proceedings which vitiated the conviction has left the issue of the defendant's guilt or innocence unresolved. In order to determine whether a rehearing or retrial may be inappropriate or oppressive, the nature of the error vitiating the conviction should be taken into account, the manner in which the proceedings were conducted, the gravity of the offence as well as any other relevant considerations.

8.3 CANADIAN LAW

8.3.1 General

In chapter 7 it was indicated that legislation introduced at the beginning of this century in the English legal system did not explicitly provide that the Court of Criminal Appeal may order new trials on reversal of convictions.⁷⁰ The first Canadian statute⁷¹ which made provision for appeals in criminal matters was essentially based on the English model. However, it differed from the English model in one important respect: under the Canadian statute a new trial could be ordered by a court of appeal on reversal of a conviction handed down in a trial on indictment.⁷² Moreover, as early Canadian legislation also provided for a right of appeal by the crown on a point of law,⁷³ the courts of appeal could also order a new trial on reversal of an acquittal. Therefore, in Canadian law, there has never been a clear legislative policy against the ordering of retrials as was initially the case in English law.

In determining the appropriateness of a new trial on reversal of a conviction or acquittal, Canadian courts of appeal have adopted a slightly different approach than that adopted in the English courts: the probable outcome of the new trial seems to be the decisive criterion, instead of the uncertainty of the matter. The Canadian approach offers slightly more protection to the accused. Courts have

⁷⁰See *supra* under 7.3 for the provisions of the Criminal Appeal Act 1907.

⁷¹Criminal Code 1923.

⁷²The provisions of the pre-1955 Code. See Salhany 9-1.

⁷³See *supra* chapter six, under 6.3.2.

also refused to order new trials where the judicial process has been delayed and where the accused has already served a portion of an intermittent jail sentence.

8.3.2 New trials on appellate reversal of convictions handed down in superior courts

In terms of current legislation, an accused convicted of an indictable offence may appeal to the Court of Appeal for the province on any ground that involves a question of law,⁷⁴ on any ground that involves a question of fact alone or on a question of mixed law and fact,⁷⁵ on any ground not mentioned previously which appears to the court of appeal to be a sufficient ground of appeal.⁷⁶

Section 686(1)(a) of the Code empowers the court of appeal to allow an appeal from a conviction in the following circumstances

- (i) where the verdict is unreasonable or cannot be supported by the evidence or
- (ii) where there was a wrong decision by the trial court on a question of law or
- (iii) where there was a miscarriage of justice.

⁷⁴Section 675(1)(a)(i) of the Criminal Code.

⁷⁵Section 675(1)(a)(ii). Leave is required from the court of appeal.

⁷⁶Section 675(1)(a)(iii). Leave is required from the court of appeal. A further appeal may be taken to the Supreme Court of Canada as of right by the accused from the judgment of the court of appeal for the province on any question of law on which a judge of the court of appeal dissents (section 691(1)(a)). The crown has a similar right of appeal from a judgment of a provincial court of appeal which sets aside a conviction or quashes an indictment or stays proceedings on indictment (section 693(1)(a)).

In terms of section 686(2), if an appeal is allowed, the court must quash the conviction and either enter a verdict of acquittal or order a new trial. However, as in English law the court may dismiss the appeal if it is of the opinion that no substantial wrong or miscarriage of justice has occurred.⁷⁷ When a conviction is quashed on a legal ground, the general principle which determines whether a new trial is apposite is reflected in the following question. Is there, despite the error of law, admissible evidence which would enable the jury to conclude that the appellant is guilty of the offence with which he is charged?⁷⁸ It follows that the court must acquit the appellant if there is no reasonable evidence in the record of an essential element of the offence with which the accused was charged.⁷⁹

However, these principles are not absolute and it has been suggested that

while the existence of a triable cause between the Crown and the subject is a *sine qua non* of an order for a new trial [a new trial should not be ordered] where there is a strong possibility of an acquittal.⁸⁰

⁷⁷Section 686(1)(b)(iii). The test applied by Canadian courts is whether the evidence is such that the jury could not (despite the miscarriage of justice), have reached any other conclusion but that the accused was guilty.

⁷⁸See *R v Woodward* (1975) 23 CCC (2d) 508 (Ont CA). In that case the court held (at 510) that where it could not be said that there was no evidence to go to the jury, the proper disposition of the appeal was the quashing of the conviction and the direction of a new trial.

⁷⁹See *R v Brown* (1967) 3 CCC 210 and Leigh LH "New trials in criminal cases" *Criminal Law Review* 1977 525, 528.

⁸⁰See Leigh 528, quoting the Canadian decision of *R v Rusnak* [1963] CCC 143.

Furthermore, Canadian courts are reluctant to order new trials after setting aside a conviction on a legal ground in cases where the judicial process was delayed⁸¹ and in cases where the accused had already served a portion of an intermittent gaol term prior to a successful appeal.⁸² In such instances Canadian courts prefer to enter an acquittal rather than to order a new trial of the accused.

In disposing of appeals against convictions on the grounds of miscarriages of justice, the courts have applied essentially the same criteria. In *R v Silvini*⁸³ the accused appealed against his conviction on the ground that he was denied a fair trial because defence counsel had failed to apply for a severance so that he could call the co-accused as a witness to support his defence. The court held that the conviction should be quashed and a new trial ordered if

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.⁸⁴

Where the ground of appeal relied on by the convicted accused is that the verdict is unreasonable or cannot be supported by the evidence, Canadian courts of appeal either dismiss the appeal or enter an

⁸¹See *R v Jamieson* (1989) 48 CCC (3d) 287. In that case the court quashed the accused's conviction following a third trial for trafficking (*sic*) in narcotics on the basis of, *inter alia*, misdirection of the jury and improper admission of evidence. The court held that, in view of the delay in the case, the appropriate order was to enter an acquittal. *Cf* also the case of *Conway v the Queen* discussed in chapter three *supra* under 3.3.2, text at note 115.

⁸²See *R v Dillabough* (1975) 28 CCC (2d) 482 (Ont CA).

⁸³(1991) 68 CCC (3d) 251 (Ont CA).

⁸⁴At 262.

acquittal. In *Savard and Lizotte v The King*⁸⁵ the court laid down the principle that where the appellate court finds that there is no evidence to support a conviction on the basis of liability advanced by the crown at trial, a court should enter an acquittal rather than order a retrial which would enable the crown to place before the jury a new theory of liability not relied upon at trial.

In *Corbett v The Queen*⁸⁶ the court held that the Criminal Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence, but also where it is unreasonable.⁸⁷ The court explained that a court of appeal

must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable.⁸⁸

The court explained its role in determining whether a verdict is unreasonable as follows

This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is "unreasonable", not "unjustified".⁸⁹

The court concluded that the proper test to determine whether a

⁸⁵(1945) 85 CCC 254 I CR 105, [1946] SCR 20 (5:0). See Martin JC *Martin's Annual Criminal Code* 1994 ed CC/1002 for a discussion of that case.

⁸⁶(1973) 14 CCC (2d) 385 (SCC).

⁸⁷See *supra* text at note 76 for the wording of the specific provision.

⁸⁸At 386.

⁸⁹*Id.*

verdict is unreasonable is

whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered.⁹⁰

The general approach in Canadian law is that an acquittal is entered if the question, as set out above, is answered in the negative. Accordingly, a court of appeal in Canada either dismisses an appeal based on this ground, or enters an acquittal. The third option, namely to order a new trial is not, in practice, applied in disposing of such appeals.⁹¹ The only exception to this practice is, if the court finds that the verdict is unreasonable, but there is some evidence to support a conviction on a lesser charge, the court will be prepared to order a new trial on the lesser charge.⁹²

If a court of appeal allows an appeal from a conviction, it can only order a new trial in respect of an offence against which the person who has been convicted appeals. This means that it cannot order a new trial of the full offence charged in the trial court.⁹³ Similarly, in the absence of a crown appeal against an acquittal, the court of appeal cannot substitute a conviction for a conviction of an offence of which the accused has been acquitted when it allows an appeal from

⁹⁰At 389.

⁹¹Not a single case could be traced where a court of appeal ordered a new trial upon setting aside a conviction on this ground.

⁹²See *Regina v Ruptash* (1982) 68 CCC (2d) 182 (Alb CA). In that case the accused appealed against his conviction for first degree murder. The court found the conviction for first degree murder unsafe, but some evidence to support a conviction for second degree murder. The court ordered a new trial limited to a charge for second degree murder.

⁹³See *Guillemette v The Queen* (1986) 26 CCC (3d) (SCC).

a conviction for a related offence.⁹⁴ However, where on an appeal by the accused the court of appeal quashes the conviction and orders a new trial, it may order a new trial for an alternative charge which had been dismissed at the previous trial *solely because of the application of the doctrine precluding multiple convictions* even though the crown has not appealed against this latter acquittal.⁹⁵

A person convicted of an offence tried on indictment may also appeal to the court of appeal against sentence passed on him.⁹⁶ The court of appeal is required to consider the fitness of the sentence imposed and either vary the sentence within the limits prescribed by law or dismiss the appeal.⁹⁷ In *Hill v The Queen* it was held by the Supreme Court that, in terms of the above power, the court of appeal is also authorised to increase a sentence even though no counter-appeal has been filed by the crown.⁹⁸ In view of this decision, it seems as if a court on retrial may also be free to impose a more severe sentence than the one initially imposed, as long as the sentence is within the prescribed limits.

As indicated in chapter six, the prosecution may also appeal against an acquittal handed down in a trial on indictment.⁹⁹ However, such

⁹⁴See *R v Sullivan* (1991) 63 CCC (3d) 97 (SCC).

⁹⁵See *R v Letendre* (1979) 46 CCC (2d) (BCCA).

⁹⁶Section 675(1)(b).

⁹⁷Section 687(1).

⁹⁸(1975) 23 CCC (2d) 321 (SCC).

⁹⁹See *supra* under 6.3.2. A further appeal to the Supreme Court of Canada may be taken by the crown from the judgment of the court of appeal of the province which dismissed such an appeal from an acquittal (section 693(1)(a)). A similar right of appeal may be exercised by the accused, namely against a successful appeal by the

appeals are limited to questions of law only. In disposing of the crown appeal the court may dismiss the appeal¹⁰⁰ or it may allow the appeal, set aside the verdict and either enter a verdict of guilty in respect of the offence if in its opinion the accused should have been found guilty except for the error of law, and then pass sentence, or order a new trial.¹⁰¹ However, where the verdict of acquittal came from a court composed of a judge and a jury, the court, when setting aside a verdict, cannot enter a verdict of guilty but must order a new trial.¹⁰² In order to obtain a new trial, the crown must discharge the onus that, if the trial judge had properly instructed himself on the law or had properly directed the jury, the verdict of acquittal would not necessarily have been the same.¹⁰³ In *Regina v Morin*¹⁰⁴ the court explained the onus which the crown must discharge as follows¹⁰⁵

[T]he onus is a heavy one and ...the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree

crown to the provincial court of appeal (section 691(1)(a).

¹⁰⁰Similar to the disposal of an appeal against a conviction, the court may dismiss the appeal if, in its opinion, no miscarriage of justice occurred.

¹⁰¹Section 686(4). Before the court may enter a conviction (instead of directing a new trial), it must be demonstrated that all the findings necessary to support a verdict of guilty had been made either explicitly or implicitly or not be in issue. See *R v Cassidy* (1989) 50 CCC (3d) 193.

¹⁰²Section 686(4).

¹⁰³See *Vezeau v The Queen* (1976) 28 CCC (2d) 81 (SCC).

¹⁰⁴(1988) 44 CCC (3d) 193 (SCC).

¹⁰⁵At 221.

of certainty that the outcome may well have been affected by it.

In Canadian law fresh evidence may also, in exceptional circumstances, be introduced on appeal if the court of appeal considers it to be in the interests of justice.¹⁰⁶ Unlike English law which does not provide for an appeal by the crown against an acquittal in a trial on indictment, fresh evidence may be introduced on appeal on the application of either the crown or the defence. Generally, the appeal court has only allowed the crown to tender further evidence to rectify errors or omissions which, if they had been noted at the original trial, would have been rectified. However, where it was not clear if the course of the trial would have differed in any respect if the error had been discovered at trial, then the application by the crown would be refused.¹⁰⁷

The court of appeal is usually reluctant to hear fresh evidence because this would be inconsistent with the institution of a trial by jury. However, Salhany explains that this inconsistency can only arise where the court assumes the function of the jury and either acquits the accused or substitutes one verdict for another. The author submits that¹⁰⁸

[w]here new evidence not available at trial is sought to be raised on appeal, it is difficult to understand how there can be any inconsistency if the court in the end only order a retrial.

The general test applied by the courts in order to determine whether

¹⁰⁶Section 683(1).

¹⁰⁷See *Martin* 989 and *R v Cheung* (1990) 56 CCC (3d) 381 (BCCA).

¹⁰⁸At 9-35.

a new trial should be ordered upon reception of fresh evidence, is the same as that applied by the English Court of Criminal Appeal.¹⁰⁹ If the evidence raised on appeal is conclusive in nature, the court of appeal may deal finally with the matter.¹¹⁰ However, if the evidence is not "of such compelling influence to enable the Court to finally come to a decision"¹¹¹ it may, in the court's view, be of sufficient strength to reasonably affect the verdict of a jury.¹¹² In such cases a new trial may be ordered so that the case together with all of the evidence may be considered by a jury.¹¹³

8.3.3 New trials on appellate reversal of convictions handed down in lower courts

Until 1976, an appeal from a trial for an offence punishable on summary conviction constituted an appeal by way of a trial *de novo*. In that year, the trial *de novo* procedure was substituted for an appeal on the record of the proceedings in the lower court.¹¹⁴ At present

¹⁰⁹See *supra* under 8.2.2, text at note 16.

¹¹⁰See Salhany 9-37.

¹¹¹*R v Miller* (1981) 59 CCC (2d) 131, 134.

¹¹²In *R v Buckle* (1949) 94 CCC 84, 85-86 the test was for the first time formulated as follows. "Is the evidence of sufficient strength that it might reasonably affect the verdict of the jury and would it be a miscarriage of justice not to allow it to go before the jury to be weighed by that jury in the light of all the evidence".

¹¹³*Id.* See also *R v Roberts* (1977) 34 CCC (2d) 177.

¹¹⁴See in general Salhany 9-50 and 9-51. The author points out that the Minister of Justice explained in a news release that there was no longer any justification for the *de novo* appeal procedure. According to the Minister, the *de novo* appeal procedure was formulated when most cases for summary offences were heard by lay magistrates and it was thought essential to permit a dissatisfied party the opportunity of having the case heard by a legally trained judge. However, in view

the accused may appeal against a conviction or against sentence passed on him.¹¹⁵ The prosecution may also appeal against an order that stays proceedings on an information or dismisses an information, or against sentence passed on the accused.¹¹⁶ An appeal may be taken by both these parties on matters of law, mixed law and fact, or fact alone. The court of appeal is given the same powers as a court of appeal in indictable cases, including the power to order a new trial.¹¹⁷ The same principles which guide a provincial court of appeal in disposing of appeals in respect of indictable offences are applied by courts hearing appeals for summary offences.¹¹⁸

The Code also provides for an appeal by way of case stated based on a transcript of evidence or an agreed statement of facts.¹¹⁹ Such an appeal lies against a conviction, judgment or verdict of acquittal or other final order or determination of a summary conviction court on a question of law or excess of jurisdiction, or from a refusal to exercise jurisdiction.¹²⁰ The appeal judge may affirm, reverse or modify the

of the broad availability of trained magistrates in Canada at the time of the proposed amendment, this justification no longer existed. It was also felt that the procedure of *de novo* trials is unnecessarily time consuming and a serious inconvenience for witnesses.

¹¹⁵Section 813 (a) (i) and (ii).

¹¹⁶Section 813 (b)(i) and (ii).

¹¹⁷Section 686(1) is incorporated into the appeal provisions for summary proceedings by section 822(1) of the Act. See *supra* under 8.3.2. for a discussion of these powers.

¹¹⁸See Bolton 71. See also *supra* under 8.3.2 for a discussion of these principles.

¹¹⁹Section 830(1).

¹²⁰*Id.* In *R v Appleby* (1974) 21 CCC (2d) 282 (NBSC) the court held that a "determination" implies an ending or finality of a controversy and does not apply to interlocutory matters which are not pertinent to

conviction, judgment or verdict of acquittal or other final order or determination.¹²¹ He may also remit the matter to the summary conviction court with his opinion.¹²² However, no power is vested in the court to order a new trial.¹²³

It was pointed out above that the trial *de novo* appeal procedure, previously applied in summary proceedings, was substituted for an appeal on the record in 1976 and that the latter is at present the standard form of appeal from summary convictions or acquittals. The legislature nevertheless deemed it necessary to reserve a discretion in a court of appeal to order that such an appeal be heard by way of trial *de novo*. Section 822(4) of the present Criminal Code provides that an appeal court may order that an appeal be heard by way of *trial de novo* if it

...is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*.

bringing finality to the charge.

¹²¹Section 834(1)(a).

¹²²Section 834(1)(b).

¹²³From the abovementioned two forms of appeal against summary convictions or acquittals a further appeal may be taken by the accused or the prosecution to the court of appeal of the province with leave of that court, on any ground that involves a question of law (section 839(1)). The provincial court of appeal may (on such an appeal) exercise the same powers that it possesses in the case of an appeal from a conviction or acquittal of an indictable offence (section 839(2)). A new trial may be ordered if the appeal is from a section 812 appeal court. The Criminal Code does not provide for a further appeal to the Supreme Court of Canada from a summary conviction or acquittal.

In *R v Faulkner*¹²⁴ the court indicated that the trial *de novo* procedure would now be used only in exceptional cases, for example, where there had been a failure of the judicial system to provide natural justice.¹²⁵ On an appeal by trial *de novo*, the accused is in exactly the same position as he was after the entry of his plea before the summary conviction court; the findings of the lower court are irrelevant to the appeal and the crown is required to prove every element of the offence charged.¹²⁶

In chapter six¹²⁷ and above¹²⁸ it was indicated that the prosecution may also appeal against an acquittal or final order in favour of the accused for a summary offence. It was further indicated that the Ontario Court of Appeal recently held that the prosecution's right of appeal (on the record of proceedings) from summary proceedings include the right to appeal on questions of law as well as questions of fact.¹²⁹ The abovementioned power of the court of appeal to hear an appeal by way of trial *de novo* is contained in the general provisions of the Code which deal with the disposition of appeals from summary convictions or acquittals. Therefore, if the Code is interpreted literally, the prosecution may also obtain a trial *de novo* on appeal if the court of appeal deems it to be in the interest of

¹²⁴(1977) 37 CCC (2d) 26 (NS Co Ct).

¹²⁵At 27. In *R v Steinmiller* (1979) 47 CCC (2d) 151 (Ont CA) the court held that in appropriate circumstances, the discovery of fresh evidence may provide grounds for allowing an application under subsection (4).

¹²⁶See Salhany 9-59.

¹²⁷*Supra* under 6.3.3.

¹²⁸See *supra*, text at note 120.

¹²⁹See *Regina v Century 21 Ramos Realty* discussed in chapter six *supra* under 6.3.3, text at note 92.

justice, or if the accused appeals against a conviction and a *de novo* trial is granted, new evidence may also be introduced by the prosecution. The constitutionality of these provisions has not as yet been considered by the Supreme Court of Canada. However, in *Corporation Professionnelles des Medecins du Quebec v Thibault*¹³⁰ the Supreme Court held that provincial legislation which gave the complainant and the crown a right of appeal by way of a trial *de novo* from an acquittal for a provincial offence, was of no force and effect by reason of section 11(h) of the Charter of Rights and Freedoms.¹³¹

Similar to the *de novo* trial procedure provided for in the Canadian Criminal Code, the *de novo* appeal procedure provided for in the provincial legislation which was under scrutiny in the above case, provided that the hearing on appeal takes the form of a trial; that the judge hears witnesses; that the parties may adduce evidence both as to credibility of those witnesses and as to the essential facts of the case and that the prosecutor is also entitled to adduce evidence whether or not it had been adduced at the first trial.

The facts of that case were as follows. The accused was charged with statutory offences which prohibit the unlawful practice of medicine. Following a trial, the charges against him were dismissed for lack of evidence identifying the accused. The prosecution then appealed against this acquittal to a superior court in terms of the abovementioned provincial legislation. The issue before the Supreme Court was whether the appellant was, in terms of section 11(h) of the Charter of Rights and Freedoms, "finally acquitted" by the decision of the judge of the court of first instance. If so, section 11(h) guaranteed him the right not to be tried again for these offences. As indicated

¹³⁰(1988) 42 CCC (3d) 1 (SCC).

¹³¹See chapter three *supra* under 3.3.1 for the wording of this section.

above, the court reached the conclusion that a prosecution appeal by way of trial *de novo* as provided for in the provincial legislation infringes on the accused's constitutional right against double jeopardy as set out in section 11(h) of the Charter. The reasons advanced by the court for its conclusion can be summarised as follows.¹³²

Initially, the court reiterated its views expressed in the *Morgentaler* case,¹³³ namely that an accused, in terms of section 11(h), is not *finally acquitted* until all the appeals provided for by law have been exhausted. However, the court stated that the fact that a proceeding is called an "appeal" is not sufficient to make it a true appeal and so prevent the accused from relying on section 11(h) of the Charter of Rights. In the court's view, one should not confuse an appeal which is decided in accordance with the record established in the lower court with a hearing at which each party adduces his evidence over again and may even add to it in the event of any deficiency. The appeal by trial *de novo* is actually a new trial disguised as an appeal; it is as if, once the accused was acquitted, the prosecutor has filed a new information alleging the same offence based on the same facts. In the court's view, this is precisely the type of abuse that section 11(h) of the Charter seeks to prevent. Section 11(h) guarantees the accused the right to plead *autrefois acquit* if the prosecution attempts to have him tried again for an offence of which he has been acquitted. According to the court, the provincial legislation which is under scrutiny in this case bars him from raising this argument by authorising the prosecution to repeat the trial as part of the appeal proceedings. This legislation was accordingly found to be in violation of the accused's constitutional right against double jeopardy.

¹³² These reasons are set out at page 9 of the judgment delivered by the court.

¹³³ *Supra* at 542.

Finally, no provision is made in the Code for the ordering of a new trial by a superior court in disposing of a matter taken on review by means of the extraordinary remedy of *certiorari*. In Canadian law, *certiorari* is mostly used where the applicant complains that the lower tribunal was improperly constituted or exceeded or abused its jurisdiction.¹³⁴ The Supreme Court also interpreted certain provisions in the Code, which place limitations on the use of this remedy, as revealing an intention of the legislature to preclude the co-existence of the two remedies of *certiorari* and appeal and to compel a recourse to appeal procedures where they are available.¹³⁵ The court laid down the principle that if an accused pleads and the case proceeds on the merits, his taking exception to the jurisdiction of the court can then only be made by way of appeal.¹³⁶ However, a plea of *autrefois acquit* will most probably not be available to an accused charged again if the proceedings at the first trial were declared a nullity by the superior court.

8.3.4 Summary

The following principles apply regarding appeals against convictions or acquittals handed down in a superior courts.

* An accused convicted in a superior court may appeal to the provincial Court of Appeal on a question of law, a question of fact, a question of mixed law and fact or any other ground which appears to the court of appeal to be a sufficient ground for appeal.

¹³⁴Bolton 134.

¹³⁵See *R v Sanders* (1970) 2 CCC 57 (SCC).

¹³⁶*Id.*

* If a conviction is quashed on the basis of an error of law and the matter cannot be set right by the court of appeal itself, the court investigates whether there is admissible evidence, despite the error, on which a jury may conclude that the appellant is guilty. If this question is answered in the affirmative, the court may order a new trial. On the other hand, if there is a strong possibility of an acquittal, the court of appeal may be reluctant to order a retrial.

* If an acquittal is quashed on an appeal brought by the prosecution and the court is unable to dispose finally of the matter, a retrial will only be ordered if there is a reasonable degree of certainty that if the error had not occurred, the verdict of acquittal would not have been given.

* If a conviction is quashed on the basis of a miscarriage of justice, it is also required that there be a reasonable probability that the result of the proceedings (at the original trial) would have been different had the error not occurred.

* Canadian courts of appeal have permanently stayed proceedings on the basis that the judicial process has been delayed. It follows that Canadian courts have recognised that serious violations of human rights may bar a second prosecution.

* Where the ground of appeal relied on by the person who has been convicted is that the verdict is unreasonable or cannot be supported by the evidence, Canadian courts either dismiss the appeal or enter an acquittal. The basic premise is that if the trial had been error-free, the crown ought not to get a second opportunity to prosecute the accused, thereby enabling it to place before the jury a new theory of liability not relied upon at the first trial.

* In the absence of a crown appeal against an acquittal, the court may not substitute a conviction for an offence of which the accused was acquitted when it allows an appeal from conviction of a related offence. However, it may impose a more severe sentence on appeal (also in the absence of a counter-appeal by the prosecution) and probably also on retrial.

* The test whether a new trial may follow on receipt of new evidence on appeal is the same as applied by the English Court of Appeal.

The following principles apply regarding appeals against convictions or acquittals handed down in lower courts.

* Both the accused and the prosecution may appeal against final verdicts handed down in lower courts on matters of law as well as on matters of fact. The powers of the courts of appeal are the same as in indictable offences.

* Unlike the position in English law, the appeal from lower Canadian courts is confined to the record of the proceedings. However, the legislature reserved a discretion in a court of appeal to order that an appeal be heard by way of trial *de novo* if it is of the opinion that the interests of justice would better be served more effectively in this manner. The courts have indicated that the *de novo* procedure would be used only in exceptional cases, for example where fresh evidence has come to light. The constitutionality of the provision (where the prosecution appeals against an acquittal) has not as yet been considered by the Supreme Court. Similar provincial legislation has nevertheless been viewed by the court to be unconstitutional; it has been held that a prosecution appeal by way of trial *de novo* as provided for in the provincial legislation infringes on the accused's

right against double jeopardy as set out in section 11(h) of the Charter. It remains to be seen if the same reasoning will apply if the discretionary powers vested in a court of appeal to hear a matter *de novo* (also in favour of the prosecution) is subjected to constitutional scrutiny.

8.4 INDIAN LAW

8.4.1 General

In Indian law wide powers are conferred on appellate tribunals to order retrials on reversal of both convictions and acquittals. The courts justify this practice in terms of the "continuing jeopardy" theory.¹³⁷ However, in exercising their discretion to order a retrial, Indian courts have not altogether denied the accused protection against double jeopardy. In fact, close scrutiny of decisions of the various High Courts and the Supreme Court reveals that there has been a reluctance on the part of the courts to order retrials if further proceedings might be viewed as a harassment of the accused.

8.4.2 The power of appellate tribunals to order new trials on reversal of convictions or acquittals

As already discussed, the Indian Code of Criminal Procedure authorises the High Court, *inter alia*, to order a retrial of an accused whose acquittal (on a prosecution appeal), had been set aside by that

¹³⁷See Pillai 301. The author cites the early case of *Queen Empress v Jabanulla* 23 C 975, 977 (1895). See also the decision of the Supreme Court of India in *Kalawati v State of Himachal Pradesh* discussed in chapter six *supra* under 6.4.2.

court.¹³⁸ It was also pointed out that although the Code expressly prohibits the High Court, in the exercise of its revisionary powers, to convert a finding of acquittal into a conviction, the Supreme Court of India nevertheless held that the High Court may order a retrial of an accused in exceptional circumstances.¹³⁹

The Code also provides for appeals against convictions.¹⁴⁰ These lengthy provisions will not be discussed in detail. Suffice it to say that the ambit of an appeal from an order of acquittal or conviction is the same except that an appeal against a conviction is as of right and lies to courts of different jurisdictions depending on the nature of sentence, the kind of trial and the court in which it was held. An appeal against an order of acquittal can only be made to the High Court by the state or by a complainant (where the case started on complaint) with the special leave of the High Court. Similar to appeals against acquittals, appeals against convictions lie on matters of fact as well as matters of law.¹⁴¹

¹³⁸See section 386(a) of the Code of Criminal Procedure Act 1973 (1 of 1974).

¹³⁹See *Chinnaswamy v State of AP* discussed in chapter six *supra* under 6.4.4. The court allowed this practice despite recognising that the ordering of a retrial on review of an acquittal would in fact amount to an indirect method of converting an acquittal into a conviction.

¹⁴⁰Section 374 of the Code.

¹⁴¹A further appeal to the Supreme Court of India may be taken in the following circumstances: (a) when the High Court in exercising its original extraordinary criminal jurisdiction convicts a person (section 374(1) of the Code); (b) when the High Court on appeal reverses an order of acquittal and sentences a person to death or to imprisonment for life or to imprisonment for a term of 10 years or more (section 379 of the Code); (c) when the High Court certifies that a case involves a substantial question of law concerning the interpretation of the Constitution (article 132(1) of the Indian Constitution) or, when such certificate is refused by the High Court and the Supreme Court grants special leave to appeal from such a decision (article 132(2) of the

The powers of the court to dispose of an appeal against a conviction are in essence the same as those which are provided for in dealing with appeals against acquittals. Apart from the power to dismiss the appeal, section 386(b) of the Code also provides that the court may

- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such Appellate Court or committed for trial or
- (ii) alter the finding, maintaining the sentence or
- (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not as to enhance the same.

In *State of AP v Thadi Narayana*¹⁴² the court held that the words "alter the finding" should be limited to the finding of conviction against which the accused has appealed. This means that the court cannot alter the finding by substituting the conviction against which the accused has appealed with a conviction of a greater offence for which the accused had been acquitted by the trial court. It is also specifically provided that, if the accused appeals (in the absence of a counter-appeal by the prosecution), the court may not increase the sentence imposed by the trial court.

In *Ukha Kolhe v State of Maharashtra*¹⁴³ the Supreme Court

Indian Constitution); (d) when the High Court withdraws for trial before itself any case from any court subordinate to its authority and convicts the defendant and sentences him to death or certifies that the case is a fit one for appeal to the Supreme Court (article 134(1) of the Constitution) or (e) when the Supreme Court itself grants special leave to appeal from any decision of a court or a tribunal (article 136 of the Constitution).

¹⁴²AIR 1962 SC 240.

¹⁴³AIR 1963 SC 1531.

formulated the policy that retrials should be ordered only in exceptional circumstances. The court stated that the following circumstances would justify a retrial:¹⁴⁴ where the trial court had no jurisdiction or that the trial was vitiated by serious illegalities or irregularities; or on account of misconception of the nature of the proceedings there had been no real trial; or if the prosecutor or an accused, for reasons over which they had no control, had been prevented from leading evidence material to the charge, and in the interest of justice the appellate court deemed it to be appropriate, in the light of the circumstances of the case, that the accused should be tried again. This is not an exhaustive list of circumstances in which retrials have been ordered. However, decisions of the various High Courts and the Supreme Court reveal that the courts have also taken into account that a new trial may amount to oppressive state conduct and possible harassment of the accused.

A number of decisions of Indian courts serve as illustrations of this approach. In *Abinash Chandra Bose v Bimal Krishna Sen*¹⁴⁵ the Supreme Court held that an accused who appealed on the facts against his conviction for misappropriation of his client's money could not be tried again in new proceedings. The court argued that it would amount to further harassment of the accused and an additional opportunity for the prosecution to advance evidence. The fact that the prosecution could have tendered the evidence at the first trial (had it acted properly), convinced the court that a second trial would be oppressive to the accused. In *State of Punjab v Gurmit Singh*¹⁴⁶ the High Court of Punjab and Haryana refused to order a retrial on the

¹⁴⁴At 1537.

¹⁴⁵AIR 1963 SC 316.

¹⁴⁶1972 74 PLR 845.

ground that the accused's trial had previously been postponed on several occasions. The High Court dismissed the prosecution appeal on the basis that the accused had already been harassed in the first trial. In *Bishan Singh v State of Rajasthan*¹⁴⁷ the trial court neglected to do its duty to frame correct charges in accordance with the law. The accused appealed against their convictions on the basis that they were irregularly charged. The court allowed their appeal, arguing that the mistake amounted to a serious illegality which had materially prejudiced the accused. The court entered an acquittal instead of ordering a retrial; it held that the accused, who had already faced the agony of a prolonged criminal proceeding including detention in jail for two years, could not be subjected to the further harassment in a new trial.¹⁴⁸ The court made the following important comment¹⁴⁹

Justice is not one sided. It has many facets. While it is incumbent upon the Court to see that the guilty persons do not escape punishment, it is even more necessary to see that persons accused of crimes are not indefinitely harassed. The scales of justice have to be kept on an even balance whether for the accused or against him, whether in favor of the state or not. In these circumstances, I am not prepared to order a retrial in the case because of the facts that appear here.

However, in other cases the Supreme Court and High Courts held that retrials should not be refused merely on the ground of harassment of the accused if the circumstances of the case made it otherwise desirable; in other words, if it would be in the interests of the proper

¹⁴⁷1973 Cri LJ 1079.

¹⁴⁸At 1081.

¹⁴⁹At 1082.

administration of justice to order a retrial.¹⁵⁰ It may therefore be concluded that Indian courts balance the conflicting interests of the accused and society in the exercise of its discretion to order a retrial.

The Indian Code of Criminal Procedure also makes provision for the receipt of fresh evidence on appeal.¹⁵¹ These provisions have been interpreted by the Supreme Court to mean that fresh evidence may be introduced on appeal irrespective of whether the prosecution or the defence institute the appeal.

In *Rajeswar Prasad Misra v State of West Bengal*¹⁵² the Supreme Court considered the interrelationship between the provisions for receiving fresh evidence on appeal and for ordering retrials. In that case the prosecution appealed against an acquittal. The High Court deemed it necessary to hear additional evidence on behalf of the prosecution. In the light of this additional evidence the court then set aside the acquittal on the basis that there was sufficient evidence to convict the accused of the crime charged. The accused appealed against this decision to the Supreme Court, arguing that the High

¹⁵⁰See *Madhukdhari Singh v Janardhan* 1966 Cri LJ 307 (SC) where the court ordered a retrial on the ground that the first trial was not properly conducted and *S v Kishan Dayal* AIR 1952 HP & Bilaspur 46 where the court ordered a retrial despite the argument that it would result in harassment of the accused. Both these cases are discussed in detail by Pillai 364-365.

¹⁵¹Subsection (1) of section 391 of the Code provides that "[in] dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate". Subsection (2) provides that "[w]hen the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal".

¹⁵²AIR 1965 SC 1887.

Court acted beyond the jurisdiction conferred by the statute in receiving additional evidence which had helped the prosecution to strengthen its case. The accused relied on the earlier decision of the Supreme Court in *Abinash Chandra Bose v Bimal Krishna Sen.*¹⁵³ In that case the court barred the retrial of an accused whose conviction had been set aside on appeal on the ground that it would be oppressive to the accused to be tried again in circumstances where the prosecution could have supplied additional evidence at the first trial. Therefore, the accused in *Rajeswar* argued that the same considerations, namely the denial of a second opportunity to the prosecution to fill in the gaps in the case, should also be applied if fresh evidence was to be presented on appeal. The Supreme Court rejected this argument. It held that although there is some analogy between the power to order a retrial and the power to take additional evidence on appeal

....the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives the power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases.¹⁵⁴

Pillai submits that the provisions in the Code which authorise a court of appeal to hear additional evidence in fact reflects an intention of the legislature to limit the need for ordering retrials.¹⁵⁵ The above discussion of Indian decisions demonstrates that the courts have been

¹⁵³See *supra*, text at note 145 for a discussion of this decision.

¹⁵⁴At 1891. See Pillay 357-359 for a detailed discussion of that case.

¹⁵⁵At 357.

cautious about ordering retrials. However, after a proper consideration of the case law, it cannot be stated categorically that the courts have preferred to hear additional evidence on appeal rather than order retrials with a view to avoid subjecting the accused to a new trial.

Concerning conviction and sentence on retrial, the general approach in Indian law is that if there is only an appeal by an accused against his conviction, the High Court may order a retrial only for the offence against which he has appealed.¹⁵⁶ This means that in the absence of an appeal against an acquittal, a retrial of the accused may not be ordered for an offence (or offences) of which he had been acquitted at the first trial. However, if the state appealed against an acquittal, or the High Court exercised its revisionary powers in terms of section 401 of the Code, *suo motu*, or at the instance of the prosecution,¹⁵⁷ the High Court may order a retrial of an accused for an offence of which he had been acquitted provided that the accused was given an opportunity to be heard.¹⁵⁸

In respect of resentencing, the provisions of section 386 of the Code clearly indicate that in the event of an appeal by the accused against his conviction, his sentence may not be increased on appeal.¹⁵⁹ Although there is no authority on the specific point, this section can also be interpreted to mean that on reconviction at retrial, after the initial conviction had been set aside on appeal, the court is prohibited from imposing a more severe sentence than that which had

¹⁵⁶*Gopalan v State of Kerala* 1962 2 Cri LJ 427.

¹⁵⁷See *supra* chapter six under 6.4.4 for a discussion of this provision.

¹⁵⁸*Gopalan v State of Kerala* at 432.

¹⁵⁹See section 386(b)(ii) and (iii) discussed *supra*, text at note 142.

been imposed at the original trial. However, if the prosecution appeals against the acquittal of a more serious offence handed down by the trial court, it appears that the court retrying the case would be free to retry the accused on the original charge and sentence him in accordance with the law.¹⁶⁰

8.4.3 Summary

* Generally, appeals and new trials are not regarded as a violation of the rule against double jeopardy in Indian law. Prosecution appeals and new trials are justified in terms of the "continuous jeopardy" theory.

* Nevertheless, in considering the appropriateness of new trials, Indian courts have recognised that the accused ought to be protected against state abuse of power. In a number of cases Indian courts have refused to order new trials on the basis that a subsequent prosecution may be viewed as harassment of the accused. Potential harassment has for instance been identified in circumstances where a conviction was set aside on the basis of insufficient evidence; it was felt that a second trial would unduly advantage the prosecution by enabling it to bring additional evidence which could have been supplied at the first trial.

* However, courts have allowed retrials despite potential harassment if the court considered it to be in the interests of the proper administration of justice to order a new trial. Therefore, in deciding on the appropriateness of a new trial, Indian courts attempt to balance the conflicting interests of the state and the accused.

¹⁶⁰See Pillai 370.

* The receipt of fresh prosecution evidence on appeal is not *per se* regarded as an infringement on the accused's double jeopardy rights.

* A court of appeal may not substitute a conviction against which the accused has appealed for a conviction of a more serious offence of which the accused had been acquitted at the trial. If the state appeals against an acquittal, the court of appeal may not substitute the acquittal for a conviction, but may order a new trial for the offence of which the accused was acquitted.

* A sentence may not be increased on appeal if only the accused appeals against his conviction and/or sentence. Although there is no direct authority on the issue, the same apparently applies as regarding the imposition of punishment at retrial. However, if the prosecution appeals against an acquittal and a retrial is ordered, a more severe sentence might be imposed by the court retrying the case.

8.5 THE LAW OF THE UNITED STATES OF AMERICA

8.5.1 General

In chapter six it was pointed out that the Supreme Court of the United States consistently held that an accused may not be tried again for an offence of which he had previously been acquitted by a court of trial.¹⁶¹ In that discussion it was also indicated that the Supreme Court in recent years limited the definition of an acquittal to a

¹⁶¹See *Kepner v US*; *Sanabria v US*; *US v Martin Linen Supply Co* and *US v Scott* discussed *supra* under 6.4. The only exception to this rule is the one recognised in *US v Wilson*, namely, that the rule against double jeopardy does not bar a state appeal against a judge's post-trial discharge following a conviction by the adjudicator of fact. See *supra* under 6.5.4, text at note 158 for the reasons advanced by the court in making this exception.

termination of proceedings in favour of the accused based on the factual merits of the case.¹⁶²

In doing this, the Supreme Court opened the door for prosecution appeals against so-called dismissals (terminations of proceedings in the trial court on a different basis than that of the factual merits of a case), and also for successive prosecutions of accused in new trials on appellate reversals of so-called dismissals.¹⁶³

The shift in emphasis that occurred in the definition of an acquittal can to an extent be ascribed to the approach adopted by the Supreme Court in cases dealing with the constitutional permissibility of new trials on appellate reversal of convictions. These decisions are considered in detail in the following paragraphs. The issue of whether a *de novo* trial system is regarded as an infringement of the rule against double jeopardy will consequently be considered briefly. Finally, the double jeopardy implications of convictions and sentence on retrial will be considered.

8.5.2 The permissibility of a retrial on reversal of a conviction by a higher tribunal

The first instance in which the Supreme Court considered in any detail the double jeopardy implications of an appellate reversal of a conviction was in the case of *US v Ball*.¹⁶⁴ As pointed out in

¹⁶²As pointed out in chapter six, a termination of proceedings in favour of the accused on this basis is regarded as an acquittal for the purpose of double jeopardy protection, even if it is based upon erroneous substantive or evidentiary legal rulings. See *Sanabria v US* discussed in chapter six *supra* under 6.5.5, text at note 185.

¹⁶³See *US v Scott* discussed *supra* under 6.5.5.

¹⁶⁴*Supra*.

chapter six, the English rule that a defective indictment cannot legally place an individual in jeopardy was rejected in *Ball*;¹⁶⁵ the court held that an accused who had been acquitted on the general issue of guilt or innocence may not be tried again, even if the indictment on which he had been charged in the first trial was defective.¹⁶⁶ However, the Supreme Court was not prepared to accord the same finality to an appellate reversal of a *conviction* on a defective indictment. It held that if a *conviction* is set aside on appeal as a result of the fact that the indictment was irremediably defective, the accused may be re-indicted in a new trial. The court relied, *inter alia*, on an early English case,¹⁶⁷ but mainly based its conclusion on the premise that

[t]heir plea of former conviction cannot be sustained because upon a writ of error *sued out by themselves* the judgment and sentence against them were reversed and the indictment ordered to be dismissed.¹⁶⁸

Because the Supreme Court did not give sufficient reasons for the disparity in its treatment of acquittals and reversed convictions based on defective indictments, several attempts have been made to explain its *rationale*. In *Trono v US*¹⁶⁹ the theory was advanced that by successfully appealing his erroneous conviction the accused "waives" the protection against being retried for the same offence which was

¹⁶⁵See chapter six *supra* under 6.5.2, text at note 131 for a detailed discussion of the court's decision in this regard.

¹⁶⁶*Id.*

¹⁶⁷At 672 of the majority opinion Mr Justice Story referred to *R v Drury* 3 Cox CC 544 3 Car & K 193 as comparative authority for his point of view.

¹⁶⁸At 672. (My emphasis).

¹⁶⁹199 (US) 521, 533 (1905).

afforded him by the original judgment. The waiver theory was also endorsed in a series of decisions in the middle part of this century.¹⁷⁰

These cases are inconsistent because in some cases the waiver theory was only applied where the accused requested a new trial on appeal but in others it was applied where the accused asked for a new trial as an alternative to a motion for acquittal or simply moved for a judgment of acquittal.¹⁷¹ What is more, in decisions that followed on *Ball*, the Supreme Court did not distinguish between appellate reversal of convictions based on procedural errors and reversals based on insufficient evidence, but instead cited *Ball* to justify the assertion that appellate reversals did not impinge on double jeopardy.¹⁷²

In the 1960's, American legal commentators advanced valid criticisms against the waiver theory.¹⁷³ It was submitted that a waiver connotes a voluntary act which is absent if the accused appeals against his conviction and moves for an acquittal without

¹⁷⁰*Bryan v US* 338 US 552 (1950) (where the defendant successfully appeals against his conviction, he waives any double jeopardy protection that he might have); *Sapir v US* 348 US 373 (1955) (the court limited the *Bryan* rule by holding that if a defendant requests a new trial, he may not rely on double jeopardy); *Yates v US* 354 US 298 (1957) (applying the *Bryan* waiver rule to cases in which the defendant asks for a new trial in the alternative to a motion for acquittal, but stating that appellate courts have full authority to order a retrial as a remedy for evidentiary insufficiency even if the defendant only moved for a judgment of acquittal).

¹⁷¹See *id.*

¹⁷²See *US v Forman* 361 US 416 (1960) which confirmed this approach.

¹⁷³See Mayers DK and Fletcher L Yarbrough "Bis vexari: New trials and successive prosecutions" *Harvard Law Review* Vol 74 1960 1.

requesting a new trial.¹⁷⁴ These authors also expressed the view that a waiver theory must start with the assumption that the Constitution *itself* protects the defendant from a new trial after appeal in the absence of his consent. They explain that if this is correct, the criticism by Mr Justice Holmes of the waiver theory in *Kepner v US*¹⁷⁵ would seem indisputable. In that case Justice Holmes commented that

[i]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution.¹⁷⁶

In the abovementioned legal commentators' views, the continuing jeopardy theory is a more satisfactory explanation or reason why an accused may be tried again on reversal of his conviction.¹⁷⁷ Their arguments amount to the following.¹⁷⁸ The word "jeopardy" was substituted for "trial" in the final amendment of the Constitution. The concept "jeopardy" may be construed to mean that it continues until the final settlement of any prosecution. This means that an unappealed conviction, by its finality, would bar a new proceeding by the government. However, a correction of error on appeal may be viewed

¹⁷⁴*Id.* At 6 the authors stated that "it is obvious that a waiver rationale here, as elsewhere, serves only to state the conclusion without explaining the reason for it. The defendant, if given his choice, would prefer both to have and eat his cake, but the term waiver connotes a voluntary act".

¹⁷⁵See chapter six *supra* under 6.5.2 for a discussion of this case.

¹⁷⁶At 135 of the dissenting opinion.

¹⁷⁷The continuing jeopardy theory was first introduced by Mr Justice Holmes in *Kepner's* case. See chapter six *supra* under 6.5.2, text at note 144 for a discussion of the dissenting opinion in that case.

¹⁷⁸Mayers and Fletcher 7.

as a *continuation* of both the jeopardy and the proceedings from which it arises. A new trial on reversal of conviction would therefore be permissible in terms of the constitutional provision against double jeopardy.

However, in decisions that followed in the latter half of this century, neither the waiver theory nor the continuing jeopardy theory has been advanced by the Supreme Court as the only reason that an accused may be tried again on appellate reversal of his conviction. In *US v Tateo*¹⁷⁹ the question raised before the Supreme Court was whether an accused who had his conviction reversed on the ground that his plea of guilty entered during trial was not voluntary, but induced by comments of the trial judge, could be tried again for the same crimes. The court concluded that this case fell squarely within the reasoning of *Ball* and subsequent cases, which allowed the state to retry persons whose convictions had been overturned. The conviction was accordingly reversed and the case remanded to the District Court with instructions to reinstate the original charges.

The decision in *Tateo* was important because the court did not attempt to advance a specific theory which explained the rule, but rather attempted to identify the policies which underlie this rule. Justice Harlan who delivered the majority opinion made the following comments¹⁸⁰

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an

¹⁷⁹337 US 463 (1964).

¹⁸⁰At 466.

accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

These remarks influenced the court considerably in the landmark decision of *Burks v US*.¹⁸¹ In that decision, the Supreme Court limited the ambit of the rule previously endorsed (namely that new trials after appellate reversals of conviction do not implicate the constitutional guarantee against double jeopardy). *Burks* had been charged with robbing a federal bank. His defence was insanity. Three psychiatrists testified on behalf of the defence that he was unable of conducting himself in accordance with the law. The state presented two experts whose testimony was ambiguous on the question of whether his mental state was such that he could conduct himself in accordance with the law. He was convicted by the jury but the case was reversed on appeal because the state had failed to rebut testimony of the defendant's expert witnesses. The Court of Appeals then remanded the case to the District Court with instructions to determine whether the defendant should receive a directed verdict of acquittal or whether a new trial should be ordered. However, The Supreme Court held that the Court of Appeals had erred in its remand order.

¹⁸¹437 US 1 (1978).

The Supreme Court distinguished between reversals due to insufficiency of evidence and reversals due to procedural errors at trial. Chief Justice Burger who delivered the opinion of the court pointed out that the reversal in *Ball*¹⁸² had not been based on insufficient evidence but rather on trial error. The court found that it was unfortunate that cases which had followed on *Ball* had failed to draw this important distinction. In the court's view, this failure had contributed substantially to the "state of conceptual confusion" which had existed in this area of the law.¹⁸³ Therefore, the Supreme Court in *Burks* made use of the opportunity to clarify the law in this area. The court explained that reversal for trial error (as distinguished from reversal for evidentiary insufficiency), does not constitute a decision to the effect that the state has failed to prove its case.¹⁸⁴ In other words, it implies nothing with respect to the guilt or innocence of the accused.¹⁸⁵ It rather amounts to a determination that an accused has been convicted through a judicial process which is defective in some fundamental respect, for example incorrect reception or rejection of evidence, incorrect instructions or prosecutorial misconduct at trial. The court expressed the opinion that if these errors occur

... the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.¹⁸⁶

¹⁸²See chapter six *supra* under 6.5.2, text at note 131 for a discussion of the court's decision in *Ball*.

¹⁸³At 15.

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶At 16.

The court stated that various *rationales* (for example the waiver theory and the continuing jeopardy theory) had been advanced to support the policy of allowing a retrial to correct a trial error. However, the court did not deem it necessary to consider the validity of these theories. Instead, the court expressed the view that the most reasonable justification for this policy is that advanced in *Tateo*¹⁸⁷ in which the court stated that¹⁸⁸

It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

However, the court in *Burks* expressed the view that different considerations come into play if a conviction is reversed on the ground of insufficiency of evidence. In such instances the court argued that

[t]he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not even have been submitted to the jury.¹⁸⁹

The court stated categorically that the double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it had failed to present in the first proceedings.¹⁹⁰ Quoting the famous *dictum* in *Green v US*,¹⁹¹

¹⁸⁷See *supra*, text at note 180.

¹⁸⁸At 466 of the majority opinion of *Tateo*.

¹⁸⁹At 16.

¹⁹⁰At 11.

¹⁹¹See chapter three *supra* for the *dictum* in *Green*.

the court identified this consideration as central to the objective of the prohibition against successive trials.¹⁹²

In casu the court concluded that the appellate court's reversal based on insufficiency of evidence was tantamount to holding that the trial court should have granted the defendant's motion for acquittal. Had the trial court done so, there could be no retrial. Therefore, the mere fact that the *appellate* court had declared the defendant's innocence was irrelevant. In the Supreme Court's view, a determination by some court had been made to acquit the accused. After that no retrial was possible in terms of the double jeopardy provision of the Constitution. Furthermore, the court regarded the fact that the accused had sought a new trial as one of his remedies or even as a sole remedy, as irrelevant.¹⁹³

Burks was confirmed in the same year in *Greene v Massey*¹⁹⁴ and, in 1981, in *Hudson v Louisiana*.¹⁹⁵ Unfortunately, the clarity that *Burks* brought was somewhat obscured in two later decisions of the Supreme Court, namely, *Tibbs v Florida*¹⁹⁶ and *Lockhart v Nelson*.¹⁹⁷ In these decisions the court gave a narrow interpretation of the principles laid down in *Burks* and once again limited the rights

¹⁹²*Id.*

¹⁹³The court rejected the notion (at 8) that a person "waives" his right to a judgment of acquittal by moving for a new trial. Previous cases which suggested that by applying for a new trial an accused waives his right to a judgment of acquittal, even if his appeal had been based on evidentiary insufficiency, were therefore overruled in *Burks*.

¹⁹⁴437 US 19 (1978).

¹⁹⁵450 US 40 (1981).

¹⁹⁶457 US 31 (1982).

¹⁹⁷109 SC 285 (1988).

of a person who had been convicted against double jeopardy.

In *Tibbs* the issue before the Supreme Court was whether a reversal of a conviction by an appellate court based on the *weight* of the evidence, as opposed to the *sufficiency* of the evidence, makes a difference in terms of double jeopardy analysis. In order to understand the distinction drawn in *Tibbs* between *sufficiency* and *weight* of evidence, it is necessary to first of all explain which test is applied in American law to establish evidentiary sufficiency.¹⁹⁸

In *Jackson v Virginia*¹⁹⁹ the Supreme Court formulated the test for a review of the evidentiary sufficiency of a jury's guilty verdict.²⁰⁰ In that case, the court stated that the presumption of innocence requires proof of guilt beyond a reasonable doubt.²⁰¹ This means that, in reviewing a guilty verdict, the appellate court must decide whether any rational adjudicator of fact could find proof of the essential elements of the crime beyond a reasonable doubt.²⁰² In reaching a conclusion about the sufficiency of evidence, the reviewing court must consider the evidence in the light most favourable to the prosecution.²⁰³ However, the evidentiary sufficiency enquiry does not require that the court must also *weigh* the sufficiency of the

¹⁹⁸The evidentiary sufficiency test is the standard of review applied in the federal law of the United States.

¹⁹⁹443 US 307 (1979).

²⁰⁰In *Burks* the Supreme Court applied the *Jackson* standard of review in order to determine whether the evidence against the accused was insufficient.

²⁰¹At 309.

²⁰²At 324.

²⁰³At 319.

evidence on the basis of the court's personal opinion.²⁰⁴ This means that it does not require the court to enquire as to whether the jury's verdict is *believable*. The jury is the factfinding body responsible for resolving conflicting testimony and weighing evidence.²⁰⁵ However, if the reviewing court finds that no rational factfinder *could have* found guilt beyond a reasonable doubt, the court must rule that the evidence was insufficient.²⁰⁶

The evidentiary sufficiency test as laid down in *Jackson* is the federal standard of review applied in the law of the United States. As the accused in *Burks* had committed a federal offence, the Supreme Court applied this standard of review in order to assess whether the evidence on which the accused was convicted in the trial court was insufficient. However, the review by the Florida Appellate Court of the trial court's decision in *Tibbs* was done in terms of a rule of appellate procedure which at the time prevailed in that state. This rule was interpreted by the Supreme Court to mean that an appellate court was required to review sufficiency of evidence as well as weight of evidence in capital cases.²⁰⁷

As already noted, the issue before the Supreme Court in *Tibbs* was whether a reversal of a conviction based on the *weight* of the evidence rather than the *sufficiency* of the evidence bars a retrial of

²⁰⁴*Id.*

²⁰⁵310.

²⁰⁶At 324-325.

²⁰⁷The particular rule (Florida Rule of Appellate Procedure 9.140(f) (Supp 1982) provided that "[i]n capital cases, the court shall review the evidence to determine if the interests of justice requires a new trial, *whether or not insufficiency of the evidence is an issue presented for review*". (My emphasis).

the accused.

Tibbs was convicted in a Florida District Court for first degree murder and rape of the murder victim's companion. He appealed against his conviction to the Florida Supreme Court. On appeal, the court identified six weaknesses in the state's case which cast doubt on the credibility of the rape victim's testimony and the substantiality of the state's evidence in placing Tibbs at the scene of the crime. The Florida Supreme Court consequently reversed the decision and remanded the case for a new trial, in terms of the Florida rule of appellate procedure discussed above.²⁰⁸ At the retrial Tibbs moved for a dismissal on the basis of the decisions of the Supreme Court of the United States in *Burks* and *Massey*. He argued that a retrial would, in terms of these decisions, violate his constitutional rights against double jeopardy. The Florida court of appeal dismissed his appeal stating that the original reversal of his conviction by the Florida Supreme Court was not simply on the basis of pure insufficiency of evidence, but rather on the view that the evidence was inherently weak and seriously contradictory. Consequently, since the reversal was not based on insufficiency of evidence, but rather on its insubstantial weight, Tibbs could not rely on *Burks* to prevent a new trial.

This approach was confirmed by the Supreme Court. Justice O'Connor who delivered the majority opinion in *Tibbs* began by characterising *Burks* as a "narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial".²⁰⁹ In the court's view, *Burks* precludes retrial of the defendant only in those cases where the reviewing court had found

²⁰⁸See *supra* note 207.

²⁰⁹At 40.

the evidence to be legally insufficient to support a conviction. According to the court's interpretation of *Burks*, this standard requires that the government's case was so lacking that it should not have been submitted to the jury.²¹⁰ In other words, the rule barring retrial would be confined to cases "where the prosecution's failure is clear".²¹¹

In order to justify the court's conclusion, Justice O'Connor argued that the exception recognized in *Burks* rested on two closely related policies. Firstly, that the double jeopardy clause attaches special weight to judgments of acquittals. In the court's view, a reversal based on insufficiency of evidence also amounts to an acquittal "because it means that no rational factfinder could have voted to convict the defendant".²¹² Secondly, *Burks* implemented the principle that the double jeopardy clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding".²¹³ In Justice O'Connor's words²¹⁴

[t]his prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

²¹⁰At 41.

²¹¹At 41, citing *Burks* 17.

²¹²At 42.

²¹³At 41, citing *Burks* 11.

²¹⁴At 41.

Therefore, because the abovementioned reasons bar a retrial where a reversal rests on the ground that the prosecution has failed to produce sufficient evidence, they do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the *weight* of the evidence.²¹⁵ In the court's view²¹⁶

[a] reversal on this ground, unlike a reversal based on insufficiency of evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a thirteenth juror and disagrees with the jury's resolution of the conflicting testimony.....

The judge also pointed out that a reversal based on the weight of the evidence can occur only after the state has presented sufficient evidence to support a conviction.²¹⁷ In the court's view, if a reviewing court finds that the evidence adduced by the state is sufficient, but the court disagrees with the jury's *weighing* of the evidence, a reversal and remand would serve the interests of the accused to obtain a favourable judgment in a new trial. In Justice O'Connor's words

[g]iving the defendant this second opportunity when the evidence is sufficient to support the first verdict, hardly amounts to "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect".²¹⁸

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷Namely if the evidence, viewed in the light most favourable to the prosecution, would be sufficient to convict the accused.

²¹⁸At 44 citing Mr Justice Rehnquist in *US v Scott* 91.

An appellate court's decision to "give the defendant this second chance" would therefore, in terms of the majority opinion in *Tibbs*, "not create an unacceptable high risk that the government, with its superior resources, will wear down the defendant solely through its persistence".²¹⁹

Several legal commentators considered the validity of the sufficiency/weight distinction as proposed in *Tibbs*.²²⁰ From a jurisprudential perspective, the most valid criticism advanced is the following. In making a subtle distinction between reversal based on sufficiency of evidence and weight of evidence, the court placed form over substance.²²¹ Although the *Jackson* standard²²² may support a distinction, the relevant distinction that should be made in order to determine whether a retrial is barred in terms of the double jeopardy clause, is whether the appellate reversal is based on *procedural* or *substantive evidentiary* grounds.²²³ All reversals based on substantive evidentiary grounds are due to a failure of proof beyond

²¹⁹At 43.

²²⁰See Johnston MM "Double Jeopardy: A systematic method for evaluating evidentiary sufficiency and weight of the evidence" *Washington and Lee Law Review* Vol 40 1983 1619; Geary CJ "Double jeopardy: Retrial after reversal of a conviction on evidentiary grounds" *Louisiana Law Review* Vol 43 1983 1061; Ginter TS "Weight v Sufficiency of Evidence: '*Tibbs v Florida*'" *Buffalo Law Review* Vol 32 1983 759; Seward M "The Sufficiency-Weight distinction - a matter of life or death" *University of Miami Law Review* Vol 38 1985 147; Singer DL "*Tibbs v Florida*: Reversals based on weight of the evidence and the double jeopardy clause" *South Texas Law Journal* Vol 24 1983 365.

²²¹Singer 377.

²²²See *supra* text at note 199 for a detailed discussion of this standard.

²²³Singer 380.

reasonable doubt at trial. If the factual proof was beyond reasonable doubt, the state would not need a second opportunity to prove its case.²²⁴

However, some commentators expressed themselves in favour of the sufficiency-weight distinction advanced in *Tibbs*. *Tibbs* is evaluated, *inter alia*, as "leaning away from notions of judicial efficiency towards a concern for fair play".²²⁵ It is suggested that the Supreme Court adopted a more flexible attitude in *Tibbs* with a view to encourage reviewing courts to act in the "interests of justice"; thereby promoting a fair process which takes into account the interests of both society and the accused.²²⁶

However, the fact that the prosecution may obtain a new trial on reversal of a conviction based on weight of evidence *and* present additional evidence on retrial is regarded as the "most troublesome aspect" of the Supreme Court's holding in *Tibbs*.²²⁷ The critics argues that this is precisely the kind of oppressive conduct identified in *Green*²²⁸ and *Burks*²²⁹ which the double jeopardy clause seeks to prevent. A retrial is allowed after reversal on procedural grounds because the prosecutor has no special incentive to uncover additional evidence, polish the testimony of his witnesses or otherwise

²²⁴*Id.*

²²⁵Geary 1074.

²²⁶*Id.*

²²⁷Geary 1078. At 44 (notes 18 and 19) of the majority opinion in *Tibbs*, the court stated that it would be possible for the prosecution to offer new evidence on retrial.

²²⁸Discussed in chapter three *supra* under 3.5.1.

²²⁹See the discussion of the court's opinion in *Burks supra*, text at note 181.

strengthen his case, thereby increasing the risk that an innocent defendant will be convicted.²³⁰ However, where a conviction is reversed on the weight of the evidence, the prosecution, in fact has been alerted that its case is not solid. Therefore, the reversal will motivate the prosecution to uncover and provide more evidence resulting in a more effective presentation at retrial.²³¹

Geary argues that if the purpose in granting a retrial (as the court argued in *Tibbs*) is to give the accused a "second chance at acquittal",²³² the prosecution should not be given another chance to introduce evidence. In his view, this would be in contradiction of the established policies supporting the protection against double jeopardy.²³³ The introduction of additional evidence by the prosecution at retrial violates the policies determined in *Green*, namely allowing the state "with all its resources and power ... to make repeated attempts to convict" and to "enhance the possibility that even though innocent [the defendant] may be found guilty".²³⁴ In view of these established policies which underly the guarantee against double jeopardy, the abovementioned author suggests that, as a prophylactic rule protecting the defendant's constitutional rights, the prosecution should not be allowed to present additional evidence in its case against a defendant whose conviction has been reversed because it was "against the weight of the evidence or "in the interests of justice".²³⁵

²³⁰Geary 1075.

²³¹*Id.*

²³²See the majority opinion in *Tibbs supra* 44.

²³³Geary 1075.

²³⁴*Id* quoting *Green* at 187-188.

²³⁵*Id.*

The last decision which deserves scrutiny in the analysis of double jeopardy protection against retrial on reversal of a conviction is *Lockhart v Nelson*.²³⁶ The problematic question which the court had to resolve in this case was whether the double jeopardy clause permits retrials if an appellate court identified the erroneous admission of evidence against an accused as ground for reversal of his conviction, but draw the further conclusion that without this evidence the remaining evidence was insufficient to sustain a conviction.

The majority of the court ruled that a retrial would not be prohibited by the double jeopardy clause in such a situation because the ground for reversal had been an error in the trial.²³⁷ In a brief opinion concerning the matter, Mr Justice Rehnquist expressed the view that in evaluating insufficiency of evidence for double jeopardy purposes, the reviewing court should look at *all* the evidence which had been admitted at trial and not only at the properly admitted evidence.²³⁸ The court then reviewed all the evidence presented by the prosecution at the trial and concluded that as the sum of the evidence complied with the requisite standard of the evidentiary sufficiency test, the accused could be tried again in a new trial. In order to strengthen its argument, the court also stated that

[p]ermitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to "obtain a fair readjudication of his guilt free from error".²³⁹

²³⁶*Supra*.

²³⁷The court based its conclusion on the rule laid down in *Burks*, namely that the double jeopardy clause does not bar retrial of an accused after reversal of a conviction for trial error.

²³⁸At 290.

²³⁹At 291, quoting the majority opinion in *Burks* 15.

In a dissenting opinion, Mr Justice Marshall rejected the majority's views that a reviewing court should look at all admitted evidence in evaluating evidentiary insufficiency for double jeopardy purposes. The judge described the majority's reliance on *Burks* for this view as "*ipse dixit* jurisprudence of the worst kind".²⁴⁰ Mr Justice Marshall interpreted the *Burks* rule, namely that a retrial is barred if the reversal is based on insufficiency of evidence, as being "based on the time honoured notion that the state should be given only 'one fair opportunity to offer whatever proof it [can assemble]'" .²⁴¹ The minority opinion indicated that the insufficiency of *admissible* evidence constitutes a decision to the effect that the government had failed to prove its case.²⁴² Therefore, the state must be denied a further opportunity to convict the accused.²⁴³

It is submitted that the minority opinion in *Lockhart* presents a true reflection of the court's approach in *Burks*. However, as yet, the court has not had another opportunity to reconsider its ruling in *Lockhart*.

8.5.3 *De novo* trials

In *Justices of Boston Municipal Court v Lydon*²⁴⁴ the issue before the court was whether the *de novo* trial system which applied in the

²⁴⁰At 296 of the dissenting opinion.

²⁴¹At 293 quoting the majority opinion in *Burks* 16.

²⁴²At 44, relying on *Burks* 15.

²⁴³See also Collins T "Double Jeopardy: Evidentiary insufficiency v. trial error after *Lockhart v. Nelson*" *Detroit College of Law Review* 1989 283, 300 which submits that the majority's opinion of the Supreme Court in this case directly contradicts its reasoning set forth in *Burks*.

²⁴⁴466 US 294 (1984).

state of Massachusetts should be declared unconstitutional in terms of the double jeopardy clause of the Fifth Amendment of the Constitution. Under the Massachusetts two-tier trial system, a defendant could choose to be tried either before a judge or a jury. If an accused who elected to have a bench trial was dissatisfied with the outcome, he could not appeal, but had an absolute right to a trial *de novo* before a jury. However, if he initially chose to be tried by a jury and was convicted, he could then appeal through the usual appellate process. In *Lydon* the accused elected to have a bench trial and was convicted despite his claim that the evidence failed to prove the element of intent required for the crime charged. He then sought to be tried *de novo* before a jury but prior to trial, he moved to have the charge dismissed claiming that the evidence at the first-tier trial had been insufficient and that the second tiered trial was barred according to *Burks*.

The majority of the Supreme Court rejected this argument. It held that this case could be distinguished from *Burks*. In *Burks*, an appellate court had made a determination that the appellant should be acquitted. The court pointed out that no such determination had been made by a reviewing court in *Lydon*.²⁴⁵ Instead, the Supreme Court viewed the trial *de novo* procedure which prevailed in the State of Massachusetts as part of a single continuous process.²⁴⁶ Also, the defendant received extra advantages under the two-tiered system. If he won, he was acquitted. If he lost, he had an absolute right to a retrial. The court expressed the view that, under these circumstances, neither the double jeopardy clause nor the holding in *Burks* would be

²⁴⁵At 309-310 of the majority opinion delivered by Mr Justice White.

²⁴⁶At 309.

violated.²⁴⁷

Considered in the context of the two-tier system under review, the Supreme Court's decision in *Lydon* cannot be criticised. However, only three months after its decision in *Lydon*, the Supreme Court applied the "continuous jeopardy" theory as invoked in *Lydon*, to justify a retrial of the accused on a declaration of a hung-jury mistrial in *Richardson v US*.²⁴⁸ This case has already been considered in detail in chapter three which focuses upon the issue of attachment of jeopardy.²⁴⁹

Suffice it to say that the criticisms raised against the decision (discussed in chapter three) are also recognised in the context addressed in this chapter.

8.5.4 Conviction and sentence on retrial

In the chapter which deals with the right of the prosecution to appeal against an acquittal, it was pointed out that the Supreme Court held in *Green v US* that an accused who had been convicted of a lesser included offence on a charge of a more serious (or greater) offence, may not be tried again for the greater offence at a second trial.²⁵⁰ The court argued that the accused's conviction for the lesser offence at the first trial should be regarded as an *implied*

²⁴⁷312.

²⁴⁸*Supra*.

²⁴⁹See chapter three *supra* under 3.5.2.1, text at note 198.

²⁵⁰See *supra* chapter six under 6.5.3, text at note 147 for a discussion of that case.

acquittal of the greater offence.²⁵¹ Therefore, the accused may not be tried again for the greater offence, even if his conviction for the lesser offence had been set aside on appeal.

The rule laid down in *Green* came to be known as the "implied acquittal doctrine".²⁵² The implied acquittal doctrine could easily have been adapted to all sentencing decisions. On the strength of the court's decision in *Green*, it may be argued that when a particular sentence is chosen from a range of authorised penalties, the judge or jury is implicitly acquitting the defendant of a greater penalty, just as the jury in *Green* implicitly acquitted the accused of a greater degree of the same offence.²⁵³ However, the Supreme Court has in several leading cases wrestled with varying approaches to the problem whether an accused may receive a harsher sentence on retrial.

The first of these cases was *North Carolina v Pearce*,²⁵⁴ decided twelve years after *Green*. Pearce was convicted and sentenced to imprisonment in the trial court. Several years later, his conviction was reversed on the ground of trial error and he was retried. The second trial resulted in a conviction and sentence which, when added to the time he had already served, amounted to a longer sentence than that imposed at the original trial. The issue before the Supreme Court was whether the double jeopardy clause protects an accused against imposition of a more severe sentence on retrial.

²⁵¹*Id.*

²⁵²See Doss MP "Resentencing defendants and the protection against multiple punishment" *University of Pennsylvania Law Review* Vol 133 1985 1409, 1412.

²⁵³Doss 1412.

²⁵⁴395 US 711 (1969).

The court stated initially that the double jeopardy clause not only protects an accused against a second prosecution for the same offence after conviction or acquittal, but also against multiple punishment for the same offence.²⁵⁵ The constitutional guarantee against multiple punishment would therefore require that punishment already exacted must be fully credited when sentence is imposed in a new conviction for the same offence.²⁵⁶ However, the court expressed the view that it does not follow that the double jeopardy clause protects an accused against the imposition of a more severe sentence on retrial. Therefore, the court rejected the notion that the imposition of a sentence less than the prescribed maximum operates as an implied acquittal of any greater sentence.²⁵⁷ In the court's view, the *Green* principle could not be applied in the context of sentencing, because it was based on the double jeopardy provision's guarantee against retrial for an offence of which the defendant had been acquitted.²⁵⁸

Instead, the court professed that a necessary corollary to the power to retry an accused is the ability

upon the defendant's reconviction, to impose whatever sentence may be legally authorised.²⁵⁹

The new sentence imposed on retrial cannot be regarded as multiple

²⁵⁵At 717.

²⁵⁶*Id.*

²⁵⁷At 720.

²⁵⁸At 720 note 14.

²⁵⁹At 720.

punishment, since

...the original conviction has, *at the defendant's behest*, been wholly nullified and the slate wiped clear.²⁶⁰

The court concluded that to hold to the contrary, would be to cast doubt on the validity of the basic principle enunciated in *US v Ball*.²⁶¹ *Pearce* has accordingly been interpreted by legal commentators as manifesting the idea that an accused who successfully appeals his conviction forfeits his right to have the court treat the initial sentence as a "ceiling".²⁶²

However, the court in *Pearce* placed some limitations on the power of a court to impose a more severe sentence on retrial. The court stated that it would be a violation of the due process clause (the Fourteenth Amendment of the Constitution) if a state trial court impose a heavier sentence on a reconvicted person with the explicit purpose of punishing the defendant for having succeeded in obtaining a reversal of his original conviction.²⁶³ Therefore, in order to give effect to due process requirements, the court required that should a judge impose a more severe sentence on a reconvicted person at a new trial, he must give reasons for doing so and these reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original

²⁶⁰At 721. (My emphasis).

²⁶¹*Id.* As discussed above under 8.5.2, text at note 164 the court held in *Ball* that an accused whose conviction is reversed on appeal, may be re-prosecuted in a new trial.

²⁶²See Westen 1059-1060.

²⁶³At 726.

sentencing proceeding".²⁶⁴

It is clear that in ruling that the constitutional guarantee against double jeopardy does not prohibit the imposition of a more severe sentence at retrial after appellate reversal of a conviction, the Supreme Court had been greatly influenced by its previous holding in *US v Ball*.²⁶⁵ However, as indicated above, the Supreme Court in 1978 in *Burks v US* qualified its holding in *Ball*.²⁶⁶ In *Burks* the court held that the double jeopardy clause of the Constitution prohibited reprosecution of an accused whose conviction had been reversed on appeal on the ground of insufficient evidence. A reversal based on insufficient evidence was regarded by the court in *Burks* to be an *acquittal* which barred retrial.²⁶⁷

In 1980, in the case of *US v DiFrancesco*, the Supreme Court applied this principle, namely that an acquittal bars retrial, in the context of sentencing.²⁶⁸ In this case, the Supreme court ruled that the double jeopardy clause does not prohibit the prosecution from

²⁶⁴*Id.* The court also required that the factual data on which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. The *Pearce* rule was accepted in later decisions by the Supreme Court and it was emphasised that *actual* vindictiveness should be found on the part of the court or prosecution before an increased sentence on retrial could be regarded as unconstitutional in terms on the fourteenth amendment. (See *Blackledge v Perry* 417 US 21 (1984); *Thigpen v Roberts* 468 US 27 (1974) and *Wasman v US* 468 US 559 (1984).

²⁶⁵See *supra* under 8.5.2, text at note 167 for a discussion of the rule laid down by the Supreme Court in *Ball*.

²⁶⁶See *supra*, texts at notes 181 and 182.

²⁶⁷*Id.*

²⁶⁸This case is discussed in detail in chapter six *supra* under 6.5.6.

appealing against sentence. As indicated in the detailed discussion of that case in chapter six,²⁶⁹ the court argued that an appeal of a sentence would only violate double jeopardy principles if the original sentence was to be treated in the same way as an acquittal and the appeal was to be treated in the same way as a retrial.²⁷⁰ The court concluded in *DiFrancesco* that the sentence imposed by the trial court could not be regarded as an acquittal nor the appeal as a retrial because it "did not ...approximate the ordeal of a trial on the basic issue of guilt or innocence".²⁷¹

In reaching this conclusion, the court relied mainly on its previous rulings in *Burks* and *Scott*.²⁷² However, the court (in *DiFrancesco*), also justified its conclusion that a prosecution appeal against sentence does not amount to double jeopardy by referring to its previous ruling in *Pearce*. The court regarded the rejection of the implied acquittal doctrine in *Pearce* in the context of resentencing on retrial as of equal force in the context of prosecution appeals against sentence.²⁷³ The court expressed the view that just as an increase of sentence on retrial was not prohibited on double jeopardy grounds, an appeal by the prosecution against sentence could also not be regarded as a violation of double jeopardy principles.²⁷⁴

²⁶⁹*Id.*

²⁷⁰At 133 of the majority opinion discussed *supra* under 6.5.6.

²⁷¹At 136 of the majority opinion.

²⁷²Discussed in text at note 181 *supra*, and chapter six *supra* under 6.5.5, text at note 193. The approach adopted by the Supreme Court in both these decisions is that a termination of proceedings based upon an adjudication of the factual guilt or innocence of the accused, bars further proceedings initiated by the prosecution.

²⁷³At 136 note 14.

²⁷⁴*Id.*

However, the court's subsequent decision in *Bullington v Missouri*²⁷⁵ cleared the way for the application of the implied acquittal doctrine in the context of resentencing. As pointed out in chapter six, the court in *Bullington* held that because Missouri's capital sentencing procedure sufficiently resembled a trial of guilt or innocence, a jury's sentence of life imprisonment in that state served as an acquittal of "whatever was necessary to impose the death sentence".²⁷⁶ Mr Justice Blackmun reasoned in *Bullington* that Missouri's capital sentencing procedure which required a pre-sentence hearing in which counsel makes opening statements; testimony is taken, and evidence is introduced, and the jury is instructed and final arguments are made, "resembled and indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence".²⁷⁷ Moreover, Missouri law explicitly required that the prosecution prove its case beyond a reasonable doubt at the sentencing hearing. The court expressed the view that since the sentencing phase at the first trial could be viewed as the guilt or innocence phase of the trial, the double jeopardy clause protected an accused in respect of the death penalty because he was implicitly acquitted of the death penalty by a jury.²⁷⁸

The court distinguished *Bullington* from those cases in which there were no separate sentencing proceedings in which the prosecution was required to prove additional facts in order to justify the particular

²⁷⁵See chapter six *supra* under 6.5.6, text at note 218 for a detailed discussion of this case.

²⁷⁶At 445 of the majority opinion.

²⁷⁷At 438.

²⁷⁸*Id.*

sentence.²⁷⁹ For all these reasons, the court concluded that Bullington (after being convicted again in a new trial) could not be sentenced to death without violating the double jeopardy clause.²⁸⁰

Therefore, in *Bullington* the Supreme Court (albeit in exceptional circumstances) endorsed the application of the implied acquittal doctrine in the context of resentencing. These exceptional circumstances are present where the sentencing proceeding adopted at the first trial sufficiently resembles a trial, because it amounts to an adjudication of the guilt or innocence of the accused in respect of a particular sentence.

The Supreme Court took the exception established in *Bullington* one step further in *Arizona v Rumsey*.²⁸¹ In that case, the court held that a bifurcated sentencing proceeding, similar to that which prevails in Missouri for capital offences, barred the state from seeking the death penalty on retrial after a life sentence had been imposed although the imposition of the life sentence instead of the death sentence could be ascribed to the fact that the trial judge had interpreted the law incorrectly.²⁸²

²⁷⁹At 439.

²⁸⁰At 438.

²⁸¹104 US 2305 (1984).

²⁸²In *Rumsey*, the trial judge did not impose the death penalty because he incorrectly interpreted a statute which set out which aggravating circumstances should be taken into account in deciding whether the death sentence should be imposed. He consequently sentenced the accused to life imprisonment. Rumsey appealed against his sentence, which enabled the state to file a counter-appeal on the issue of the judge's interpretation of the aggravating circumstance statute. The Arizona Supreme Court held that the statute was interpreted incorrectly. The court subsequently set aside the life sentence and remanded the case for determination of aggravating and mitigating

Justice O'Connor who delivered the majority opinion in that case found that the trial-like elements of the Arizona sentencing procedure were comparable to those of Missouri. She pointed out that both sentencing procedures involved a choice between the options of death and life imprisonment, a decision based on evidence presented and a burden of proof beyond a reasonable doubt on the prosecution.²⁸³ The court reasoned that the fact that the sentencer in Arizona was the trial judge and not the jury did not render the sentencing proceeding less like that of a trial.²⁸⁴ Moreover, the judgment of life imprisonment at the initial sentencing hearing had been based on findings "sufficient to establish legal entitlement to the life sentence".²⁸⁵ This amounted to an acquittal on the merits and, as such, barred any retrial on the issue of the death penalty. The fact that the acquittal resulted from an erroneous interpretation and ruling, in the court's view, did not change the double jeopardy effect of a judgment which amounted to an acquittal on the merits. The court opined that although "[i]t affects the accuracy of that determination, ... it does not alter its essential character".²⁸⁶ Therefore, the implied acquittal doctrine was also extended to cases which were conducted according to bifurcated sentencing procedures in which the trial court's ruling had been overturned because of an error.

circumstances and resentencing. On resentencing, the trial court found that the aggravating circumstance (which incorrectly had not taken into account at the first trial), existed and resentedenced Rumsey.

²⁸³At 2309.

²⁸⁴*Id.*

²⁸⁵*Id.*

²⁸⁶At 2310 quoting *US v Scott* discussed *supra* under 6.5.5, text at note 193.

8.5.5 Summary

* In *Burks* the United States Supreme Court held that a reversal of a conviction by a court of appeal on the basis of insufficient evidence as opposed to procedural error, effects double jeopardy protection. The rationale advanced was that the prosecution, having already had a fair opportunity to offer the proof which it could procure, ought not to be offered another opportunity to present evidence which it failed to present in the first trial. This would amount to a violation of the values which underlie the constitutional guarantee against double jeopardy as identified in *Green*.

* In *Tibbs* the Supreme Court made a distinction between reversal on the basis of insufficiency of evidence and reversal based on the weight of the evidence. The court argued that reversal on the basis of the weight of the evidence does not violate the accused's rights against double jeopardy. The decision in *Tibbs* was criticised, *inter alia*, on the basis that the court failed to recognise that the introduction of additional evidence by the prosecution at a retrial defeats the values which the rule against double jeopardy seeks to protect regardless of the basis on which a conviction is reversed (sufficiency or weight of evidence).

* In *Lockhart* the Supreme Court held that in determining whether evidence is insufficient, a court of appeal should consider *all* the evidence including *inadmissible* evidence which was rendered at trial. If the sum of the evidence was sufficient to convict, the accused may be tried again. The court argued that to try a person again, in such instances, does not amount to oppressive state conduct but rather serves the interests of the accused by enabling him to obtain a fair adjudication of his guilt in a trial free of error. Criticism raised against this argument is that a finding of insufficiency of *admissible evidence*

means that the state failed to prove its case; a further opportunity to convict will therefore undermine the values which underlie the double jeopardy rule.

* Both *Tibbs* and *Lockhart* can be viewed as an attempt by the Supreme Court to narrow the application of the constitutional guarantee against double jeopardy as professed in *Burks*. As indicated in the above discussion of these cases, the court justified its decisions in both these cases as being well within the boundaries of *Burks*. Be that as it may, there can be no doubt that the rulings of the court in both *Tibbs* and *Lockhart* undermine the values which underlie the constitutional guarantee against double jeopardy; values which the court was at pains to identify in *Burks*.

* In *Pearce* the Supreme Court laid down the rule that the imposition by a court of a sentence less than the maximum does not operate as an "implied acquittal" of any greater sentence. The court subsequently applied this principle in the context of prosecution appeals against sentence. In *DiFrancesco* the court ruled that just as an increase of sentence on retrial is not prohibited on double jeopardy grounds, an appeal by the prosecution against sentence can also not be regarded as a violation of the constitutional guarantee against double jeopardy. The court argued that only an acquittal offers the accused protection against double jeopardy; a sentencing proceeding cannot be regarded as an acquittal because it does not amount to a trial on the issue of guilt or innocence.

* In *Bullington*, the argument advanced in *DiFrancesco* to justify prosecution appeals against sentence, was used to *prohibit* the imposition of a more severe sentence on retrial. The court held that because the sentencing hearing followed in *Bullington* resembled a trial inasmuch as it amounted to an adjudication of guilt or innocence, a

jury's sentence of life imprisonment served as an acquittal of the more severe sentence that could have been imposed, namely the death sentence. In *Rumsey* the court applied this principle despite the fact that the trial judge, in imposing the less severe (life imprisonment instead of death), interpreted the law incorrectly.

* The court has not as yet extended the application of the implied acquittal doctrine to sentencing proceedings other than those which involve the imposition of the death penalty.

* In view of the United States Supreme Court's decisions in the cases discussed above, it may be concluded that, at present, the accused whose conviction is reversed on appeal may receive a more severe sentence on retrial unless due process violations are involved and the procedural method employed for the imposition of sentence does not give rise to double jeopardy implications.

8.6 SOUTH AFRICAN LAW

8.6.1 Historical overview

The development in South African criminal law of the institution of appeal was discussed comprehensively in chapter six.²⁸⁷ This discussion focuses on the development of South African law with regard to the permissibility of new trials on appellate reversal of convictions and (at a later stage) acquittals.

As indicated in chapter six legislation enacted in 1828 provided for the Supreme Court to review proceedings of all lower courts on certain

²⁸⁷See *supra* under 6.6.1.

specified grounds.²⁸⁸ These grounds were the following: incompetency of the court; malice or corruption on the part of the judge; gross irregularity in the proceedings and the admission of illegal or incompetent evidence.²⁸⁹ This legislation also empowered the Supreme Court, if necessary, "to set aside or correct the proceedings of inferior [*sic*] courts".²⁹⁰ However, no provision was made for the Supreme Court to order new trials.

In 1879 the legislature introduced a right of appeal by the accused against a conviction handed down by a superior court by means of special entry on the record of the proceedings on the basis of an irregularity which had occurred at trial.²⁹¹ The Act also empowered a superior court *suo motu* to reserve a question of law to the Court of Appeal in circumstances where the accused had been convicted.²⁹² Specific provision was also made for the powers of the Court of Appeal in disposing of appeals. Based purely on English law, section 27 of the Act provided essentially as follows

In case of any appeal against a conviction, or of any question being reserved as aforesaid, it shall be lawful for the Court of Appeal in criminal cases

(a) to confirm the judgment of the Court below ...

²⁸⁸Ordinance 40 of 1828.

²⁸⁹Section 5 of Ordinance 40 of 1828.

²⁹⁰Section 4.

²⁹¹See section 23 of the Administration of Justice Act 5 of 1879 discussed in chapter six *supra* under 6.6.1.

²⁹²See section 25 of the Administration of Justice Act 5 of 1879.

- (b) or direct that the judgment shall be set aside, notwithstanding the verdict, which order shall have for all purposes the same effect, as if the defendant had been acquitted
- (c) or direct that the judgment of the Court shall be set aside, and that instead thereof such judgment shall be given by the Court before which the trial took place as ought to have been given at the trial
- (d) or if such Court has not delivered judgment, remit the case to it in order that it may deliver judgment
- (e) or make such other order as justice may require.

However, the provision was added that no conviction be set aside by reason only of some irregularity or illegality, whereby the defendant was not prejudiced in his defence, or because evidence was improperly admitted or rejected, by which no substantial wrong was, in the opinion of the Court of Appeal, done to the defendant.

The same provisions applied in Transvaal except that where a judgment had been set aside, the Court of Appeal could not direct the lower court to give such judgment as ought to have been given at the trial but had to give the proper judgment.²⁹³ However, decisions handed down after these provisions were enacted do not indicate whether the provision set out in (e) above had been invoked to order new trials.

In 1917 these provisions were re-enacted in consolidating legislation. Act 31 of 1917 dealt *inter alia* with appeals against decisions handed down in superior courts. These appeals were still limited to special entries of irregularities in the proceedings or reservations of questions of law. Section 374 of that Act repeated the

²⁹³Section 272 of Transvaal Ordinance 1 of 1903. See Nathan 2755.

provisions of section 27 of the 1879 Act as set out above.²⁹⁴ No indication was given in the new Act of whether and in which particular circumstances a court of appeal would have the competency to order a new trial.

In *R v Silber*²⁹⁵ the court set aside a conviction in terms of these provisions on the basis of a serious miscarriage of justice. One of the jurymen at the trial, unknown to the presiding judge, had been unable to understand the language in which the complainant had given her evidence. The court did not order a new trial, but acting in its inherent jurisdiction, added that "under the circumstances, however, this order [which sets aside the conviction] will be without prejudice to the right of the Attorney-General if so advised, to bring fresh proceedings against the accused in respect of the crime with which he was charged".²⁹⁶

In *R v Harmse*²⁹⁷ the court relied on the "nullity" theory as proposed in English law in order to set aside a conviction and order a new trial. The facts of that case were as follows. Harmse pleaded guilty to the offence of being an accessory after the fact of the crime of theft before a Special High Court constituted under a War Measure during the second World War. On conviction and sentence the court reserved the following question of law for the decision of the Appellate Division

Whether the Special High Court had jurisdiction to

²⁹⁴See *supra* text beneath note 292.

²⁹⁵1940 AD 186.

²⁹⁶At 194.

²⁹⁷1944 AD 295.

convict the accused of being an accessory after the fact to the crime of theft.

The Appellate Division held that although the Special High Court had jurisdiction to try a person for the crime of theft, it had no jurisdiction to try a person for the offence of being an accessory after the fact to the crime of theft.²⁹⁸ It accordingly set aside the conviction and sentence. The issue was then raised whether the court of appeal could order a new trial.

It was contended on behalf of Harmse that if the court set aside the verdict, subsection (b) of section 374 would become applicable. This subsection stipulated that an order that the judgment should be set aside "shall have for all purposes the same effect as if the accused had been acquitted". Defence counsel submitted that this meant that the accused may not be tried again for the same offence. Tindall JA rejected this argument. He stated that there were no decisions of South African courts which set out the effect of subsection (b).²⁹⁹ He pointed out that if it was held that the effect of subsection (b) was that remittal to the trial court was precluded

in a case like the present where the proceedings after arraignment were a nullity and there has in law been no proper trial, the result of the order would ... not be in accordance with the requirements of justice.³⁰⁰

Instead, the court suggested that in a case where all the

²⁹⁸At 300.

²⁹⁹At 305.

³⁰⁰At 306.

proceedings in the trial after arraignment could be regarded as a nullity, a court should order a new trial by exercising the power conferred by subsection (e), namely to "make such other order as justice may require".³⁰¹ The court referred to English case law, for instance *Crane's case*,³⁰² as authority for its conclusion that a court of appeal may set aside a conviction and order a new trial in circumstances where the accused "had not been tried at all" in the court of trial.³⁰³

It is also necessary to consider briefly the relevant provisions of the Magistrates' Courts Act 32 of 1917 enacted at the same time as the above legislation. This Act provided for an appeal by the person who had been convicted in a magistrate's court against his conviction as well as sentence, both on questions of law and of fact. The Act also empowered the court of appeal to affirm or set aside the conviction or vary the sentence imposed by the magistrate's court.³⁰⁴ However, in the Magistrates' Courts Act the additional provision was inserted that³⁰⁵

[w]henver a conviction or sentence of a magistrate's court is set aside on appeal or on review on the ground that evidence was admitted which should not have been admitted, or that evidence was rejected which should have been admitted or on the ground of any other irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and

³⁰¹*Id.*

³⁰²That case is discussed in chapter seven *supra* under 7.3, text at note 45.

³⁰³At 308.

³⁰⁴Section 100 of the Act set out the same provisions as section 374 of Act 31 of 1917 dealing with appeals from superior courts.

³⁰⁵Section 100(7) which was added by the Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926.

sentence referred, may again be instituted either on the original summons or charge or upon any other indictment, as if the accused had not previously been arraigned, tried and convicted: Provided that such proceedings shall be instituted before some other judicial officer than the judicial officer who recorded the conviction and imposed the sentence set aside on appeal or review.

In *Sewmangel v Rex*³⁰⁶ the court set aside a conviction on the basis that it had been partially obtained as a result of inadmissible evidence. The court relied on the above section and stated that "the Crown is at liberty to institute fresh proceedings before some other judicial officer".³⁰⁷ In *Ngobese v Rex*³⁰⁸ the provision was relied on in the following circumstances. At the close of the crown's case the accused wished to call three witnesses who were not present. The magistrate declined to allow the witnesses to be called. On appeal the court held that the failure of the magistrate to allow the accused to call evidence had prejudiced him and amounted to an irregularity within the meaning of the above section.³⁰⁹ The court added that "the Crown will be entitled, if so advised, to institute proceedings again before another magistrate".³¹⁰

In 1935 all courts of appeal were given the express power to impose punishment, which could be more or less severe or of a different nature to the punishment imposed by the court *a quo*, which ought to

³⁰⁶1939 NPD 105.

³⁰⁷At 106.

³⁰⁸1940 NPD 286.

³⁰⁹Section 100(7) of Act 32 of 1917.

³¹⁰At 287. See also to the same effect *Cebekulu v Rex* 1945 NPD 284, 286.

have been imposed at the original trial.³¹¹

In 1944 the provisions dealing with appeals from magistrates' courts discussed above were re-enacted in the Magistrates' Courts Act 32 of 1944.³¹² Subsequently (in 1948), the legislature for the first time provided for an appeal against a conviction and sentence handed down in a superior court on factual as well as legal issues.³¹³ As indicated in chapter six, this legislation also made provision for an appeal by the prosecution on a point of law against an acquittal.³¹⁴ However, the Appellate Division had no power in terms of the 1948 legislation to increase a sentence imposed by a superior court.³¹⁵ Of importance is that the legislature added a new provision which stipulated in which circumstances *de novo* proceedings could be instituted when a conviction or acquittal is set aside on appeal. These circumstances were the following³¹⁶

- (a) where the court lacks competence to convict
- (b) where the indictment is invalid
- (c) where there is any other technical irregularity or defect in the proceedings.

³¹¹See Strauss 186.

³¹²Sections 103(1)-(7). Section 98(2)(d) set out the powers of courts of appeal in disposing of an appeal.

³¹³Act 37 of 1948.

³¹⁴See chapter six *supra* under 6.6.1.

³¹⁵See Swift 721. However, it still had the power to increase a sentence where the case originated in the magistrate's court. See Strauss 187 citing *R v Theunissen* 1952 (1) SA 201 (AD).

³¹⁶See section 13 of Act 37 of 1948.

In 1955 these provisions were re-enacted in the Criminal Procedure Act 56 of 1955. The 1955 legislation once again vested the power to increase a sentence imposed by a superior court in the Appellate Division.³¹⁷ The grounds (set out above) on which *de novo* proceedings could be instituted were re-enacted and authoritatively interpreted by the Appellate Division in two decisions handed down during the 1960's. These decisions are discussed in detail in the paragraphs that follow.

8.6.2 Current law

8.6.2.1 General

The current powers of a court of appeal to dispose of a matter before it are basically the same as those provided for in the 1955 legislation. As indicated above, the English law of criminal procedure has undergone significant changes in the last decades, particularly in the field of new trials on appellate reversal of convictions. Although South African law of criminal appeals is based on the original English model, no reforms have been introduced in this particular field of criminal procedure. The legislature has maintained the position that new trials may be ordered only in certain defined circumstances. The basic premise is that the defence of *autrefois acquit* will be of no avail to an accused whose conviction is set aside on the basis of a technical irregularity in the proceedings which technicality is of such a nature that it precludes the court of appeal from considering the merits of the conviction.

Provisions which empower a court of appeal to substitute a conviction of a lesser offence for a conviction of a more serious

³¹⁷See section 369(5) of the 1955 Act.

offence, have recently been considered and criticised by the Appellate Division on the basis of the "implied acquittal" doctrine. Provisions which empower a court of appeal to increase a sentence where only the accused appealed against his conviction and/or sentence, have been challenged on *constitutional grounds; inter alia* on the basis that they violate the accused's rights to a fair trial. However, the prohibition against double jeopardy has not specifically been relied on in this context. The appropriateness of the setting aside of a conviction on the ground of an irregularity has also been considered on the basis of the more comprehensive right of the accused to a fair trial. However, the appropriateness of a new trial following on a reversal of a conviction has not as yet been considered from constitutional perspectives.

8.6.2.2 New trials on appellate reversal of convictions handed down in superior courts

In terms of the current Criminal Procedure Act³¹⁸ a person who has been convicted in a superior court and has been granted the necessary leave may appeal with the required leave to the Appellate Division or a full bench of the provincial division (as the case may be)³¹⁹ on the following bases

- (a) against conviction on the factual merits³²⁰

³¹⁸Act 51 of 1977.

³¹⁹Section 315 of Act 51 of 1977 sets out the circumstances in which an accused may appeal either to the Appellate Division or to a provincial division.

³²⁰Section 316(1)(b) of Act 51 of 1977. An accused found guilty on the basis of a guilty plea may only appeal against sentence and not against his conviction. However, a person who pleaded guilty in a superior court to a charge of murder may appeal against his conviction

- (b) against sentence only³²¹
- (c) on a point of law³²² or
- (d) by means of special entry on the record on the ground of an irregularity or illegality that occurred during the proceedings in connection with or during his trial.³²³

As indicated in chapter six, a superior court of first instance may also on its own motion or on request of the prosecutor, reserve a question of law for the consideration of the Appellate Division.³²⁴ Moreover, the Attorney-General may also appeal against a sentence imposed on a person convicted in a superior court.³²⁵

The powers of the court of appeal are set out in section 322 of the Act. In the case of an appeal against conviction or of any question of law reserved the powers of the court are the following

- (a) it may allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice³²⁶ or

which had been based on such a plea. (See *S v Mavhungu* 1981 (1) SA 56 (A) 63G-H).

³²¹Section 316(1)(b).

³²²Section 319(1).

³²³Section 317.

³²⁴See *supra* under 6.6.2.2.

³²⁵See section 316B.

³²⁶Section 322(1)(a).

- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial³²⁷ or
- (c) make such other order as justice may require

provided that no conviction or sentence shall be set aside or altered by reason of an irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.³²⁸

In the case of an appeal against sentence by the accused or the prosecution, the court of appeal may confirm the sentence or may delete and amend the sentence and impose such punishment as ought to have been imposed at the trial.³²⁹ The Act also specifically provides that the powers of the court of appeal in relation to the imposition of punishment should include the power to impose a punishment more severe than that imposed by the court of trial or to impose another punishment in lieu of or in addition to such punishment.³³⁰

The Act furthermore provides that where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted because of the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in

³²⁷Section 322(1)(b).

³²⁸Section 322(1)(c).

³²⁹Section 322(2).

³³⁰Section 322(6).

such manner as the court of appeal may think fit.³³¹ The court may also receive further evidence on appeal or remit the case to the court of first instance for a further hearing, with the necessary instructions regarding the taking of further evidence as is deemed necessary.³³²

Finally, the Criminal Procedure Act provides that where a question of law has been reserved on the application of a prosecutor in the case of an *acquittal*, and a court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that the applicable steps referred to in section 324 be taken "as the court may direct".³³³ Again, section 324 deals with the institution of proceedings *de novo* when a conviction is set aside on appeal. It provides that proceedings, in respect of the same offence to which the conviction and sentence refer, may again be instituted before a different judge on the original charge (suitably amended) or on any other charge, as if the accused had not previously been arraigned, tried and convicted. However, proceedings *de novo* may only be instituted on the following grounds

- (a) that the court which convicted the accused was not competent to do so
- (b) that the indictment on which the accused was convicted was invalid or defective
- (c) that there has been any other technical irregularity or defect in the procedure.

The interpretation of these provisions by South African courts will accordingly be considered. The first issue to be considered is whether

³³¹Section 322(3).

³³²Section 22(a) of the Supreme Court Act 59 of 1959.

³³³Section 322(4).

a court of appeal may, in terms of the power "to give such judgment as ought to have been given at the trial",³³⁴ set aside a conviction and substitute it for a conviction of a more serious offence. In *R v Makwanazi*³³⁵ the Appellate Division answered this question in the affirmative. However, the court added the provision that the accused originally had to be charged with the offence substituted. In that case the court, on an examination of the evidence as a whole, found that the accused's conviction of assault with intent to do grievous bodily harm had to be substituted for a conviction of assault with the intent to rape. The accused was originally charged in the trial court with rape. In *S v E*³³⁶ the court confirmed this position. Corbett JA laid down the principle in the following terms³³⁷

[W]aar 'n Appèlhof oortuig is dat die verhoorhof, weens òf 'n verkeerde feitebevinding òf 'n regsdwaling, die appellant skuldig gevind het aan 'n mindere ernstige misdaad as die waaraan hy, ingevolge die akte van beskuldiging, skuldig bevind behoort te gewees het, die Appèlhof die bevoegdheid het, kragtens die huidige Strafproseswet, om die skuldigbevinding dienooreenkomstig te verander.

The court added that in such cases, a court of appeal may also set aside the sentence, substitute it for an appropriate sentence, or refer the matter back to the trial court to impose sentence.³³⁸ In a recent decision, *S v Morgan*,³³⁹ the Appellate Division explained in which

³³⁴Section 322(1)(b).

³³⁵1948 (4) SA 686 (A).

³³⁶1979 (3) SA 973 (A).

³³⁷At 977D.

³³⁸*Id.*

³³⁹1993 (2) SACR 134 (A).

circumstances a court of appeal will be entitled to substitute a conviction of a lesser offence for a more serious offence. One of the several accused (Ms Winnie Madikizela Mandela), was charged with kidnapping and assault to do grievous bodily harm. She was found guilty of kidnapping, but only of being an accessory after the fact to the crime of assault on the basis that, at the time of the assaults she was away from home and therefore unable to take part in the assaults. On appeal against her conviction, the state requested the court to reverse the decision of the trial court on her alibi in respect of the time when the victims were assaulted and asked the court to change the conviction on the assault charge from guilty as an accessory after the fact to one of guilty as charged. The state argued that the court was empowered to do so in terms of the provisions of section 322(1)(b) and the explanation of these powers of a court of appeal in *S v E*.³⁴⁰ The court in *Morgan* rejected this argument. Delivering judgment, Corbett CJ stated that if the court were to re-open the question of the alibi it would have to re-assess the evidence of all the witnesses who testified in this respect, resolve evidential conflicts and consider the probabilities.³⁴¹ Moreover, (so the court argued), it would have to do so without the assistance of the trial judge's full reasons for accepting the alibi, his impressions of the witnesses concerned and his weighing of the probabilities.³⁴²

The court observed that in all previous cases of relevance, the court substituted a conviction for a conviction of a more serious offence generally on the basis of the facts found by the trial court, or the undisputed facts, or the appellant's own evidence. The court

³⁴⁰See *supra*, text at note 336 and 337.

³⁴¹At 162c.

³⁴²*Id.*

emphasised that in no case did the court "completely overturn the trial Court's finding of fact, its assessment of the credibility of witnesses and its weighing of the probabilities".³⁴³ Corbett CJ pointed out that the furthest the court went was in the cases of *Makwanazi* and *E*, namely in drawing a different inference from the evidence as a whole to that which had been drawn in the trial court.³⁴⁴

Of importance, however, is that the court also advanced other reasons, based on considerations of fairness, why section 322(2)(b) ought to be interpreted narrowly. The court explained that the formula "to give such judgment as ought to have been given by the court of trial" has a long history which can be traced back to legislation passed in the Cape colony in 1896.³⁴⁵ The court pointed out that prior to the enactment of Act 51 of 1977, the Magistrates' Courts Act 32 of 1944³⁴⁶ had conferred these powers, which included the power to increase a sentence imposed by the trial court, on the court of appeal (including the Appellate Division).³⁴⁷

Corbett CJ continued by observing that in *R v V*³⁴⁸ the Appellate Division had interpreted the relevant provisions in the Magistrates'

³⁴³At 162e.

³⁴⁴At 162f.

³⁴⁵Section 36 of the Administration of Justice Act 35 of 1896. The court observed that these provisions were re-enacted in consolidating legislation in 1917 (section 374(d) of the Criminal Procedure and Evidence Act 31 of 1917).

³⁴⁶Sections 98(2) read with section 103(4).

³⁴⁷These powers were subsequently enacted in Act 51 of 1977 (sections 304 and 309 - see *infra* for discussion of these provisions.)

³⁴⁸1953 (3) SA 314 (A).

Courts Act on the basis that these provisions also authorised the court of appeal to convict the appellant on an alternative count when quashing a conviction on another count. The facts of *V* were as follows. The accused was charged in the magistrate's court with *inter alia*, the offence of sodomy (the main charge) and alternatively with the statutory offence of aiding or being party to the commission by any male person of any act of gross indecency with another male person. *V* had been acquitted on the main charge but convicted and sentenced on the alternative charge. On appeal the court held that the evidence did not support the conviction on the statutory offence and that the magistrate's verdict should be set aside. However, the court found that the evidence did establish at least an attempt by *V* to commit sodomy and that a verdict to this effect (on the main charge) should be substituted.

The importance of the decision lies in the fact that counsel for the appellant argued that it was not competent for the appeal court to do this where the accused had been acquitted in respect of the charge on which the prosecution had sought a conviction; it could only do so where the magistrate had returned no verdict on the charge. Counsel for the appellant based this argument on the contention that it is a fundamental principle of South African law that once an accused had been acquitted on a charge, the matter is finally concluded and no court of appeal can alter that acquittal to a conviction. Greenberg ACJ (who delivered judgment in the *V* case) passed the following comment concerning this argument³⁴⁹

But this sacrosanctity of an acquittal has been encroached upon by the Legislature; s 104 of the Act entitled the Court of appeal to reverse a decision on a point of law which has resulted in an acquittal by a

³⁴⁹At 322G of the *V* case.

magistrate, and s 103(4) provides that on an appeal on facts, the Court of appeal may increase the sentence which, apart from special legislation, had enjoyed the same security, in regard to an increase, as an acquittal. The reason advanced therefore affords no ground for not giving the passage in regard to alternatives their plain meaning and this meaning does not justify the distinction contended for.

In *Morgan* Corbett CJ pointed out that this fundamental principle (the "sacrosanctity of an acquittal") had recently been referred to by the Appellate Division in the case of *Magmoed v Janse van Rensburg*.³⁵⁰ The Chief Justice added that just as it was held in *R v V* that this practice relating to an acquittal had been encroached by the legislature when it enacted sections 103(4) and 98(2) of the Magistrates' Courts Act, "so also must it be acknowledged that a similar encroachment results from the provisions of section 322 of Act 51 of 1977".³⁵¹

The court emphasised that in determining the extent of the powers of the court of appeal under section 322, the background of this principle ought to be borne in mind. Returning to the facts of the case at hand, Corbett CJ pointed out that although the court *a quo* had not acquitted the accused in the technical sense of the word on any of the charges preferred against her, the court's verdict in respect of the assault charges (based on an acceptance of her alibi) did "in effect" amount to an acquittal on the charges as formulated in the indictment and to a return of competent (but lesser) verdicts on those charges on the strength of different facts.³⁵² The court expressed the view that

³⁵⁰See chapter six *supra* under 6.6.2.3 for a detailed discussion of that case.

³⁵¹At 161b.

³⁵²At 161c.

"in such a case, too, one should not lose sight of the aforementioned practice".³⁵³ In other words, the court held that one should not lose sight of the practice adverted to in *Magmoed's* case (namely to preserve the sacrosanctity of an acquittal) also in cases as the one at hand. This means that the court in *Morgan* came out in favour of, what is popularly referred to in American double jeopardy jurisprudence as the "implied acquittal doctrine".³⁵⁴

Section 322(c) vests in the court of appeal a general discretion to dispose of the matter. The section therefore may also be interpreted on the basis that it empowers the court of appeal to order a new trial. However, South African courts have not utilised this particular section to order new trials. This is probably so because section 324 specifically provides for the institution of *de novo* proceedings.

The proviso to section 322(1) refers to an irregularity in the record or the proceedings. The term "irregularity" was explained by the Appellate Division in *S v Pretorius*³⁵⁵ as "any irregular or illegal departure from those formalities, rules and principles of procedure in accordance with which the law requires a criminal trial to be initiated or conducted".³⁵⁶ In the past, appeals on the basis of an irregularity only succeeded if on the remaining evidence not affected by the irregularity, the court found proof beyond reasonable doubt that the appellant committed the offence. However, if the irregularity was of such a nature that the remaining evidence could not properly be taken

³⁵³*Id.*

³⁵⁴See chapter six *supra* under 6.5.3, text at note 147 for a discussion of this doctrine. *Cf* also *supra* under 8.5.4, text at note 250.

³⁵⁵1991 (2) SACR 601 (A).

³⁵⁶At 608f.

into consideration, the conviction had to be set aside on account of the irregularity.

In *S v Solo*³⁵⁷ the court held that the provisions of the *interim* Constitution, more specifically sections 25(3) and 33(1) changed the position.³⁵⁸ Section 25(3) guaranteed an accused a right to a fair trial, whereas section 33(1) set out the circumstances in which the state's infringement on fundamental human rights may be justified. The court stated that an appeal against a conviction ought to succeed if the accused's right to a fair trial in terms of section 25(3) has been infringed, unless the court finds that such right has been limited by law of general application as intended by the provisions of the limitation clause (section 33(1)). In *Solo*, the court of appeal set aside a conviction of an attempt to cause an explosion and a sentence of 9 years imprisonment on the basis that the presiding magistrate had not exercised his discretion to refuse a postponement of the case to enable the accused to secure the services of a legal representative, in a regular and judicial manner. However, the court emphasised that its finding could not be regarded as an acquittal of the crime charged; the court's finding was not based on the evidence advanced at the trial, but merely on the irregularity.³⁵⁹ However, the court was not prepared to order a new trial in this particular case. Because the court emphasised that its finding did not amount to an acquittal ("onskuldigbevinding"),³⁶⁰ it may be inferred that the court left open

³⁵⁷1995 (1) SACR 499 (E).

³⁵⁸Act 200 of 1993. These provisions are presently contained in sections 35(3) and 36 respectively of the final Constitution (Act 108 of 1996). See chapter ten *infra* under 10.5. and 10.7 for the provisions of these sections.

³⁵⁹At 509h.

³⁶⁰See *id.*

the door for the prosecution to initiate proceedings *de novo*.

As far as an appeal against sentence is concerned, the general principle applies that a court of appeal may only interfere if the trial court did not exercise its discretion in a judicial or reasonable manner.³⁶¹ These principles also apply where the court of appeal increases the sentence, irrespective of whether the state or the accused appealed.³⁶²

The Appellate Division interpreted the provisions of section 324 (dealing with the institution of *de novo* proceedings) in the landmark decision of *S v Moodie*.³⁶³ The facts of the case were as follows. Moodie was convicted of the murder of his wife and sentenced to death. He appealed by means of special entry on the record on the basis that the proceedings in connection with the trial were irregular in that the deputy sheriff in charge of the jury had been present in the jury room during the whole of their deliberations. The appeal was upheld by the Appellate Division on the basis that the irregularity complained of consisted of such a gross departure from the established rules of procedure that it constituted *per se* a failure of justice and that it was therefore unnecessary for the court to deal with the merits of the case. In other words, the court held that the trial

³⁶¹See *S v Rabie* 1975 (4) SA 855 (A).

³⁶²See *S v Anderson* 1964 (3) SA 494 (A) in which the court emphasised (at 495g) that a court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently, but only if the trial court acted unreasonably or improperly. See also *S v Du Toit* 1979 (3) SA 846 (A), a case where the court of appeal increased the sentence where the accused had lodged an appeal. In that case, Rumpff CJ emphasised (at 855h) that a court will not lightly take the step of increasing a sentence.

³⁶³1961 (4) SA 752 (A).

was a nullity and on that account it did not consider the merits at all. The conviction and sentence were accordingly set aside and the accused freed. Moodie was subsequently arraigned before the Transvaal Provincial Division on the same charge as that on which his conviction and sentence had been set aside. He pleaded that he had previously been acquitted of the charge. His plea was upheld, and, at the request of the prosecution, the court reserved a question of law for the decision of the Appellate Division as to whether the trial judge was correct in upholding the plea.³⁶⁴

On appeal counsel for the state argued that just as an acquittal by a trial court set aside on appeal by reason of an irregularity or defect in the procedure does not qualify as an acquittal which brings into effect protection against double jeopardy, so too a conviction which is similarly set aside on appeal is not an acquittal which bars a further trial.³⁶⁵ In other words, the state argued that a conviction and sentence set aside on a basis other than the factual merits of the case is not tantamount to an acquittal.³⁶⁶

Counsel for the accused on the other hand raised the argument that the principle applicable at common law is not that a person should not be tried twice or punished twice for the same act or omission, but that he should not be "put in jeopardy" twice for the same offence.³⁶⁷ Counsel for the accused pointed out the lack of unanimity in previous decisions with regard to the meaning of the expression "acquittal on

³⁶⁴See *S v Moodie* 1961 (4) SA 752 (A).

³⁶⁵At 591d. The state relied *inter alia* on *R v Twalatunga* (discussed in chapter three *supra* under 3.6.2).

³⁶⁶At 591h.

³⁶⁷At 592, relying *inter alia* upon *R v Manasewitz* discussed in chapter four *supra* under 4.6.3.

the merits". They referred to the test proposed by Ridley J in the English case of *Haynes*,³⁶⁸ namely "a verdict by the jury", or the test proposed by Gardiner JP in *Bekker*,³⁶⁹ namely whether the case can be regarded as a *lis terminata*. Counsel for the accused raised the argument that because the jury in the court *a quo* in *Moodie* "gave a verdict which it intended to be a final decision,"³⁷⁰ the accused could not be tried *de novo*, except in the circumstances set out in the relevant legislation.³⁷¹ In their view, section 370 had to be interpreted on the basis that it amounted to a mere confirmation of the common law; the words "any other technical irregularity or defect" as set out in section 370(c) had therefore to be interpreted *ejusdem generis* so that they were interpreted to have the same meaning as the words contained in subsections (a) and (b) (conviction on a defective indictment or conviction without the court having the necessary jurisdiction).³⁷² In other words, where the defect rendered the trial a nullity because (a) the court had no jurisdiction or (b) the indictment was invalid or defective.

The Appellate Division rejected the arguments raised by the defence. It held that in terms of the common law principle of *res judicata*, the plea of *autrefois acquit* cannot succeed unless it is based on a final judgment on the merits.³⁷³ The court relied on *R v Bekker*³⁷⁴ in

³⁶⁸See chapter three *supra* under 3.2.2 for a discussion of this case.

³⁶⁹See chapter three *supra* under 3.6.2 for a discussion of the *Bekker* case.

³⁷⁰At 592h.

³⁷¹Section 370 of Act 56 of 1955 (presently section 324 of Act 51 of 1977).

³⁷²At 594F.

³⁷³At 595F.

which the Cape Provincial Division had previously referred to general statements which had been made by Voet in his treatment of the plea of *res judicata*.³⁷⁵ In the court's view there had not been, as suggested by counsel for the defence, a *lis terminata* when he was convicted; his conviction had been set aside on appeal on the basis that the judgment convicting the accused was invalid by reason of an irregularity in the procedure.³⁷⁶ The court stated that in effect the court in the first appeal held that no verdict by the jury, in those circumstances, could have been valid; accordingly (in the court's view in the second appeal) "the accused never was in jeopardy of being legally convicted at his trial".³⁷⁷

The court then considered whether its judgment (in the second appeal) could be regarded as an acquittal on the merits. Building on the premise that an acquittal on the merits was required in terms of the common law, the court observed that the factor which is common to sections 370(a) and (b) is that the ground on which the court of appeal sets aside the conviction is an irregularity or defect "which precludes a legally valid consideration upon the merits".³⁷⁸ In the

³⁷⁴See *supra* chapter three under 3.6.2, text at note 270 for a discussion of the *Bekker* case.

³⁷⁵See Voet 44.2.1 - 44.2.3 set out in chapter two *supra* under 2.2, text at notes 13 and 14 and the text of Carpzovius referred to in *Kaplan's* case at 595G-H (discussed in chapter three under 3.6.2, text at note 281). The court also relied on Wessels CJ's opinion in *Manasewitz* (discussed in chapter four under 4.6.3, text at note 437) and concluded that whatever the position might have been in English law, a successful reliance on the *exceptio rei judicatae* in Roman-Dutch law required an acquittal on the merits (at 596E).

³⁷⁶At 596F.

³⁷⁷At 596G.

³⁷⁸At 597F.

court's view, that factor must therefore also be found in section 370(c). The court accordingly laid down the principle that³⁷⁹

[a]n irregularity in the procedure which justifies the setting aside of a conviction by the Court of Appeal is technical if it precludes a valid consideration of the merits: in other words, if it makes it impossible for the court to give a valid consideration on the merits.

The *Moodie* principle was subsequently applied in *State v Naidoo*.³⁸⁰ Naidoo was convicted by a jury of the murder of a girl with whom he was on intimate terms. He was sentenced to death but his conviction and sentence was set aside on appeal on the ground that an irregularity had occurred in that certain evidence, calculated to influence the jury, was inadmissible. The inadmissibility was based on the fact that an Indian interpreter had not been sworn. On appeal the court examined the facts, including the *valid evidence* in respect of which there had been no irregularity. In other words, in considering the merits of the conviction, the court did *not* also take into account the *inadmissible evidence* given at the first trial.³⁸¹ The court concluded that it could not be said that the jury would inevitably have convicted on the remaining *valid* evidence. The conviction and sentence were accordingly set aside. However, Naidoo was subsequently reindicted on the same charge of murder. He pleaded *autrefois acquit*, which plea was upheld by the trial court. The matter came before the Supreme Court by reservation of a question of law posed by the prosecution, namely whether the trial court was correct

³⁷⁹At 597G.

³⁸⁰1962 (2) SA 625 (A).

³⁸¹*Contra* the approach adopted in the American Supreme Court decision of *Lockhart v Nelson* discussed *supra* under 8.5.2, text at note 236.

in upholding the plea. The Appellate Division answered the question in the affirmative. By applying the *Moodie* principle, the court concluded that Naidoo was entitled to rely on the plea of former jeopardy. Naidoo could therefore not be tried again for the same offence. The court explained why *Moodie* could be retried but not Naidoo, in the following terms³⁸²

In each case there was an irregularity in the first trial. But irregularities vary in nature and degree. Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits and the accused can be re-tried in terms of sec. 370(c) of the Criminal Code. That was the position in *Moodie's* case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial.

On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial Court, properly directing itself, would inevitably have convicted, it dismisses the appeal and the conviction stands as one on the merits. But if, on the merits, it cannot come to that conclusion, it sets aside the conviction, and this amounts to an acquittal on the merits. In such a case sec. 370(c) of the Code does not permit of a re-trial. That was the position in *Naidoo's* case, in which the failure to swear an interpreter at one stage, resulted in certain evidence being regarded as inadmissible.

The effect of the application of the *Moodie* principle in *Naidoo* was badly received in certain juristic circles. Professor Kahn criticised the

³⁸²At 353G-H.

decision on the ground that it is difficult to understand how a case can be re-decided on the merits when vital portions of the record are eliminated.³⁸³ His main criticism was directed against the unjust effect of the rule. In this respect Kahn observed that³⁸⁴

[i]f the irregularity is a thumping big one (how ironic that counsel for Moodie in the appeal argued it was such a one!) it is tough luck on the accused - he can be retried; if it is just a teeny weeny irregularity, again tough luck - it is disregarded under section 369(1)³⁸⁵ as no failure of justice resulted, and the conviction is sustained; but if it is just the correct sort of error, the convicted man is acquitted and can be tried no more.

Kahn pleaded for the permissibility of retrials whenever a conviction has been quashed for irregularity.³⁸⁶ In passing it may be mentioned that in view of the subsequent enactment of section 322(3), a situation like the one which presented itself in *Naidoo* cannot arise again.³⁸⁷

A subsequent decision which deserves to be discussed³⁸⁸ in detail

³⁸³See Kahn E "Criminal Appeals or once again 'Erewhon revisited'" *South African Law Journal* 1963 439, 445.

³⁸⁴At 441.

³⁸⁵The proviso to the present section 322(1).

³⁸⁶At 444. He added that a comparative study may be useful in developing new principles in this particular field of law.

³⁸⁷See *supra* under 8.6.2.2, text at note 331 for the provisions of section 322(3).

³⁸⁸The Appellate Division applied the "*Moodie* principle" in two subsequent decisions, *S v Nzuzza* 1963 (3) SA 631 (A) and *S v Louw* (1965) (4) SA 120 (E). In *Nzuzza* the accused was convicted of murder on admissions given at preparatory examinations. The court held that

is that of *S v Mkhize*,³⁸⁹ handed down by the Appellate Division in 1988. In this case the Appellate Division elucidated the principle introduced in *Moodie* and applied in *Naidoo*. The facts were the following. M and three others were tried and convicted in the Transvaal Provincial Division of various offences. They were represented by a person with an LLB degree. However, their legal representative had not been admitted to practise as an advocate. He misrepresented himself as an advocate by falsely taking the identity of another person who had in actual fact been admitted to practice as an advocate. When the full facts became known, the appellants applied for a special entry alleging that the proceedings in the trial court and their subsequent convictions had been vitiated by this irregularity.

The Appellate Division stated that it is a well-established principle that an irregularity in the conduct of a trial may be of such an order as to amount *per se* to a failure of justice which vitiates the trial.³⁹⁰ The court referred to such an irregularity as a "fatal irregularity".³⁹¹

The court explained that, in terms of its decision in *Naidoo*, less serious and less fundamental irregularities do not necessarily have the effect of vitiating a trial. In these cases, the court of appeal must examine and assess the evidence and decide for itself whether, on the

it amounted to an irregularity so gross as to be *per se* a failure of justice which rendered the trial a nullity and allowed the state to reindict the accused. In *Louw*, a plea of *autrefois acquit* was rejected on the basis that denial to give counsel for the defence an opportunity to state its case amounted to a miscarriage of justice of such a gross nature that it could be said that the accused had not had a trial in which he lawfully could have been convicted (at 121).

³⁸⁹1988 (2) SA 868 (A).

³⁹⁰At 871G.

³⁹¹*Id.*

evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt. If proof of guilt is found, the appeal is dismissed. If not, the appellant is acquitted and may not be tried again in a new trial. However, the court explained that if the irregularity amounted to a fatal one which vitiated the trial, "[n]o further enquiry into the merits is called for".³⁹² The conviction may accordingly be set aside and a new trial ordered.

An important aspect of the judgment in *Mkhize* is that the Appellate Division laid down certain criteria which a court of appeal must apply in order to determine whether an irregularity which tainted the proceedings (in the trial court) amounted to a fatal irregularity which rendered the trial a nullity. The court stated³⁹³

[T]he inquiry in each case is whether it [the irregularity] is of *so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings* in which it occurred.

On the facts before it the court concluded that in terms of the abovementioned criteria, practising as an advocate without being duly admitted amounted to a fatal irregularity which rendered the trial a nullity.³⁹⁴ New proceedings against the accused for the same offence would accordingly have been in order.

³⁹²At 872A.

³⁹³Per Kumbleben AJA at 872G. (My emphasis).

³⁹⁴At 875G.

8.6.2.3 New trials on appellate reversal of convictions handed down in lower courts

Parties dissatisfied with the outcome of a criminal trial in a lower court may bring the matter before the provincial or local divisions of the Supreme Court either by way of review or by way of an appeal. An appeal is brought where the accused challenges the legal or factual correctness of his conviction or sentence. However, where his complaint is based on the methods of a trial concerning an irregularity involved in arriving at the conviction, the complaint is brought by way of review. Therefore, a review is not specifically directed at the finding of the court but at the method which the court employed to make its finding. In an appeal the appellant is confined to the record, but in review proceedings the aggrieved party may also rely on irregularities which do not appear from the record.³⁹⁵

Section 309 of the Criminal Procedure Act provides that any person convicted of an offence by any lower court, may appeal against such a conviction and against any resultant sentence or order to the provincial or local division having jurisdiction. As indicated in chapter six, the prosecution may also request the magistrate to reserve a question of law for decision by a court of appeal; in other words, the prosecution may also appeal on a point of law against an acquittal handed down in a lower court.³⁹⁶ The Attorney-General may furthermore appeal against sentence imposed on a person who has been convicted in a lower court, provided that leave to appeal has been granted by a judge in chambers.³⁹⁷

³⁹⁵See in general Du Toit Service 14 1994 30-1 and Hiemstra 1993 ed 761.

³⁹⁶Section 310.

³⁹⁷Section 310A.

In disposing of an appeal against a conviction, the court may³⁹⁸

- (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternatives charge or one or other of the alternative charges³⁹⁹
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court⁴⁰⁰
- (iii) set aside or correct the proceedings of the magistrate's court⁴⁰¹
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question⁴⁰² or
- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit⁴⁰³ and
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.⁴⁰⁴

³⁹⁸See section 309(3) read with section 304.

³⁹⁹Section 304(2)(c)(i).

⁴⁰⁰Section 304(2)(c)(ii).

⁴⁰¹Section 304(2)(c)(iii).

⁴⁰²Section 304(2)(c)(iv).

⁴⁰³Section 304(2)(c)(v).

⁴⁰⁴Section 304(2)(c)(vi).

Furthermore it is specifically provided that unless the appeal is based solely on a question of law, a court of appeal, in addition to the abovementioned powers, has the power to increase any sentence imposed on the appellant or to impose any other form of sentence in lieu of or in addition to such sentence.⁴⁰⁵ Similar to the position regarding appeals from superior courts, the proviso is also added that no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or the proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.⁴⁰⁶

It is also provided for in the Supreme Court Act⁴⁰⁷ that the Appellate Division or a provincial division or a local division which has appeal jurisdiction may receive further evidence or remit the case to the court whose judgment is the subject of the appeal for a further hearing, with the relevant instructions regarding the taking of further evidence or otherwise as seems necessary to the division concerned. If the appeal is dismissed, the accused may with leave of the court against whose decision he wishes to appeal or with special leave of the Appellate Division appeal further to the latter division.⁴⁰⁸ The Appellate Division may reinstate the conviction, sentence or order of the lower court which is being appealed from, in its original or in a modified form or give such a decision or take such an action as the provincial or local division ought to have taken.⁴⁰⁹ It is further

⁴⁰⁵Section 309(3).

⁴⁰⁶*Id.*

⁴⁰⁷Section 22 of Act 59 of 1959. *Cf* to the same effect section 304(2)(b).

⁴⁰⁸See section 21 of the Supreme Court Act 59 of 1959.

⁴⁰⁹Section 311(1).

provided that if an appeal brought by the Attorney-General to the Appellate Division or to a local or provincial division (in terms of section 310) is dismissed, the court may order that the state pay the costs of the accused.⁴¹⁰

Where the prosecutor appeals against a decision in favour of the accused on any question of law, the following rules pertain.⁴¹¹ If the appeal is allowed, the court of appeal may itself impose the sentence or make the order which the lower court ought to have given. However, the court of appeal may also remit the matter to the lower court concerned and instruct that court as to what should be done. If the court of appeal does not choose one of these options, the case is returned to the court against whose decision on a question of law a successful appeal was made. The court re-opens the case and deals with it in the light of the question of law as set out on appeal. In reconsidering its decision in the light of the court of appeal's exposition of the legal position, the court *a quo* is limited to the record. Further evidence may be heard only if it has been specially authorised by the court of appeal.⁴¹² Conversely, if a question of law is decided in favour of the accused, the state may appeal further to the Appellate Division.

The issue whether the prosecution may take a matter on review to the detriment of the accused has already been considered in detail in chapter six.⁴¹³ This chapter focuses instead on the powers of an

⁴¹⁰Section 311(2).

⁴¹¹See sections 310(4) and (5). See chapter six *supra* under 6.6.2.2 for a discussion of the right of the prosecution to appeal on a point of law.

⁴¹²See Du Toit Service 11 1993 30-42C.

⁴¹³See chapter six *supra* under 6.6.2.6.

appellate tribunal in disposing of a matter taken upon review in favour of the accused. These powers are the same as those of a superior court in disposing of an appeal by the accused against his conviction and/or sentence, and need not be repeated.⁴¹⁴

Finally it is provided for in the Criminal Procedure Act that when a conviction is set aside on appeal or review, the circumstances in which *de novo* proceedings may be instituted are the same as those provided for in instances of appeals from superior courts to the Appellate Division.⁴¹⁵ In other words, the defence of *autrefois acquit* will not be of any avail to an accused whose conviction or sentence is set aside on appeal on the ground of a technical irregularity in the proceedings. It follows that the principles laid down in *Moodie* are also applicable to convictions and sentences of lower courts set aside by courts of appeals.

The interpretation by our courts of these various provisions is considered in the following paragraphs. This discussion is confined to interpretations which involve double jeopardy issues.

Similar to the position where an accused appeals against a conviction handed down in a superior court as a court of first instance, a court disposing of an appeal against a conviction from a lower court has the power to substitute the conviction of a court *a quo* for a conviction of a more serious offence of which the appellant (in the

⁴¹⁴See *supra*, text at notes 399-404 for the provisions of section 304(2)(c).

⁴¹⁵See section 313 which provides that the provisions of section 324 shall *mutatis mutandis* apply with reference to any conviction and sentence of a lower court which is set aside on appeal or review on any ground referred to in that section.

court of appeal's view) should have been convicted in the first place.⁴¹⁶ In such cases, the court of appeal may also impose a more severe sentence⁴¹⁷ or remit the matter to the trial court for the imposition of an appropriate sentence.⁴¹⁸ Moreover, it was held in *S v F*⁴¹⁹ that a court of appeal may also interfere with a sentence (which includes the power to impose a more severe sentence) in cases where only the conviction was appealed against. In *S v Magabe*⁴²⁰ the court held that a court of appeal may also add to the conviction by the trial court an additional conviction on another offence. However, it does not include the power to alter a conviction of murder with extenuating circumstances to one of murder.⁴²¹

The principles which our courts apply in determining whether a sentence ought to be increased on appeal have already been discussed in the context of appeals from superior courts.⁴²² Suffice it to add the following: In *S v Sunday*⁴²³ the constitutionality of the statutory provision which empowers a court of appeal to increase a

⁴¹⁶See *S v E supra* 977D-E and *S v Du Toit* 1966(4) SA 627 (A) 634A-B.

⁴¹⁷*S v E* 976D-E.

⁴¹⁸*R v V supra* 324A. See the provisions of section 309(3) discussed *supra*, text at note 405.

⁴¹⁹1983 (1) SA 747 (O) 753G-H.

⁴²⁰1990 (2) SACR 234 (W).

⁴²¹See *S v Mako* 1984 (3) SA 677 (A) 680H and *R v Taylor* 1949 (4) SA 702 (A) 717.

⁴²²See *supra* under 8.6.2.2.

⁴²³1994 (2) SACR 810 (C).

sentence at its own initiative and without request to do so by the state⁴²⁴ was challenged on the basis that it violates the accused's right to a fair trial (section 25(3) of the interim Constitution),⁴²⁵ and, more particularly, the right to have recourse by way of appeal to a higher court and the right to adduce and challenge evidence (sections 25(3)(b) and (d) respectively).⁴²⁶

The court rejected this argument. It stated that "the concept of a fair trial, including a fair appeal, embraces fairness, not only to the accused or the appellant ... but also, in a criminal case, to society as a whole".⁴²⁷ In the court's view, the whole object of the statutory power of the court of appeal to increase a sentence on appeal is to empower the court to rectify miscarriages of justice in the form of sentences which are manifestly much too light.⁴²⁸ The court concluded that the contention that the exercise of such a power could derogate from the fairness of the accused's trial had to be rejected and enjoyed no prospect of being accepted by a reasonable court. The court based its conclusion on the following argument⁴²⁹

By noting this appeal the applicants have reopened the *lis* between themselves on the one hand and society on the other which closed when they were sentenced by the trial court. That reopened *lis* is now before us on appeal.

⁴²⁴This is provided for in section 309(3) of the Criminal Procedure Act. See *supra*, text at note 405 for the provisions of this section.

⁴²⁵Act 200 of 1994. The right to a fair trial is now provided for in section 35(3) of Act 108 of 1996.

⁴²⁶These provisions are presently contained in section 35(3) (o) and (i) of Act 108 of 1996.

⁴²⁷At 820e.

⁴²⁸At 821h.

⁴²⁹At 821f-g.

Within certain circumscribed limits an appeal is a rehearing of the case. The applicants, having chosen to reopen the *lis*, cannot be heard to complain, in my view, in the event of this court finding itself obliged to correct an obvious miscarriage of justice, albeit to their detriment, in the performance of its duty to see to it that the interests of society are properly and fairly protected by its decisions.

Therefore, although the rule against double jeopardy did not feature in this case, the court clearly came out in support of what is known in American law of double jeopardy jurisprudence as a waiver theory.⁴³⁰

A court of appeal, in setting aside a conviction, also has the power to remit the case back to the magistrate.⁴³¹ In *S v Somciza*⁴³² the court held that it was undesirable that an accused who has been found guilty by a particular magistrate and whose conviction and sentence have been set aside should be retried, or that his trial should continue before the same magistrate who has already made findings in which he has accepted the evidence tendered by the prosecution.⁴³³ The court argued that⁴³⁴

[h]owever dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's

⁴³⁰See *supra* under 8.5.2, text at note 176 for a criticism of the "waiver theory" by Mr Justice Holmes in his minority opinion in the the American Supreme Court decision of *Kepner*.

⁴³¹See section 304(2)(c)(v).

⁴³²1990(1) SA 361 (A).

⁴³³At 365i.

⁴³⁴At 365j-366a.

evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.

However, the court found it unnecessary to decide the point raised by the appellants that sections 313 read with section 324 in fact precludes a remittal to the same magistrate. The court also added that where the appeal is allowed on the basis of an irregularity, the court should merely set aside the conviction and sentence and leave it to the Attorney-General to act in terms of section 324 (in other words to institute proceedings *de novo*) if he so desires.⁴³⁵

As indicated above, the Criminal Procedure Act as well as the Supreme court Act provide that a court of appeal may hear further evidence, or, remit a case to a magistrate's court to hear further evidence.⁴³⁶ Where the state wants to lead further evidence, it was recommended in *S v Smit*⁴³⁷ that it must place a proper application before the court, which contains the evidence that the state would adduce. Moreover, the appellant ought to be informed of the application so that he might be present and may lead evidence in rebuttal.

In *R v Siwi*⁴³⁸ the court of appeal on automatic review set aside convictions of a number of counts of stock theft on the ground that there was insufficient evidence *aliunde* on all of the counts except one

⁴³⁵At 365H-366G.

⁴³⁶Sections 304(b) and section 22 of the Supreme Court Act (see *supra*, text at note 407). sections 22 and 304(b). The Appellate Division may also hear further evidence (see section 316). However, this does not occur in practice. (See Hiemstra 841.)

⁴³⁷1966(1) SA 638 (O) 641C-F.

⁴³⁸1951 (3) SA 703 (O).

to prove the offences. The state made the submission that the matter ought to be remitted to the magistrate to give the crown a further opportunity of leading evidence to prove the commission of the offences of the counts on which the convictions were set aside, more especially so because the accused had pleaded guilty to all the counts. It was submitted that the court had these powers in terms of section 98(2) of the Magistrates' Courts Act 32 of 1944 which provided that the court of appeal may "hear any evidence or ... remit the case to the magistrate's court with instructions to deal with any such matters in such manner as the court of appeal may think fit ..." ⁴³⁹

The court refused to remit the matter for further evidence on the basis that a survey of previous decisions in point revealed a strong reluctance on the part of courts to remit cases for further hearing "where the Crown has failed to prove an essential element of the crime".⁴⁴⁰ In the court's view, the power to remit a case for evidence to supplement a deficiency in the crown's case should be sparingly exercised in review or appeal.⁴⁴¹ The court stated that a court "as a rule", ought not to remit a case for further evidence if the crown had omitted to prove an essential element of the offence.⁴⁴²

However, the court added that it might do so if a reasonable explanation was given to the court as to why such evidence was not led at the trial and the interests of justice demanded such a course.⁴⁴³ The court expressed its willingness to hear evidence or

⁴³⁹This is currently provided for in section 304 (2)(c)(iv).

⁴⁴⁰At 710F.

⁴⁴¹At 713H.

⁴⁴²*Id.*

⁴⁴³At 714A.

remit a case (a) if "owing to an oversight" the crown failed to lead evidence; (b) where the omitted facts could be proved without delay and (c) were undisputable, for example, failure to prove the *locus delicti*.⁴⁴⁴ In the case at hand, the court held that it could not remit the case because the crown could have led the evidence at the trial and could offer no reasonable explanation why the evidence had not been led.

These principles were subsequently confirmed by the Transvaal Provincial Division in *R v Letuli*.⁴⁴⁵ In that case the court made the following important statement⁴⁴⁶

The public prosecutor is *dominus litis*: if he fails to adduce the necessary evidence there is no apparent reason why the accused, who is entitled to his acquittal, should by a remittal be deprived of such right as he possesses to raise on some later occasion a plea of *autrefois acquit* in respect of this charge.

The court added that even in the exceptional cases namely, (a) where the evidence was of such a nature that it would prove the case without delay and without real dispute and (b) where it had not been omitted deliberately but by oversight or through some misunderstanding and (c) where a satisfactory explanation is furnished as to why it had not been adduced in the first trial, the superior court's discretion to allow the crown this privilege should be sparingly used.⁴⁴⁷ In *S v Mokgeledi*⁴⁴⁸ the Appellate Division held that while

⁴⁴⁴At 714A.

⁴⁴⁵1953 (4) SA 241 (T).

⁴⁴⁶At 246C.

⁴⁴⁷At 246G-H and 251A-B.

it, like any provincial division, has the undoubted power to remit a case to the trial court for further evidence to remedy a deficiency in the state's case, that power would be sparingly exercised.⁴⁴⁹ The court laid down as a general principle that remittal for hearing of further evidence should normally not be ordered where an appeal succeeds because of insufficiency of evidence against the appellant.⁴⁵⁰

Finally, in *S v Roux*⁴⁵¹ the court questioned whether "the true interests of justice requires that a case which has been completed should be reopened for the purpose of enabling further evidence to be led".⁴⁵² The court added that⁴⁵³

[t]he interests of justice and the public interest require that those who are guilty of an offence ought to be convicted. It is also in the interest of justice however, that finality should be reached in criminal cases, which should not be allowed to "drag on indefinitely".⁴⁵⁴ Where evidence which ought to have been led at the trial was not led, a request to allow the case to be reopened will therefore not be readily acceded to on appeal.

⁴⁴⁸1968 (4) SA 335 (A).

⁴⁴⁹At 339.

⁴⁵⁰*Id.*

⁴⁵¹1974 (2) SA 452 (N).

⁴⁵²At 454H-455A.

⁴⁵³At 455A.

⁴⁵⁴Referring to the words of De Wet CJ in *R v Mkize* (2) 1940 AD 211, 212.

8.6.2.4 Summary

The following principles apply with regard to the setting aside by the Appellate Division of convictions and acquittals handed down in superior courts.

* If the accused appeals against his conviction, a court of appeal may set aside the conviction and substitute it for a conviction of a more serious offence. This position has recently been criticised by the Appellate Division on the ground that it encroaches on the sacrosanctity of an acquittal. In doing this, the Appellate Division endorsed the implied acquittal doctrine.

* In considering whether a conviction should be set aside on the ground of an irregularity or defect in the procedure, it is at present (in terms of the provisions of the Constitution), appropriate to consider whether the accused's right to a fair trial has been violated. If the answer to this question is in the affirmative, it must furthermore be established whether the infringement can be justified in terms of the limitation clause.

* In *Moodie* the Appellate Division invoked the nullity theory (previously applied in English law) to effect new trials on appellate reversal of convictions. The principle advanced in *Moodie* and applied in *Naidoo*, namely that the person who has been convicted may be tried again in a new trial if his conviction is set aside on appeal on the basis that the irregularity which tainted the proceedings was of so gross a nature that it precluded the court of appeal from considering the merits of the case, has further been elucidated in *Mkhize*. The Appellate Division explained in *Mkhize* that no further enquiry into the merits is even called for if the irregularity which occurred at the trial can be described as a fatal irregularity. A fatal irregularity is

determined by enquiring whether the irregularity is *of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred*. If the irregularity is regarded (in terms of these criteria) as fatal, the trial and subsequent conviction is regarded as a nullity. Therefore, the state may once again prosecute the accused for the same offence in a new trial; the accused has never been in jeopardy of a conviction at the first trial.

* The *Moodie* principle still forms part of South African law. Unlike the position in English law, no reforms have been introduced in this particular area of criminal procedure in South African law.⁴⁵⁵ Furthermore, as will become apparent in the conclusions to this thesis in chapter ten, it is an open question whether application of the *Moodie* principle can withstand constitutional scrutiny in *all* cases.

The following principles apply with regard to the setting aside by courts of appeal of convictions and acquittals handed down in lower courts.

* If the accused appeals against his conviction, a court of appeal may substitute the conviction for a conviction of a more serious offence. The same applies with regard to appeals by the accused against sentence. A court of appeal may impose a more severe sentence even if the prosecutor did not request the court to increase the sentence. The constitutionality of this practice has recently been challenged on the basis (*inter alia*) of the accused's constitutional right to a fair trial. The submission that this practice infringes on fundamental human rights was rejected by a division of the Supreme Court on the basis that there is no reasonable prospect that it will be accepted by the

⁴⁵⁵*Cf* the position currently in English law set out *supra* under 8.2.

Constitutional Court. The particular division justified its standpoint, *inter alia*, by advancing a waiver theory. As indicated in American constitutional double jeopardy jurisprudence, a waiver theory cannot be advanced as a *rationale* to explain why an accused who succeeds in having his conviction set aside on appeal, may be tried again in new proceedings; not only does the theory rely on a fiction, but it also assumes that by exercising the fundamental constitutional right to appeal, the accused is simultaneously denied the right to claim enforcement of *other* fundamental human rights such as the constitutional guarantee against double jeopardy.

* In general, courts of appeal are reluctant to remit a case back to the magistrate for hearing of further evidence to supplement a deficiency in the state's case. The basic concern is that an accused ought not be deprived of his rights against double jeopardy. In other words, remittal for further hearing will, as a rule, not be ordered where the appeal succeeds because of insufficiency of evidence against the appellant.

PART FIVE

A CONSIDERATION OF DOUBLE JEOPARDY PRINCIPLES IN A CONTINENTAL SYSTEM OF CRIMINAL PROCEDURE

CHAPTER NINE

GERMAN LAW

9.1 General introduction

Section 103 (III) of the German Constitution (*Grundgesetz*, sometimes translated as Basic Law) provides¹

Niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden. (No person may in terms of the general provisions of criminal law be punished more than once for the same conduct).²

On a literal interpretation, the provision only contains a guarantee against *double punishment*. However, the Constitutional Court of Germany (*Bundesverfassungsgericht*) interpreted this provision broadly: it held that the provision not only affords the accused protection against double punishment, but also against *multiple prosecutions*.³ The right has furthermore been interpreted as affording the accused protection against a successive prosecution for

¹*Grundgesetz für die Bundesrepublik Deutschland* v 23.5.1949 (BGB1.,1).

²My translation.

³BVerfGE 12 62, 66.

the same criminal conduct after a conviction as well as after an acquittal.⁴

An accused may only rely on the provision if previously acquitted or convicted by a court of law of an act or omission punishable in terms of criminal law.⁵ Soon after the enactment of the German Constitution, the *Bundesverfassungsgericht* held that the protection afforded by the section is the same as that provided for in the ordinary law. In other words, constitutional protection against double jeopardy is the same as provided for in criminal law and the law of criminal procedure as interpreted by the ordinary courts.⁶ However, in 1981 the Court held that this rule is not absolute: if the Constitutional Court is faced with new issues not previously resolved in terms of the ordinary law, or with controversial issues, it may lay down new

⁴*Id.* *Contra* the narrow interpretation of the similarly worded double jeopardy provision of the Indian Constitution set out in chapter three under 3.4.1 above.

⁵See Sachs M *Grundgesetz Kommentar* 1996 1610. A conviction or acquittal in other proceedings, for example disciplinary proceedings, falls outside the ambit of this provision. The Constitutional court also interpreted section 103 (III) on the basis that it applies only to decisions handed down by German courts of law, and not to decisions of foreign courts. (See BVerfGE 12 62, 66). However, this does not apply in respect of decisions of the International Court of Human Rights (a supranational court). The decisions of that court attains *Rechtskraft* in German law. (See BGH 24 54, 57).

⁶See BVerfGE 3 248, 252. The court held that the history of the establishment of the fundamental right did not indicate that it ought to be interpreted on a basis different from that provided for in the ordinary law of the land. This interpretation, known as the *subjektiv-historische* interpretation, is severely criticised in legal literature. See for example Maunz T & Dürig G et al *Grundgesetz Kommentar* Band 1V 1994 103 (III) 5-6 hereinafter referred to as Maunz/Dürig.

principles in this particular field of law.⁷

In German law, the *ne bis in idem* rule is referred to as the *Rechtskraftlehre* (the doctrine of *res judicata*).⁸ In legal literature, a

⁷BVerfGE 56 22, 34. See Maunz/Dürig 103 (III) 6-7 for a detailed discussion of this case.

⁸See in general Spinellis DD *Die Materielle Rechtskraft des Strafurteils* (Inaugural dissertation zur Erlangung der Doktorwürde) 1962 3-7; Rheingans H *Die Ausbildung der strafprozessualen Rechtskraftlehre von der Aufklärung bis zur Reichsstrafprozessordnung v 1877 1937* 3-33; Wolter E *Der Umfang der Rechtskraft im Strafprozess* (Inaugural dissertation zur Erlangung der juristische Doktorwürde) 1938, 11 for the historical development of the *Rechtskraftlehre* in Germany. Based initially on the principle of *res judicata* as expounded in Roman and Canon law, the principle was subjected to several exceptions during the Middle Ages. During this period, the inquisitorial process came to be applied in criminal trials. Since the most important value in terms of this process was the establishment of the truth, it had the following implications for the principle of *Rechtskraft*: if the accused failed to prove his innocence beyond any doubt, the court would release him in terms of a procedure known as *absolutia ab instantia*. A release in terms of this procedure did not amount to an acquittal: new proceedings for the same crime could be undertaken if new evidence became available. (See Wolter 11, Rheingans 15-23 and Spinellis 5). However, the *Rechtskraftlehre* gained momentum during the period of the Enlightenment. The ideas of freedom of the individual and certainty of the individual against arbitrary action by the state came to be recognised in the law of criminal procedure, particularly in the field of *Rechtskraft*. The predominant value of the inquisitorial process, namely that the truth must be established at all costs, was substituted for the value of legal certainty which eventually led to finality accorded to an acquittal. (See Rheingans 34). The *ne bis in idem* rule acquired formal recognition in a constitution of 1791, but was applied inconsistently during the 1900s: the rule applied only to acquittals; convictions could be challenged, apparently, *ad infinitum*. (See Spinellis 6). It was only after 1848 that the principle was formally recognised as being available to decisions in favour of the accused as well as decision prejudicial to the accused. In 1877, the principle was recognised in the *Strafprozessordnungsgesetz*. Following on the violation of the principle during the period of the Third Reich, the rule eventually in 1949 attained the status of a fundamental human right in terms of the German Constitution.

distinction is drawn between *formelle* (formal) *Rechtskraft* and *materielle* (substantive) *Rechtskraft*.⁹ *Formelle Rechtskraft* means that the decision can no longer be challenged in the same proceedings. This means that all possible remedies (such as appeals or applications for reviews) have been exhausted or that the time within which these remedies could have been utilised has lapsed. The effect of the *formelle Rechtskraft* is that the court's decision may be implemented (it accordingly has *Vollstreckungswirkung*). *Materielle Rechtskraft* means that the matter is now *res judicata*; it can no longer be the subject of adjudication in *another* proceeding. Of importance is that *formelle Rechtskraft* is a prerequisite for *materielle Rechtskraft*. The result of this approach is that the appeal to a higher tribunal by the prosecutor is not regarded as a violation of the rule against double jeopardy; *materielle rechtskraft* only attaches at a stage after all legal remedies have been exhausted.¹⁰ Terminology used in German law to describe the concept of *res judicata* (*materielle Rechtskraft*), are the following: *Strafklageverbrauch* (consumption of the criminal charge) and *Sperrwirkung* (blockage effect). Moreover, when the criminal charge is consumed (*verbraucht*), it results in a *Verfahrenshindernis* (obstruction to further proceedings).

German legal commentators have identified several policies that underlie the rule or principle of *Rechtskraft*. The basic principle advanced is that the rule seeks to achieve the objectives of legal certainty as well as justice for the individual.¹¹ It is suggested that

⁹See in general Roxin C *Strafverfahrensrecht* 1991 22 Auflage 337-338.

¹⁰See also *infra* under 9.2, text at note 20 for a discussion of this particular aspect of German criminal procedure.

¹¹Henkel H *Strafverfahrensrecht Ein Lehrbuch* 1968, 2 (neuebearbeitete) Auflage 384 points out that in the field of *Rechtskraft*, the value of individual justice is sacrificed to the social value of legal certainty.

the rule seeks to achieve the following specific purposes¹²

(a) A protection function (*Schutzfunktion*)

The rule protects the accused against arbitrary exercise of state power and has the effect of ensuring individual legal certainty. Inasmuch as the accused may appeal to the Constitutional Court on the basis of violation of this right, this particular function achieves its objective.

(b) A sanction function (*Sanktionfunktion*)

This is a particularly important function of the rule against double jeopardy in German law. It presupposes that the prosecutor conducts an exhaustive investigation of all the facts pertaining to a criminal matter before preferring charges. The rule fulfils this function by prohibiting the prosecutor from bringing charges in a successive prosecution for offences arising from the same transaction which previously have been adjudicated on.¹³ The same applies to the court; the presiding judge has the right and the duty to investigate *all* the facts pertaining to the matter as well as to evaluate the facts from all legal perspectives.¹⁴ If he fails to perform his duty in these respects (his so-called *Kognitionspflicht*), a second proceeding may be

This is so, because in terms of the *Rechtskraft* doctrine, incorrect decisions (unfavourable to the accused) also acquire finality; to maintain order and peace in the legal community, it is necessary that correct as well as incorrect decisions acquire finality.

¹²See Trepper T *Zur Rechtskraft strafprozessualer Beschlüsse* (dissertation) 1995 18-22.

¹³See *infra* under 9.4 for a discussion of the definitional issue of "same offence" in German law.

¹⁴See *infra* under 9.4.2 for a discussion of the courts duties in this respect.

prohibited, not only for offences considered and adjudicated on in the first proceeding, but also for other offences. The *Rechtskraft* therefore performs a preventative function; it attaches a sanction to failure by the organs of state to perform their duties, namely denial of a second opportunity to prosecute the accused.

The general approach is that only a decision or adjudication on the factual merits of the matter (which can no longer be challenged) acquires *materielle Rechtskraft*. This is known as a *Sachurteil* (a decision on the factual merits of the case) as opposed to a *Prozessurteil* (a decision on procedural grounds). The latter does not attain *materielle Rechtskraft* because it does not relate to the factual guilt or innocence of the accused.¹⁵ The ambit of the previous subject of adjudication is determined by reference to what is understood as the concept *strafprozessuale Tat*. This concept is a very wide one and can be translated as "the criminal act, conduct, or transaction in the criminal procedural sense of the word". The ambit of the *strafprozessuale Tat* is probably one of the most complex issues in German criminal procedure. Before considering this concept, it is essential first to explain certain distinctive features of German criminal procedure. Thereafter the issue of attachment of jeopardy will be considered, which will be followed by a discussion of the concept *strafprozessuale Tat* and the principle known as the *Verbot der Reformatio in Peius*.

9.2 DISTINCTIVE FEATURES OF THE GERMAN LAW OF CRIMINAL PROCEDURE

German criminal procedure differs from the procedure applied in Anglo American countries inasmuch as the former is based on an

¹⁵See Fezer G *Strafprozessrecht* 1995 zweite Auflage 239.

inquisitorial model and the latter on an adversarial model. The intention of this thesis is not to elaborate on the differences and similarities between the two models.¹⁶ However, it will focus on certain premises which differ in the two models which may explain the evolution of different rules of double jeopardy in the two systems.

The basic goal of the German criminal proceeding is the same as that in the countries which adopt an adversarial system: the determination of the objective truth on the basis of and within the framework of the procedural forms which the law prescribes.¹⁷ However, the techniques of finding this objective truth differ in these respective legal systems. Also, the mechanics used to establish equality of trial position between the prosecutor and the defence are not the same.¹⁸

The principal difference between German and Anglo-American systems of criminal procedure is that the former does not have a trial

¹⁶See Herrmann J "Models for the reform of the criminal trial in the People's Republic of China - comparative remarks from a German perspective" *Festschrift für Koichi Miyazawa* 1995 611, 612-613 (hereinafter referred to as Herrmann *Festschrift*) for a synopsis of the main characteristics of the two models, and a detailed discussion (616-631) of the different types of inquisitorial and adversarial trials.

¹⁷See Jescheck H "Principles of German criminal procedure in comparison with American law" *Virginia Law Review* Vol 56 1970 239, 240. The author observes that it is often assumed that the Anglo-American trial with its adversarial nature is merely "a sporting match between the attorneys involved without any goal of ascertaining the truth" (at 240). The German trial on the other hand, is viewed as a means of convicting the accused at all costs. In the author's view, these assumptions over-emphasise certain features of the different trial procedures. He observes that "the object of both trials is the same search for the truth within the permissible legal framework" (*Id*). See also Herrmann *Festschrift* 621-622.

¹⁸See Jescheck 241.

by jury.¹⁹ This difference should be considered in conjunction with another distinctive feature of German criminal procedure: the right of the German prosecutor to appeal against an acquittal on a point of law as well as on the factual merits of a case.²⁰ As indicated above, it is suggested in legal literature that the *only* reason why prosecution appeals are prohibited in Anglo-American countries is that the jury nullification rule excludes a determination of the grounds on which an acquittal is based.²¹ In other words, the prosecution is prohibited from appealing an acquittal, not because of double jeopardy principles, but for the simple reason that the jury nullification rule makes it impossible to identify grounds on which the decision can be challenged. In countries without jury systems such as Germany and South Africa, this problem does not exist; the judge must set out the reasons or grounds on which his judgment is based. This is arguably the reason why the German prosecutor may appeal against an

¹⁹The trial by jury was abolished in Germany in 1924 and replaced by a *Schwurgericht* in which three professional judges together with six lay judges decide the question of guilt and penalty together. These lay judges have the same rights as the professional justices; they may even outvote the professional judges and grant an acquittal. However, this hardly occurs in practice. The lay judges usually preside by the legal evaluation of the professional judges. With the exception of the single judge *Amtsgericht* (lower court of general jurisdiction in Germany), all the other criminal courts are collegial (composed of professional judges and lay judges (*Laien*)). See in general Jescheck 243.

²⁰See *infra* note 74 for a discussion of the forms of appeal namely, *Berufung* and *Revision*. The German prosecutor may appeal on the factual merits of a case (*Berufung*) or take a matter on review (*Revision*). See para 296 I StPO Kleinknecht T and Meyer K *Strafprozessordnung* 39 ed 1989 1054. Either of these remedies may also be employed by the prosecutor to appeal against sentence. The *Revision* is an appeal on a point of law or an appeal on procedural grounds. See in general Roxin 347-385.

²¹See chapter six *supra* under 6.5.7 for a discussion of the views of the American commentator Westen and Drubel.

acquittal on legal as well as factual grounds. Consequently, there is no reason why the South African prosecutor should not also be allowed to appeal against an acquittal, not only on legal grounds, but also on the factual merits of a case.

However, this argument loses ground if one considers the other important distinctive feature of German criminal procedure, namely that the prosecutor may also take a matter on appeal or review *in favour* of the accused after a conviction.²² This particular rule flows from the inherent nature of the inquisitorial process; the prosecutor and accused are theoretically not opposing parties, but are both committed to finding the truth.²³ This perhaps explains why the institution of the prosecution appeal (the right of the prosecutor to appeal) has never been challenged in German courts or even been considered in legal literature as involving double jeopardy violations. In German law, the appeal is (apparently) viewed simply as a mere continuation of the same proceedings. This assumption is strengthened by the distinction drawn in German law between *formelle* and *materielle Rechtskraft*.

A further distinctive feature of the German system of criminal procedure is that the prosecutor theoretically has very little discretion (if any) whether to charge a suspect with a crime. Instead, the German prosecutor is bound in theory by the *Legalitätsprinzip*

²²See para 292 II StPO set out in Kleinknecht and Meyer 1054. The German prosecutor may appeal or take a matter on review if he is convinced that the accused ought to have been acquitted, or that a procedural error tainted the proceedings which prejudiced the accused. The prosecutor may even take the appeal (in favour of the accused) against the wishes of the accused (See Kleinknecht and Meyer 1056).

²³See also *infra* under 9.3.1 for a discussion of the prosecutor's duties during the investigating stage of the trial.

(principle of legality) under which he is required to bring an action in all non-petty cases in which he is able to prove his case in court.²⁴ This particular feature of criminal procedure also has certain implications with regard to the right of the prosecutor to withdraw charges. The extent to which the German prosecutor is allowed to withdraw charges is discussed in detail in the paragraphs dealing with the "attachment of jeopardy" issue.²⁵

Probably the most important difference between the two systems lies in the manner of adducing evidence. As will become clear from the discussion of German rules of double jeopardy, this difference also has an impact on those rules.²⁶ In Anglo-American systems, proof is received by direct examination and cross-examination. In Germany, the so-called *Instruktionsmaxime* applies. This means that it is the responsibility of the judge to take testimony and to discover the true facts.²⁷ The judge bears the responsibility of interrogating the accused and witnesses. Moreover, the completeness and correctness of the proof also rests on his shoulders.²⁸ The judge must be thoroughly familiar with the charges (contents of the file) to carry out his examination and to discharge his duty to clarify the facts. This is referred to as his so-called *Aufklärungspflicht* (duty to clarify the facts, or duty to ensure that all the relevant facts of a case are duly

²⁴See Jescheck 245 and Herrmann J "The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany" *University of Chicago Law Review* Vol 41 1974 468.

²⁵See *infra* under 9.3.

²⁶See *infra* under 9.4.

²⁷See Eser A "Beweisermittlung und Beweiswürdigung in vergleichender Perspektive" *Festschrift für Koichi Miyazawa* 1995 561, 565-566.

²⁸See Jescheck 249.

presented).²⁹ A necessary consequence of this rule is that his adjudication can only be based on what was established in the open and main trial (*Hauptverhandlung*) and not what occurred in the investigative stages of trial (*Ermittlungsverfahren*).³⁰ This also ensures that the judge cannot make a prejudicial decision on the basis of evidence obtained in earlier, preliminary, investigative stages of trial.³¹

The German judge is also obliged to consider the facts as established and clarified by him in the main trial from all legal perspectives. This means that, in making his judgment, he has to take into consideration *all* the relevant offences which the accused may possibly have committed - not only those set out in the charge sheet.³² In other words, the court is not bound by the prosecution's legal evaluation of the facts; the judge may arrive at different conclusions to those of the prosecutor in the charge sheet and is only bound by the factual basis of the criminal conduct set out in the charge sheet (the so-called *Tat*).³³ The court therefore has a

²⁹In terms of para 244 II StPO this is a fundamental principle of German criminal procedure: the court must determine the truth by considering all facts and testimony which is necessary for reaching a decision. See Beulke *W Strafprozessrecht* 1994 170. Herrmann *Festschrift* points out (at 618) that, unlike the position in French law where there is only a *moral duty* on the judge to try to discover the truth, there is a *legal duty* on the German judge to try to discover the truth.

³⁰See Eser 566. See also *infra* under 9.3 for a discussion of these different stages of proceedings in German criminal procedure.

³¹See Eser 566.

³²These duties are implicit in a number of provisions of the Code. These are discussed in detail *infra* under 9.4.2.

³³See *infra* under 9.4 for a detailed discussion of these principles of German criminal procedure.

umfassende Kognitionspflicht, in other words, a comprehensive duty to consider all the facts related to the criminal conduct set out in the charge sheet. Moreover, the court must consider these facts from *all* legal perspectives.³⁴

The scope of the *Sperrwirkung* in German criminal procedure is closely related to or dependent on the expansive *Kognitionspflicht* of the judge, namely his duty to consider the conduct charged from all factual and legal perspectives. As will become clear from a discussion of the principles, it is precisely these wide duties and powers of the court which resulted in expanded protection against successive prosecutions for the same criminal transaction in German law.

9.3 The attachment of jeopardy

In order to understand at which stage jeopardy attaches in German law, it is necessary firstly to give a broad outline of the different stages of criminal proceedings in German law, as well as the different kinds of discontinuances of proceedings which may occur during these stages.

9.3.1 Discontinuance of proceedings by the prosecutor during investigative phase

The first stage of German criminal proceedings is known as the investigative stage (*Ermittlungsverfahren*). During this stage, the office of the prosecutor investigates whether a crime has been committed. However, his duty is not simply to gather one-sided evidence against the suspect, but to investigate all the facts, also

³⁴See BGH StV 1987 52, 53.

those favourable to the accused.³⁵ After a full investigation of the alleged offence, the prosecutor has to decide whether there is enough evidence against the suspect to bring a charge against him. If the prosecutor decides to bring a charge, it is then lodged with the court with jurisdiction to hear the matter.³⁶

The *Ermittlungsverfahren* comes to an end by preferring a charge against the accused, or by discontinuing the proceedings against the accused. As a general rule, this is done by the prosecutor without participation of the court.³⁷ During the *Ermittlungsverfahren* the prosecutor is *dominus litis*. Discontinuance of proceedings during this stage may be based on the following grounds

- (a) procedural grounds, for example that the crime has prescribed
- (b) substantive legal grounds, for example that the act is not punishable or
- (c) on factual grounds, for instance that X did not in actual fact commit the crime
- (d) the principle of expediency.³⁸

Only the last-mentioned of these grounds needs to be explained. As indicated above, the basic premise in German law is that the prosecutor has no (or very little) discretionary powers whether to institute criminal proceedings. In fact, he is under an obligation to

³⁵See para 160 II StPO Kleinknecht and Meyer 646.

³⁶Par 170 1 StPO Kleinknecht and Meyer 706.

³⁷The only exception is where the discontinuance is in terms of the principle of expediency. See *infra*, text at notes 45 and 46.

³⁸Discontinuances of proceedings described in (a)-(c) are provided for in para 170 II 1 StPO (Kleinknecht and Meyer 706-707), and in (d) in terms of paras 153 and 153A StPO (Kleinknecht and Meyer 595-615).

prosecute when he is presented with evidence of criminal conduct. This is a fundamental principle in German criminal procedure, known as the *Legalitätsprinzip*.³⁹ However, there are certain exceptions to this rule. In the field of petty offences (*Vergehen*), the prosecutor may in certain defined circumstances (set out in the Code), exercise a discretion whether to continue or to discontinue proceedings.⁴⁰ These powers are justified in terms of the principle of expediency (*Opportunitätsprinzip*). They are as follows

- (d) (i) where the guilt of the accused can be regarded as trivial or insignificant and there is no public interest warranting a prosecution.⁴¹

Where proceedings are discontinued in the circumstances set out in (a) to (d)(i) above, new proceedings may nevertheless be instituted against the accused for the same conduct even if no new facts or evidence comes to light.⁴² The fact that the prosecutor's decision does not invoke *materielle Rechtskraft* is not criticised in legal literature. It is, *inter alia*, explained on the basis that the *Legalitätsprinzip* requires that the prosecutor investigates a matter afresh if there are sufficient grounds to suspect that a person has

³⁹See section 152 II StPO Kleinknecht and Meyer 590.

⁴⁰German law distinguishes between *Vergehen* (petty offences) and *Verbrechen* (serious offences). *Verbrechen* are offences punishable by more than one year of imprisonment.

⁴¹Par 153 I StPO Kleinknecht and Meyer 595. This, however, may only be done with the consent of the court competent to open the main proceedings except if the alleged crime was only against property and the damage was insignificant and the punishment prescribed low. Therefore, in the last-mentioned circumstances, the prosecutor may drop the case without consent of the court.

⁴²See Beulke 133-140. This is the position even if the court consented to the discontinuance.

committed a crime.⁴³ It is also argued that *Rechtskraft* is related only to judgments of the court which can be described as final decisions on the factual merits of the case. The preliminary decision of the prosecutor not to prefer a charge does not comply with these requirements.⁴⁴

The Code furthermore provides for discontinuance of proceedings on grounds of expediency during this phase (the investigative phase) by the prosecutor on a conditional basis. This is provided for in the following circumstances

- (d) (ii) When a person is regarded as having had minor guilt, and the offence is simply a *Vergehen*, the prosecutor may drop the case on condition that the accused pay an amount of money to a charitable organisation, the victim or the state.⁴⁵

A discontinuance of proceedings on this basis requires consent of the court (competent to open the main proceedings) as well as the consent of the accused.⁴⁶ The double jeopardy implications are the following. If the suspect does not comply with the conditions, the proceedings may be continued. If however, the conditions are complied with, the termination acquires limited *Rechtskraft*. The transgression may not again be prosecuted as a *Vergehen*, but may be prosecuted as a *Verbrechen* if it appears at a later stage that the case can be viewed from a different legal perspective, indicating that a

⁴³See Radtke H *Zur Systematik des Strafklageverbrauchs verfahrenserledigender Entscheidungen im Strafprozess* 1994 153.

⁴⁴See Radtke 159.

⁴⁵Para 153a StPO Kleinknecht and Meyer 603.

⁴⁶See Beulke 142.

more serious offence has been committed which deserves a more severe punishment.⁴⁷ The fact that this particular form of discontinuance of proceedings obtains only limited *Rechtskraft* is explained as follows. The act (or conduct) has already been consumed (*verbraucht*) as a *Vergehen*. It therefore cannot be prosecuted once again as a *Vergehen*, but it may subsequently be prosecuted as a *Verbrechen*.⁴⁸

German criminal procedure also provides for another summary procedure which imposes sanctions without trial. This is known as the Penal Order or *Strafbefehl* procedure.⁴⁹ The penal order can be described as an offer to the accused to accept a sentence and thereby admit his or her guilt. To this extent, the penal order can be compared to the guilty plea in Anglo-American procedure.⁵⁰ Instead of filing a formal charge, the prosecutor may in the case of less serious offences (*Vergehen*), draft a penal order specifying the act, the criminal law applicable, the evidence available and the proposed sentence, together with a statement that the penal order will be executed unless the accused objects within a week after delivery. The order is presented to a judge for review and approval. The judge may then sign the order, or direct a public trial. If the judge signs it (which happens in most cases), it becomes effective as a final judgment one week after delivery to the accused. However, if the accused objects, he files a notice with the court and he is then entitled to an ordinary trial. In terms of the relevant provision in the Code, the issuance of a penal order which is not contested obtains the status of a final

⁴⁷Para 153a I 4 StPO. See Kleinknecht and Meyer 603 and 612.

⁴⁸See Radtke 158.

⁴⁹See paras 407-412 StPO (Kleinknecht and Meyer 1340-1360).

⁵⁰See Herrmann *Festschrift* 632.

decision.⁵¹ However, against the literal meaning of the provision in the Code, the courts have attached only limited *Rechtskraft* to the *Strafbefehl*: they held that new proceedings nevertheless may be instituted if it appears at a later stage that the case can be viewed from a different legal perspective, indicating that a more serious offence has been committed which deserves more severe punishment.⁵² However, the legislature then added a provision to the Code which stipulates that on issuance of a penal order, new proceedings may only be instituted against the accused when *new facts and evidence come to light* which, if evaluated on their own or in conjunction with the previous evidence, amount to a *Verbrechen*.⁵³

To summarise. As a rule, discontinuance of proceedings by the prosecutor during the investigative stage of trial does not bring into effect protection against double jeopardy. However, there are two exceptions to this rule. The first is that a discontinuance of criminal proceedings for a less serious offence (*Vergehen*) on a conditional basis (with the consent of the accused and the court), in terms of the principle of expediency, obtains *limited finality*. This means that the accused may not again be prosecuted for the less serious offence, but may nevertheless be prosecuted once again for a more serious offence (*Verbrechen*) arising from the same facts if it appears at a later stage that the case can be viewed from a different legal perspective,

⁵¹Para 410 III StPO provides: "*Soweit gegen einen Strafbefehl nicht rechtzeitig Einspruch erhoben worden ist, steht er einem rechtskräftigen Urteil gleich*". See Kleinknecht and Meyer 1353. (A penal order against which an objection has not been timely raised obtains the effect of a final judgment). Translation by Niebler H in *American series of foreign penal codes - The German Code of Criminal Procedure* Vol 10 1965.

⁵²See BGH 28 69.

⁵³See para 373a (Kleinknecht and Meyer 1257) and Roxin 432.

indicating that a more serious offence has been committed which deserves a more severe punishment. The second exception is that discontinuance of proceedings for a less serious offence in terms of a summary conviction procedure known as the penal order procedure (which order is issued by the court with the consent of the accused), obtains also *limited* finality. Since such an order resembles a final adjudication on the merits, a higher degree of finality is attached to a discontinuance on this basis than which is attached in terms of a discontinuance on the basis of the principle of expediency; new proceedings may only be instituted against the accused when *new facts and evidence* come to light which demonstrate that the accused committed a more serious offence.

9.3.2 Discontinuance of proceedings by the court during the intermediary stage of proceedings (*Zwischenverfahren*)

If the prosecutor prefers a charge, the court then carries the responsibility for the matter and becomes *dominus litis*. An important implication of this is that the court, if it decides to proceed with the matter, is not bound by the charges set out in the charge sheet.⁵⁴ Another important aspect relating to the preferring of a charge, is that the prosecutor is not allowed, from this stage onwards, to discontinue proceedings or withdraw the charges on his own initiative or with consent of the court.

The prosecutor brings a charge when a conviction is probable, in other words, if the person is sufficiently suspect.⁵⁵ The most important details set out in the charge are the following: the name of

⁵⁴Par 155 II Kleinknecht and Meyer 638.

⁵⁵Para 170 I. See Roxin 258. The concept "*hinreichend verdächtig*" (sufficiently suspect) is used in this context.

the accused and a description of the facts, namely the acts or omissions which the accused allegedly performed (the so-called *Tat*). This is known as the *Prozessgegenstand* (the subject of adjudication as set out in the charge).⁵⁶ Further particulars set out in the charge are the definitions of relevant offences and the prescribed punishment for these offences in terms of the German Penal Code. However, the fact that the charge is handed in at the court does not mean that the trial is initiated and that the accused is requested to plead. First of all, the court must determine in intermediate proceedings (*Zwischenverfahren*) whether the trial should take place by opening the proceedings or admitting the charge.

During the *Zwischenverfahren*, the charge is read to the accused and he is then granted an opportunity to advance reasons as to why the main proceedings should not be opened.⁵⁷ After the accused has stated his case, the court must decide whether there are sufficient grounds on which to open the main proceedings. If the court decides that a conviction is probable, the main proceedings are opened by means of an *Eröffnungsbeschluss* (a decision to open proceedings). The *Eröffnungsbeschluss* contains certain detail, for example in which court the main proceedings should take place etcetera. Of importance is that the *Eröffnungsbeschluss* may also deviate from the charge sheet; it may, for instance be viewed from a different factual or legal perspective than that set out in the charge itself.⁵⁸ The only limitation is that the *Eröffnungsbeschluss* must refer to the same *Tat* (acts or conduct) described in the charge. If it covers other acts or

⁵⁶Roxin 123-124.

⁵⁷See Beulke 148.

⁵⁸Para 207 II Kleinknecht and Meyer 740.

conduct, a new charge must be lodged.⁵⁹

However, the court may also decide *not* to open the proceedings. This may be done on the following grounds⁶⁰

- (a) where a verdict of not guilty can be expected on factual or legal grounds
- (b) where the act is not a crime or
- (c) where there is a *Verfahrenshindernis*, for example prescription.

The prosecution may appeal against the decision of the court *not* to open the proceedings. However, the decision obtains finality if it can no longer be challenged in the *same* proceedings. The finality is nevertheless limited; new proceedings may be instituted if new facts or new evidence come to light.⁶¹

The fact that the *Nichteröffnungsbeschluss* on these grounds acquires limited finality, has been criticised on the basis that it resembles a final decision on the factual merits of the case; the *Nichteröffnungsbeschluss* on the abovementioned grounds relies on a conclusion that there is no probability that the accused may be convicted.⁶²

The alternative point of view advanced in legal literature is that the decision not to open the main proceedings involves a lesser degree of investigation into the guilt or innocence of the accused than the

⁵⁹See para 207 III Kleinknecht and Meyer 740.

⁶⁰Para 204 1 Kleinknecht and Meyer 733.

⁶¹Para 211 Kleinknecht and Meyer 750. See also BGHSt 18, 225.

⁶²See Radtke 218.

Sachurteil (decision on the factual merits of a case at the end of trial).⁶³ A subsequent adjudication based on new testimony and facts is therefore justifiable.

The court, at this stage, may also prefer on principles of expediency, not to open the main proceedings.⁶⁴ These principles are the same as those on which the prosecutor may discontinue proceedings in the *Ermittlungsverfahren*.⁶⁵ A discontinuance by the court on the basis that the accused's guilt is trivial or insignificant and that there is no public interest to prosecute may only occur with the consent of the accused and the prosecutor. A discontinuance on this basis by the court during the *Zwischenverfahren* acquires limited *Rechtskraft*, the ambit of which is controversial in the case law.⁶⁶ In earlier legal literature the fact that a discontinuance of proceedings on this basis during the intermediary stage of trial acquires only limited *Rechtskraft* was severely criticised. The general view was that, inasmuch as it involves an adjudication *by the court* to the extent of guilt with which

⁶³See Radtke 225-226. The commentator points out that it is required of the court to set out the grounds on which the decision is based; a requirement which makes it possible to determine the ambit of the *materielle Rechtskraft* in the particular case.

⁶⁴Par 153 II StPO Kleinknecht and Meyer 595.

⁶⁵These are (a) that the guilt of the accused for a less serious offence is trivial and insignificant and that there is no public interest to prosecute and (b) that the guilt of the accused for a less serious offence is minor and that proceedings are discontinued with the consent of the accused on a *conditional* basis, namely that the accused compensates the state or the victim or a charitable organisation.

⁶⁶See Beulke 140-141. This commentator expresses the point of view that new proceedings ought to be allowed if it appears that the accused committed a *Verbrechen*.

the accused performed the act, it also amounts to a *Sachurteil*.⁶⁷

An alternative point of view recently raised is that the grounds on which a court may decide *not* to open proceedings (in terms of the principle of expediency) cannot be regarded as being equivalent to a decision on the factual merits of the case. It is suggested, for instance, that a discontinuance on this basis amounts simply to a *hypothetical adjudication of guilt*.⁶⁸ Therefore, it cannot exclude a subsequent adjudication based on new facts and evidence which demonstrate the presence of a higher degree of guilt, and the possibility that a *Verbrechen* has been committed.⁶⁹ The limitation placed on the *Rechtskraft* is also explained on the basis that, at this particular stage of criminal proceedings, the court's *Kognitionspflicht* is not as comprehensive as required for a *Sachurteil*. Since the *Rechtskraft* is arguably dependent on the ambit of the *Kognitionspflicht*, only limited *Rechtskraft*⁷⁰ is accorded to discontinuances of proceedings on these grounds.

As indicated above, a discontinuance of proceedings by the court during the *Zwischenverfahren* may also occur (in terms of the

⁶⁷See Radtke 174-175. (See *supra* under 9.3.1, text at notes 41 and 45 for the grounds on which proceedings may be discontinued in terms of the principle of expediency).

⁶⁸See Trepper 102.

⁶⁹*Cf* Radtke 196. However, it is not altogether clear from the case law or the Code of Criminal procedure whether new proceedings may be instituted only for *Verbrechen*, or in *all* cases where there is new evidence available.

⁷⁰See Radtke 187-197 and 213-214.

principle of expediency) on a conditional basis.⁷¹ The prosecutor has to give his consent and the decision cannot be challenged. If the conditions are fulfilled, new proceedings may not be instituted - at least not for *Vergehen*.⁷²

To summarise. If the prosecutor prefers a charge, the court becomes *dominus litis*. From this moment onwards the prosecutor is not permitted to discontinue criminal proceedings on his own initiative (even with the consent of the court). The prosecutor brings a charge if a conviction is probable. Then the court must decide whether a trial should take place by opening the main proceedings. The decision of the court *not* to open the proceedings (the *Nichteröffnungsbeschluss*) obtains only *limited* finality; new proceedings may be instituted if new facts or evidence come to light. In legal literature this position is criticised on the basis that the decision not to open the main proceedings relies on a conclusion that there is no probability that the accused may be convicted; in other words, a decision which resembles a final adjudication on the factual merits of a case. An alternative point of view is that the decision not to open the main proceedings involves a lesser degree of investigation into the guilt or innocence of the accused than that which precedes the *Sachurteil*. Consequently, a subsequent adjudication based on new facts and evidence may be justified.

During this stage of proceedings the court may also discontinue proceedings for less serious offences on the basis of the principle of expediency, namely on the grounds that (a) the guilt of the accused

⁷¹Para 153a II. See Kleinknecht and Meyer 602. These are the same as provided for during the *Ermittlungsverfahren*. See *supra* under 9.3.1, text at note 45.

⁷²See Beulke 142. Apparently, new proceedings may be instituted for *Verbrechen*.

can be regarded as trivial or insignificant and that there is no public interest to prosecute and (b) the case is dropped on a conditional basis (by issuance of a penal order) because the accused only had minor guilt. A discontinuance of proceedings on any these grounds also obtains *limited* finality, the ambit of which is controversial in the case law. In legal literature, the fact that a discontinuance in terms of the principle of expediency during the intermediary stage of trial obtains limited *Rechtskraft*, is justified *inter alia* on the ground that it only involves a hypothetical adjudication of guilt. However, a more substantial argument is that the limitation placed on the *Rechtskraft* can be explained as follows. The court's *Kognitionspflicht* (at this stage of proceedings) is not as comprehensive as that which is required for a final decision on the factual merits (*Sachurteil*) at the end of the trial. Since the ambit of the courts' *Kognitionspflicht* relates to the ambit of the *Rechtskraft*, a lesser degree of finality is accorded to a discontinuance on any of these grounds during this preliminary stage of criminal proceedings than that which is accorded to a *Sachurteil* at the conclusion of the main trial.

9.3.3 Discontinuance of proceedings after the opening of the main trial

The trial or main proceedings (*Hauptverhandlung*) begins with the opening of proceedings by the court. After the opening of the main proceedings, the case can no longer be withdrawn - by either the court or the prosecutor. If the court decides after opening the main proceedings that there is no probability of conviction, the proceedings continue and the accused is acquitted by a judgment on the factual merits (*Sachurteil*).⁷³

⁷³See Fezer 113.

If the decision can no longer be challenged by appeal or review, further proceedings are barred. In other words, *materielle Rechtskraft* then comes into operation.⁷⁴

9.3.4 Discontinuance of proceedings on the basis of violation of fundamental rights

The law in this particular field has not as yet been fully settled in Germany. However, discontinuance or stay of proceedings by the court on this basis has been considered in the following instances

- (i) the right to a speedy trial
- (ii) entrapment
- (iii) kidnapping against the principles of International law and
- (iv) violation of the accused's rights during the investigative stages of trial.

⁷⁴There are several remedies by which a decision may be challenged. The first one is the appeal (*Berufung*). This leads to a trial *de novo*. The court of appeal may investigate the whole case afresh and also receive new evidence. The court either dismisses the appeal or allows the appeal by making its own decision on the merits. Both the defendant and the prosecutor may appeal. The prosecutor may appeal against an acquittal on the factual merits of a case as well as against sentence imposed on the person who has been convicted. As indicated above, the prosecutor may even appeal on behalf of the accused if he is of the opinion that the accused was unfairly convicted and/or sentenced. The *Berufung* is available to the accused and the prosecution to challenge the decisions of lower courts of general jurisdiction. The *Revision* is a remedy which can be described as an appeal on a point of law and an appeal on procedural aspects for instance, whether the court applied the law correctly to the facts or whether there was any procedural irregularity (a violation of the Code of Criminal Procedure). If the review is well-founded, the decision is reversed and the matter referred back to the lower court for a new trial. The appeal or revision on initiative of the prosecutor to the prejudice of the accused is not regarded as a violation of the rule against double jeopardy. The remedy of *Revision* is available to the accused and the prosecution to challenge the decisions of lower as well as superior courts. See in general Roxin 347-392.

The right to a speedy trial has only been considered by the *Bundesgerichtshof* as a factor to be taken into account for the imposition of a lesser punishment. However, in recent times lower courts as well as the *Bundesgerichtshof* have recognised the possibility that a violation of this right may lead to a permanent stay of proceedings.⁷⁵ In cases of entrapment (*Lockspitzel*), the possibility has also been recognised by the *Bundesgerichtshof* that it may in certain circumstances lead to a *Verfahrenshindernis*. However, since 1984 the *Strafsenat* of the *Bundesgerichtshof* held that it may only be taken into consideration as a factor for the imposition of lesser a punishment.⁷⁶ The law however, is still in a stage of development in this particular field. In the remaining instances, the courts' right to stay proceedings has been denied in the case of (iii)⁷⁷ and has not yet been fully resolved in the case of (iv).⁷⁸

9.4 THE DEFINITIONAL ISSUE OF *DIESELBE TAT* (THE "SAME OFFENCE")

9.4.1 General

The *Grundgesetz* does not give a definition of the concept *dieselbe Tat*. As has been mentioned, the meaning of the concept is therefore

⁷⁵See Roxin I *Die Rechtsfolgen schwerwiegender Rechtsstaatsverstöße in der Strafrechtspflege* 1987 (neuebearbeitete Auflage 1995) 84-91, hereinafter referred to as Roxin Imme.

⁷⁶BGHSt 32 345. See Roxin Imme 25-31.

⁷⁷See Roxin Imme IV citing BVerf G NstZ 86 178; 86 468.

⁷⁸Two lower courts recognised a *Verfahrenshindernis* in these situations, but the courts of *Revision* (reviewing courts) had a different point of view. See Roxin Imme IV.

also to be found in the ordinary law.⁷⁹ A distinction is drawn in German law between the concept *Tat* in the substantive law sense of the word (*materielle Tatbegriff*) on the one hand, and *Tat* in the procedural law sense of the word (*prozessuale Tatbegriff*) on the other hand. The concept *Tat* in the substantive law sense of the word relates to single trial multiple punishment issues. In other words, in substantive law, the concept *Tat* determines which punishment ought to be imposed on the person who has been convicted.

In most cases, the criteria applied in substantive law to determine whether there is a single unit of conduct (*Tateinheit*) or multiplicity of conduct (*Tatmehrheit*), is also implemented by the courts to determine whether a subsequent prosecution for the same *Tat* is prohibited. It follows that in most cases where there is *Tateinheit* in the substantive sense of the word, there will also be *Tateinheit* in the procedural sense of the word.⁸⁰ It is therefore essential to discuss the criteria advanced in substantive law to determine the concept *materielle Tat*. This is known as the *Konkurrenzlehre* (doctrine of concurrency). However, the courts have also given a broader meaning to the concept *strafprozessuale Tat* than to the concept *Tat* in the substantive law. This will become clear from the discussion of the concept *strafprozessuale Tat* in German law.

To summarise. In German law, the basic premise is that the same criteria apply to determine the permissibility of multiple punishment in a single trial on the one hand, and successive prosecutions for the same offence on the other hand. However, a successive prosecution

⁷⁹See Maunz\Dürig 103 III 13.

⁸⁰Of importance is to always keep in mind that *materielle Rechtskraft* comes into operation in respect of the *Tat* in the procedural sense of the word.

may also be prohibited in circumstances where multiple punishment (in a single trial) may be allowed. In other words, in certain cases where there is *Tatmehrheit* in substantive law, the courts nevertheless held that the offences charged in successive prosecutions are in a relation of *Tateinheit* to each other. This means that broader protection is afforded the accused in the context of successive prosecutions than in the single trial multiple punishment context.

The following discussion will focus on the concept *strafprozessuale Tat* as explained in terms of the Code of Criminal Procedure. Thereafter, the criteria advanced in the substantive law to determine the multiple punishment issue will be discussed (the so-called *Konkurrenzlehre*). Finally, the ambit of the concept *strafprozessuale Tat* as explained by the courts will be considered.

9.4.2 The concept *Tat* in terms of the Code of Criminal Procedure

The concept *strafprozessuale Tat* becomes relevant in the following procedural contexts ⁸¹

- (a) While the *Tat* is adjudicated on, it may not at the same time be adjudicated on by another court. This is referred to as *Rechtshängigkeit* (the principle of *lis pendens*).
- (b) It defines the subject on which the court may give a decision. This means that the court, in delivering judgment, is bound to the *Tat* with which the accused is charged. The *Tat* with which the accused is charged is known as the subject of the adjudication (*Gegenstand der Urteilsfindung*).
- (c) The ambit of the *materielle Rechtskraft* is dependent on the concept *strafprozessuale Tat*.

⁸¹See Fezer 243 and Beulke 212.

The concept *strafprozessuale Tat* is the same in all three these contexts.

The concept *Tat* is described in the Code as the subject matter of adjudication against the accused.⁸² This is called the *Prozessgegenstand*. Unlike the position in Anglo-American countries, the *Prozessgegenstand* is not limited to the crimes set out in the charge sheet. It pertains to a much wider field. The subject matter of adjudication in German law pertains to the conduct of the accused described in the charge sheet *as revealed as a result of the trial*.⁸³ It follows that the court, in delivering its judgment (*Urteilsfindung*), is neither bound to the charge sheet nor to the description of the criminal conduct in its opening decision (*Eröffnungsbeschluss*).⁸⁴ For example: A throws a stone at B, a police officer. He is charged with the crime of resisting a police officer. However, depending upon the facts as revealed in the trial (*Hauptverhandlung*), he may also be convicted of assault without this being alleged in the charge sheet.

There is a duty on the court to consider (in its judgment), all factual issues which came to light as a result of the trial. The court also has a duty to consider the facts (as they appear to be as a result of the

⁸²Para 264 I StPO. See Kleinknecht and Meyer 972.

⁸³See para 264 I: *Gegenstand der Urteilsfindung ist die in der Anklage bezeichnete Tat wie sie sich nach der Ergebnis der Verhandlung darstellt*". (Kleinknecht and Meyer 972). (The subject matter of the judgment is the act specified in the charge as revealed as a result of the trial - translation by Niebler).

⁸⁴See para 264 II: *"Das Gericht ist an die Beurteilung der Tat, die dem Beschluss über die Eröffnung des Hauptverfahrens zugrunde liegt, nicht gebunden"*. (Kleinknecht and Meyer 972). (The court is not bound by the classification of the act on which the order opening the main proceeding is based - translation by Niebler.)

trial) from all legal perspectives. This means that the court must take into consideration *all* the crimes of which the accused may be convicted on the basis of the facts as determined during the trial.⁸⁵

The only limitation placed on the court is that it may not adjudicate on a completely different *Tat* from that described in the charge sheet and the opening decision.⁸⁶ Therefore, there is a comprehensive duty on the court finally to dispose of the totality of the criminal conduct which the accused allegedly committed, *in one single trial*. The duty of the court to establish all the true facts and relevant legal perspectives is called the *Kognitionspflicht*.⁸⁷ As indicated above, it is suggested that the ambit of the court's *Kognitionspflicht* is closely related to the ambit of the *materielle Rechtskraft*. In fact, certain writers suggest that it should be the only criterion in determining whether a successive prosecution ought to be prohibited.⁸⁸ The scope of the court's *Kognitionspflicht* is discussed in detail in the paragraphs which follow. However, before considering this particular issue, it is necessary first of all to consider which criteria are applied in the substantive law to determine the permissibility of multiple punishment.

⁸⁵See BGHStV 1987 52, 53. See also Fezer 243.

⁸⁶See para 155 I: "*Die Untersuchung und Entscheidung erstreckt sich nur auf die in der Klage bezeichnete Tat und auf die durch die Klage beschuldigten Personen*". II. "*Innerhalb dieser Grenzen sind die Gerichte zu einer selbständigen Tätigkeit berechtigt und verpflichtet; insbesondere sind sie bei Anwendung des Strafgesetzes an die gestellte Anträge nicht gebunden*". (The investigation and decision extend only to the act designated in the charge and to the persons accused in the charge. Within these limits the courts are authorised and obliged to act independently; in particular in applying the criminal law, they are not bound by the charges made - translation by Niebler).

⁸⁷See Fezer 243.

⁸⁸This is the view of Fezer (244).

9.4.3 The doctrine of concurrency

As indicated above, the doctrine of concurrency was developed in German law in order to regulate the multiple convictions problem encountered in a single trial. The basic premise in terms of this doctrine is the following

One *Tat* = one punishment.

More than one *Tat* = multiple punishment combined in a sensible manner.

According to this basic premise an accused, by performing one single act (*Handlung*), can comply with the elements (*Tatbestände*) of more than one crime. This is known as *Tateinheit* (unity of conduct) and referred to in German law as *Idealkonkurrenz*. However, there is also the possibility that by committing several acts the accused complies with the elements of several crimes. This is known as *Tatmehrheit* (multiplicity of conduct) and referred to as *Realkonkurrenz*.

Basically, *Tateinheit* presupposes that only a single punishment may be imposed.⁸⁹ This is the case even if several legal interests are infringed. However, in determining what punishment ought to be imposed, the most important legal interest which has been infringed is taken into consideration. With this evaluation the punishment is imposed which relates to the gravest *Unrechtsgehalt* (the gravest degree of injustice) of the conduct. This is known as the *Absorptionprinzip*: the most severe punishment absorbs the lighter punishments.⁹⁰ *Tatmehrheit* on the other hand, presupposes multiple

⁸⁹Para 52 I StGB (*Strafgesetzbuch*). See Baumann J et al *Strafrecht Allgemeiner Teil Lehrbuch* 10 (neuebearbeitete) Auflage 1995, 732.

⁹⁰*Id.*

punishment. The principle applicable is known as the *Asperationprinzip* (principle of asperity). This means that the punishment imposed for offences which are in a relationship of *Tatmehrheit* forms one aggregate sentence, based on the severest penalty for the individual sentence.⁹¹

However, for the purpose of this thesis it is important to establish in which circumstances it can be said that there is *Tateinheit* or *Tatmehrheit*. As indicated above, in cases where *Tateinheit* exists in substantive law, there will also be a single *strafprozessuale Tat*.

9.4.3.1 The concept *Tateinheit* (unity of conduct)

The doctrine of concurrency advances several criteria to establish *Tateinheit*. These are the following

- (i) The act in the natural sense of the word. (*Handlung im natürlichen Sinn*). This is the most simple form of an act: a single physical act (one body movement). For example: X slaps Y once in the face. If there is one act in the usual sense of the word, there will also be only one *Strafprozessuale Tat*.
- (ii) Natural unity of conduct (*natürliche Handlungseinheit*). This is a dogmatic construction of an act. This form of *Tateinheit* consists of at least two physical acts in the usual sense of the word. However, in terms of certain criteria, they are regarded as a unit of conduct. These criteria are the following
 - (a) connection in terms of time and place and

⁹¹See paras 53-55 StGB & Baumann 733-734. This is known as *Gesamtstrafe*. The *Gesamtstrafe* is determined by considering the most severe sentence, aggregate to the other sentences. The *Gesamtstrafe* must be more severe than the most severe punishment for one of the offences, but not more severe than the total of all the punishments prescribed for each sentence.

similarity in the execution of the acts⁹²

- (b) a similar intention; in other words, there ought to be uniformity in the decision (*einheitlicher Handlungswille*) so that it may be said that it could be regarded as one project.

A simple example of *natürliche Handlungseinheit* is the following. X slaps Y across the face, and with a second slap breaks Y's glasses. The crimes of assault and malicious injury to property then are in a relationship of *Tateinheit*.⁹³ It is also irrelevant whether the rights of different victims are violated.⁹⁴

For example: X, acting in a continuous state of rage, breaks down a door of a hotel and injures several people inside. The crimes of malicious injury to property and multiple assaults on several victims are in a relationship of *Tateinheit*.⁹⁵

The *Bundesgerichtshof* explained the concept *natürliche Handlungseinheit* as follows⁹⁶

Eine natürliche Handlungseinheit ist gegeben wenn der Handelnde den auf die Erzielung eines Erfolges in der Aussenwelt gerichteten einheitlichen Willen durch eine Mehrheit gleichgearteter Akte betätigt und diese einzelnen Betätigungsakte aufgrund ihres räumlichen und zeitlichen Zusammenhanges objektiv erkennbar derart zusammengehören, dass sie nach der Auffassung des Lebens eine Handlung bilden. (A natural unit of conduct exists where a person commits several similar acts in the same space and during the same time and with a similar intention, and each of the single acts performed can in

⁹²See Baumann 726.

⁹³See Bauman 727.

⁹⁴*id.* The only exception is where highly personal rights of the individual are violated.

⁹⁵Example taken from Jakobs G *Strafrecht Allgemeiner Teil - Die Grundlagen und die Zurechnungslehre* Lehrbuch 2 (neuebearbeitete Auflage) 1993 890.

⁹⁶BGHSt 10 230, 231.

terms of the ordinary course of events be viewed objectively as a unit of conduct).⁹⁷

Where there is a normal unit of conduct (*natürliche Handlungseinheit*) in the substantive law, there will also be a *strafprozessuale Tat*.

(iii) Legal unit of conduct (*rechtliche Handlungseinheit*)

Legal unit of conduct exists where particular acts can be viewed as inherently independent of each other. However, in terms of certain criminal law perspectives, they are regarded as one unit of conduct.⁹⁸ The following are forms of a legal unit of conduct

(a) Multiple act *Tatbestände*

This is where the *Tatbestand* of a crime itself joins multiple acts into a legal unit. For example, the crime of robbery entails that the accused has to perform several acts in the ordinary sense of the word: an act of violence and the appropriation of an object. In this case there is *Tateinheit* in substantive law, as well as one *strafprozessuale Tat*. If a person is only charged with the appropriation, it is expected of the judge to fulfil his *Kognitionspflicht* by also viewing the appropriation from the perspective of the unlawful compulsion (*Nötigung*) as a method of effecting the appropriation. The appropriation and the compulsion cannot be divided; the degree of injustice and blameworthiness for both these manifestations of criminal conduct ought to be determined in one trial.⁹⁹

(b) Continuing crimes (*Dauerdeliktstatbestände*)

In these cases, the realising of the *Tatbestand* occurs over a period of time, for example the kidnapping of a

⁹⁷Freely translated.

⁹⁸See Baumann 727.

⁹⁹See Fezer 245.

person; the crime continues until the victim is set free. Single acts performed to fulfil the *Tatbestand* of the continuous crime build a unit of conduct (*Handlungseinheit*), and one *strafprozessuale Tat*.¹⁰⁰

The following are examples of *Idealkonkurrenz*

- * If, from a factual or legal perspective, certain conduct is required for the realisation of a *Tatbestand*, there will be *Handlungseinheit* (a unit of conduct) where at least a part of this conduct is identical to that required to comply with another *Tatbestand* or *Tatbestände*.¹⁰¹ In other words, if there is overlapping of conduct in the process of committing more than one crime, there will be *Tateinheit*. This is known in German law as *Teilidentität*. This means that there is only partial identity in conduct. A simple example is the following. X drives a car without a licence. He stops, breaks into a house and steals jewellery. Then he drives back to his house. This is *Idealkonkurrenz* on the basis of overlapping conduct. In order to comply with the *Tatbestand* of theft, X must remove the property. While taking away the property, he also commits the crime of driving without a licence.¹⁰² Where there is *Teilidentität* in the substantive law, there will also be one *strafprozessuale Tat*.
- * Where each of several crimes is in a relationship of *Handlungseinheit* with a particular crime, there should also be *Handlungseinheit* between each of these several crimes. This is called *Verklammerung* (joining together).¹⁰³ An example is the following. A person drives under the influence of liquor. On his way, he picks up a woman and takes her to a lonely place where

¹⁰⁰See Baumann 728.

¹⁰¹See Jakobs 909-910.

¹⁰²See Fezer 246. This commentator explains *Teilidentität* as follows: An act in the ordinary sense of the word (*natürliche Handlung*) complies at the same time with the preconditions of two *Tatbestände*, but one of these *Tatbestände* or each of them still requires further acts or a continuing act to be fully complied with.

¹⁰³See Jakobs 912.

he rapes her. The crimes of rape and drunken driving are not in a relationship of *Tateinheit* with each other. However, they are joined in *Tateinheit* by a third crime, namely kidnapping a woman against her will with unlawful performance of sexual acts with the woman.¹⁰⁴ Where there is *Verklammerung*, there will also be one *strafprozessuale Tat*.

9.4.3.2 The broader interpretation of the concept *strafprozessuale Tat* by the courts

German courts have adopted a comprehensive "same transaction" approach to determine whether a successive prosecution for the "same offence" (*dieselbe Tat*) ought to be barred. The *Bundesgerichtshof* explained the courts' approach in the following terms¹⁰⁵

Nach der ständigen Rechtsprechung des Reichsgerichts und des Bundesgerichtshofs ist unter Tat im Sinne des [Absatz] 264StPO ... der vom Eröffnungsbeschluss betroffene geschichtliche Vorgang einschliesslich aller damit zusammenhängenden und daraufbezüglichen Vorkommnisse und tatsächlichen Umstände, die nach der Auffassung des Lebens eine natürliche Einheit bilden, zu verstehen. (In terms of the approach of the Reichsgericht and the Bundesgericht, the Tat in the sense of para 264StPO is understood as the subject of adjudication as described in the opening decision, including all other related events and factual circumstances which, according to normal human experience or the ordinary understanding of things, form a natural unity).¹⁰⁶

¹⁰⁴This is a substantive offence in German law (para 237 StGB). See Dreher E & Tröndle H *Strafgesetzbuch und Nebengesetze* Band 10 1991 45 Auflage 1255). The example is taken from Kühl K *Strafrecht Allgemeiner Teil* 1994 1 Auflage 727-728.

¹⁰⁵BGHSt 13 320, 321. See also BGHSt 23 141, 145 & 35 80, 81-82. The same concept of the *strafprozessuale Tat* was adopted by the Constitutional Court. See BVerfG 56 22, 28.

¹⁰⁶Freely translated.

At first glance it may seem as if these criteria are the same or very similar to those advanced in substantive law to determine *natürliche Handlungseinheit* for the purpose of establishing concurrency in one trial. This is indeed the basic approach. In most cases where, in terms of substantive law, there is *Tatmehrheit* (multiplicity of conduct), there will also be a single *strafprozessuale Tat*.¹⁰⁷ However, the courts have also held that where there is *Tatmehrheit* in substantive law (*Realkonkurrenz*), there may nevertheless be only one *strafprozessuale Tat*. In other words, a successive prosecution for an act may be prohibited even if multiple punishment are allowed in a single trial. The *Bundesgerichtshof* held that this would be the case if separate acts (in terms of substantive law) are so closely connected that a separate evaluation and adjudication of each of these acts could be regarded as an unnatural splitting up of a unit of conduct.¹⁰⁸

The classic example given in the textbooks of a situation where there is *Tatmehrheit* in terms of substantive law but only one *strafprozessuale Tat*, is the following. The crimes of drunken driving and causing an accident on the one hand, and subsequent departure from the scene of the crime ("hit and run") on the other hand, stands in *Realkonkurrenz* with one another.¹⁰⁹ However, the *Bundesgerichtshof* held (applying the above criteria), that there is nevertheless *Tatidentität* (identity of acts) between these offences to

¹⁰⁷See Radtke 99.

¹⁰⁸(Zwischen den einzelnen Verhaltensweisen des Täters muss ein innere Verknüpfung bestehen, dergestalt, dass ihre getrennte Aburteilung in verschiedenen erstinstanzlichen Verfahren als unnatürliche Aufspaltung eines einheitlichen Lebensvorganges empfunden wurde). See Beulke 213, citing BGHSt 13 21, 26. See also BGHSt 35 14, 17 to the same effect.

¹⁰⁹The *Bundesgerichtshof* held that the offences of *Unfallflucht* (para 142 StGB) and *Gefährdung des Strassenverkehrs* (para 315c) are not in a relationship of *Tateinheit* with one another. (See BGHSt 21 203).

the extent that they can be regarded as a single *strafprozessuale Tat*.¹¹⁰

This approach may be reconciled with the court's *Kognitionspflicht*: the court is obliged to consider the facts as they appear in the *Hauptverhandlung* from all legal perspectives. However, the issue is whether the *Strafklageverbrauch* may cover an even wider field than could be expected objectively of the presiding judge to investigate and determine. In other words, is the *Kognitionspflicht* of the judge an abstract-hypothetical concept, or a concept with concrete boundaries? In the past, the courts have followed an abstract-hypothetical approach. This means that in order to determine the scope of the *Strafklageverbrauch* it is not important in which sense the court was *de facto* able to adjudicate on the act in its totality, but only if it was *de jure* in a position to do so.¹¹¹

Several legal commentators criticise this approach. It is suggested, *inter alia*, that the *Rechtskraft* should be limited to the matter which could in actual fact be established or determined by the court exercising due diligence.¹¹² Another suggestion is that the identity

¹¹⁰See BGHSt 23 141, 146-147. Beulke 214 points out that the result of this approach is that if a person is simply charged of drunken and dangerous driving, he may also be convicted in the *Hauptverhandlung* of the crime of "hit and run" if the facts revealed during the main trial demonstrate that he also committed the offence of "hit and run".

¹¹¹See Radtke 107. (*Für den Umfang des Strafklageverbrauchs kommt es nicht darauf an, inwieweit das Gericht die angeklagte Tat tatsächlich in ihren gesamten Umfang aburteilen konnte, sondern nur darauf, ob es rechtlich dazu in der Lage war*). The author points out that this approach was established by the previous *Reichtsgesicht* (RGSt 9 344, 347) and followed in decisions of that court and the subsequent *Bundesgericht*.

¹¹²See Henkel H 388-389. (*Nicht nur das, was diese hypotetisch abzuurteilen in der Lage war, sondern was es bei sorgfältiger Erfüllung*

of acts ought to be determined on the basis of the identity of the legal interests violated.¹¹³ Some legal commentators express the view that the principles of concurrency should be applied consistently in determining whether there is one *strafprozessuale Tat*. In other words, in all cases where there is *Tatmehrheit* in terms of the substantive law, a subsequent prosecution should be allowed.¹¹⁴

A further criterion advanced in order to determine identity of offences in the context of successive prosecutions is the following. There should only be *Tatidentität* if the second proceeding relates to factual events which could have been charged in the alternative to the crimes charged in the first proceeding.¹¹⁵ The *rationale* underlying this theory is the avoidance of inconsistent judgments.

Peters raises the following argument.¹¹⁶ The identity of the act in the context of *Rechtskraft* should be determined by considering not only the relationship of the individual acts, but also the aim (or target) of each act (*Richtung des Tätigkeitsaktes*). In other words, it must be determined if the previous subject of adjudication had the same

der Wahrheitserforschungspflicht abzuurteile hatte, bestimmt den Umfang der Sperrwirkung de ne bis in idem).

¹¹³See Bertel C *Die Identität der Tat* 1970. However, he also requires that there ought to be similarity in the injury caused (before a second prosecution is prohibited). In his view, the legal interest violated and the gravity of the injurious act should be considered together (at 140).

¹¹⁴See Herzberg RF "Ne bis in idem - Zur Sperrwirkung des rechtskräftigen Strafurteils" *Juristische Schulung* 1972 113.

¹¹⁵See Schöneborn C "Alternativität der Handlungsvorgänge als Kriterium des strafprozessualen Tatbegriffs" *Monatschrift für deutsches Rechts* 1974 529, 531.

¹¹⁶See Peters K *Strafprozess: Ein Lehrbuch* 2 Auflage 1985 508-509.

"direction" or aim as the subsequent subject of adjudication. For example, the crimes of theft and robbery have the same aim (*Tatrichtung*). These offences can therefore not be charged in successive prosecutions. However, a person previously convicted of poaching of animals may in a subsequent trial be charged of murder of a person even if the murder occurred during the same time as the offence of poaching; the "direction" or aim of each of these acts differs. In terms of this criterion, a person previously convicted of receiving stolen property may also again be charged of robbery of the same objects. The "direction" or aim of each act is different.¹¹⁷

In recent times German courts have handed down a few decisions which deviate from a strict abstract-hypothetical approach. In 1980, the *Bundesgerichtshof* allowed a subsequent prosecution for capital crimes committed by the accused in his capacity as a member of a criminal organisation after a previous conviction of a crime which prohibits membership of the same organisation.¹¹⁸ The court based its conclusion on the fact that the subsequent proceedings had not in fact been part of the subject matter of adjudication in the previous trial and also that a more severe punishment is prescribed for the acts charged in the second proceedings.¹¹⁹

The court also allowed a subsequent prosecution for negligent assault with a weapon after a previous conviction for unlawful possession of that particular weapon.¹²⁰ The court took into

¹¹⁷This criterion has recently been applied by German courts. See *infra* text at note 127.

¹¹⁸See BGH 29 288, 289.

¹¹⁹At 296-297.

¹²⁰See BGHSt 36 151, 153.

consideration the following criteria: the objectives of the respective acts (*Tatobjekt*), the time during which they were performed, and the place where they were performed.¹²¹

Legal commentators have suggested that these decisions rely in particular on the following criteria¹²²

- (i) the "direction" or aim of the act (*Tatrichtung*)¹²³
- (ii) the gravity of the legal interest infringed (*Unrechtsdimension*).

These criteria were also applied in two other important decisions of the *Bundesgerichtshof* during 1987. The issue in the first of these cases was whether a previous (incorrect) conviction of receiving stolen property would prevent a subsequent prosecution for robbery.¹²⁴ The court answered this question in the negative. It argued that the crimes had not been committed during the same time or in the same space, and also that the different legal interests violated had not indicated a unit of conduct.¹²⁵ In the second decision the *Bundesgerichtshof* also denied the existence of one *strafprozessuale Tat* in circumstances where the accused was charged with theft of jewellery after a previous conviction of being an accessory after the

¹²¹At 154-155.

¹²²See Beulke 215 & Schlüchter E "Von der Unabhängigkeitsthese zur materiell-rechtlich begrenzter Tatidentität beim Dauerdelikt *Juristen Zeitung* 1991 1057, 1060-1061.

¹²³As explained *supra*, text at note 117.

¹²⁴BGHSt 35, 60.

¹²⁵At 64.

fact in respect of the same jewels.¹²⁶ The second prosecution was permitted on the basis that that different legal interests were violated and that the target or aim of the act (*Angriffsrichtung*) differed and also that it occurred at different times in different places.¹²⁷

The fact that the court employed normative criteria instead of the wider factual approach in all of these cases, may be viewed as an indication of a swing towards a more conservative approach in this particular field of double jeopardy jurisprudence.¹²⁸ However, the *Bundesgerichtshof* has not as yet explicitly rejected the wider *de facto* approach.¹²⁹ It may therefore be concluded that German courts apply a wide "same transaction" approach to determine identity of offences, but allow exceptions in individual cases, namely where the interests of justice require that the accused be prosecuted once again.

¹²⁶BGHSt 35, 80. The decision therefore amounted to a rejection of the theory of alternativity as proposed by Schöneborn. See *supra* text at note 115 for a discussion of this theory.

¹²⁷At 82.

¹²⁸See however Radtke (at 102) who expresses the point of view that the number of decisions in which the court relied on these criteria are too few to conclude that the traditional comprehensive *Tatbegriff* has given way to a more limited *Tatbegriff*.

¹²⁹An issue which would subject the ambit or the *strafprozessuale Tat* to closer scrutiny is the "subsequent death" situation. This particular issue has not as yet been considered by the courts. A plausible explanation may be that the prosecution has refrained from instituting new proceedings in these particular cases because it is generally recognised that the *materielle Rechtskraft* also covers a consequence which arises only after adjudication of the act (*Tat*) which brought about the consequence.

9.5 PROHIBITION ON IMPOSITION OF A MORE SEVERE SENTENCE ON APPEAL AND RETRIAL (*VERBOT DER REFORMATIO IN PEIUS*)

As indicated above, German law allows the accused as well as the prosecution to appeal against acquittals, convictions and sentences handed down by lower courts.¹³⁰ The courts of appeal have wide powers to dispose of each of these matters.¹³¹ However, there are certain limitations placed on a court of appeal in respect of sentences. These limitations are set out in certain provisions of the Code of Criminal Procedure. The relevant rules are the following

- (i) if the accused or his counsel appeals against a conviction and/or sentence, or the prosecutor appeals in favour of the accused against a conviction and/or sentence, the judgment of the trial court may not, with regard to the nature and degree of punishment, be changed to the prejudice of the accused¹³²
- (ii) however, if the prosecutor appeals to the prejudice of the accused against an acquittal or sentence, the decision may be changed either to the prejudice of the accused or in his favour.¹³³

The prohibition is only applied to punishment and not to a change in the decision itself.¹³⁴ It also applies on retrial after appellate

¹³⁰See *supra* note 74.

¹³¹See *supra* note 74 for a discussion of these powers.

¹³²Paras 331 I; 358 II 1 StPO (See Kleinknecht and Meyer 1127 & 1217).

¹³³Para 301 StPO (Kleinknecht and Meyer 1061).

¹³⁴This means that a person charged and convicted of theft, may nevertheless be convicted (on appeal) of robbery.

reversal of a conviction. The rule is known as the *Verschlechterungsverbot*. This means that there is a prohibition on placing a person in a worse position that he has previously been. However, it only applies if the accused appealed, or the prosecutor appealed in favour of the accused. If the prosecutor appealed to the prejudice of the accused (against his acquittal and/or sentence), a more severe sentence may be imposed.

Of importance is that the *Verschlechterungsverbot* is based on the consideration that the accused ought not to be inhibited from using his legal remedies, for instance the institution of appeal.¹³⁵

9.6 RE-OPENING TO DISADVANTAGE OF FINALLY ACQUITTED ACCUSED

The German Code of Criminal Procedure provides that a case may be re-opened to the disadvantage of a finally acquitted accused in the following circumstances¹³⁶

- * if a document presented to his advantage during the main trial as genuine was false or falsified
- * if the witness or expert, while giving testimony or rendering an opinion to the advantage of the accused has made himself guilty of an intentional or negligent violation of the duties imposed by the oath or of intentionally giving false unsworn testimony
- * if a judge, juror or lay judge who participated in passing the judgment has made himself guilty of a violation of his official duties with respect to the matter (if public punishment to be imposed by way of a judicial criminal proceeding is provided for such violation) and/or

¹³⁵See BGHSt 11 319, 323.

¹³⁶Para 362 Kleinknecht and Meyer 1232.

- * if a credible confession of the punishable act is made by the acquitted person in court or outside of court.

9.7 SUMMARY

* On a literal interpretation, the double jeopardy provision of the German Constitution only offers the accused protection against multiple punishment. This is similar to the double jeopardy provision of the Indian Constitution. However, the Supreme Court of India preferred to give effect to the literal meaning of the words used in the constitutional guarantee, while the Constitutional Court of Germany (the *Bundesverfassungsgericht*) opted for a broad interpretation of the guarantee. The court ruled that the provision protects the accused against multiple punishment as well as against multiple trials. Moreover, the court held that an accused may rely on the guarantee irrespective of whether he has previously been *acquitted or convicted* for the same criminal conduct (*dieselbe Tat*).

* In one of the first double jeopardy cases the *Bundesverfassungsgericht* held that protection afforded in terms of the constitutional guarantee against double jeopardy is the same as that provided for in the ordinary law. However, the court added in a later decision that it may lay down new principles in this field of law if it is faced with new issues not previously resolved in terms of the ordinary law, or if it is faced with controversial issues of double jeopardy.

* Legal commentators have identified several policy considerations which underlie the guarantee against double jeopardy. It is pointed out, *inter alia*, that the rule strives to achieve the objectives of legal certainty as well as justice for the individual. Also, it protects the accused against arbitrary exercise of state power and ensures that organs of state perform their duties in a diligent manner. If the organs

of state (the prosecutor and the court) do not perform their duties in a diligent manner, namely by investigating all the facts from all relevant legal perspectives, they are denied a second opportunity to prosecute the accused.

* In German law of criminal procedure, the doctrine of *res judicata* is referred to as the *Rechtskraftlehre*. Unlike the position in Anglo-American systems, a distinction is drawn in German law between *formelle Rechtskraft* and *materielle Rechtskraft*. *Formelle Rechtskraft* means that a decision can no longer be challenged in the same proceedings. This means that all possible remedies (such as appeal and review) have been exhausted, or that the time within which these remedies could have been utilised, has lapsed. *Materielle Rechtskraft* on the other hand, means that a decision has obtained the status of finality: it can no longer be the subject of adjudication in *another proceeding*. Of importance is that a decision only becomes final (obtains *materielle Rechtskraft*) at a stage after all legal remedies available to the accused or the prosecution have been utilised. In other words, *formelle Rechtskraft* is a prerequisite for *materielle Rechtskraft*.

* Apart from the requirement of *formelle Rechtskraft*, it is also necessary that a termination of proceedings against the accused amounts to an adjudication on the factual merits of the case. This is called a *Sachurteil* (a decision on the merits) as opposed to a *Prozessurteil* (a decision based on procedural grounds). Therefore, a decision cannot attain the status of finality (acquire *materielle Rechtskraft*) unless it can be viewed as *a final decision on the factual merits of the case*. In this respect, the German approach is similar to that followed in most Anglo-American systems of criminal procedure.

* As in Anglo-American systems of criminal procedure, a *Sachurteil* usually takes place at the conclusion of the main proceedings (the *Hauptverhandlung*). However, German law also recognises that a discharge may occur at an earlier stage of criminal proceedings, namely during either the investigative stage (the *Ermittlungsverfahren*) or during the intermediary stage of proceedings (the *Zwischenverfahren*) which, although it does not follow on a full trial on the merits, resembles a decision on the merits. Therefore, in terms of Anglo-American legal terminology, it may be said that jeopardy, in German criminal law, may also "attach" at a stage before the final conclusion of the trial.

* Nevertheless, German courts have been reluctant to afford *absolute finality* to discontinuances during these preliminary stages of trial, even if they resemble an adjudication on the factual merits of the case. In fact, the courts only afford *limited finality* to such discontinuances. However, this does not mean that all types of discontinuances during these stages of criminal proceedings obtain the same degree of finality. In fact, the courts have accorded different degrees of finality to different types of discontinuances of proceedings during these stages of criminal proceedings.

The basic approach is that the accused discharged during these preliminary stages of criminal proceedings for a minor or less serious offence, may be prosecuted once again if the prosecutor discovers at a later stage that he in fact committed a more serious offence. However, in some instances new proceedings may only be instituted *if new facts or evidence come to light* which demonstrate that a more serious crime has been committed which deserves a more severe punishment. In other instances, new proceedings may be instituted if it appears (at a later stage) that the case can be viewed from a different legal perspective, indicating that a more serious offence has

been committed which deserves a more severe punishment. In the latter cases, it is not necessary for the prosecution to prove the discovery of new facts or evidence.

In legal literature, various *rationales* have been advanced to explain the phenomenon that limited finality is accorded to particular discontinuances of proceedings during the preliminary stages of trial. It is, for instance, suggested that the degree of investigation into the guilt or innocence of the accused required for a particular decision to either continue with a case or to discharge the accused, relates to the degree of finality accorded to the subject-matter on which the discontinuance is based. This argument is further supported by the notion that the court's *Kognitionspflicht* is not as comprehensive during the preliminary stages of criminal proceedings as during the main trial (*Hauptverhandlung*). Since the ambit of the *Rechtskraft* is related to the ambit of the *Kognitionspflicht*, only limited finality is accorded to decisions to discontinue during the preliminary stages of criminal proceedings.

* Discontinuance of proceedings on the basis of violation of human rights has not as yet occurred in German law. In recent times, lower courts as well as the *Bundesgerichtshof* have nevertheless recognised that proceedings may, in deserving circumstances, be discontinued permanently on the basis of violation of human rights such as denial of a speedy trial or entrapment. However, the law in this particular field is still in a developing stage.

* In German law, the prosecution appeal against an acquittal on a point of law or on the factual merits of the case is not regarded as a violation of the rule against double jeopardy. In fact, it is not even considered in legal literature as involving double jeopardy principles. The reasons are the following. Finality only attaches to a decision if

all legal remedies have been exhausted in the same proceedings. Therefore, the appeal is viewed merely as a continuation of the same proceedings. In terms of German law of criminal procedure, the state may appeal against a decision favourable to the accused handed down in a lower court on the factual merits as well as on a point of law. However, the state may also appeal against a decision which is *prejudicial* to the accused on all the abovementioned grounds. This phenomenon, which is unknown in Anglo-American systems of criminal procedure, is a result of the inquisitorial nature of the German criminal trial; the defence and the prosecution are not opposing parties, but are both committed to finding the truth. Therefore, as submitted in the text, any assumption that the German prosecutor is allowed to appeal against an acquittal on the factual merits of a case solely because the jury system does not apply in the German system of criminal procedure, has no valid basis.

* In German law, the Anglo-American concept of "same offence" is referred to as the *strafprozessuale Tat*. The concept *strafprozessuale Tat* defines the subject matter on which the court may give a decision, and determine the ambit of the *materielle Rechtskraft*. Unlike the position in Anglo-American systems of criminal justice, the subject matter of adjudication against the accused is not limited to the crimes set out in the charge. It covers a much wider field, namely the conduct of the accused *as is revealed as a result of the trial*.

The comprehensive subject matter on which the court may, and also is obliged to adjudicate, flows from the inquisitorial nature of the criminal trial: the court has a duty (a so-called *Kognitionspflicht*) to establish the truth by examining *all* the relevant facts, and to view these facts from *all* possible legal perspectives. This means that the court must take into consideration *all the crimes* of which the accused may be convicted *on the basis of the facts determined during the trial*.

The underlying idea is that the court has a comprehensive duty finally to dispose of the totality of the criminal conduct which the accused committed in one single trial. Of importance is that the ambit of the *Kognitionspflicht* is closely related to the ambit of the *Rechtskraft*. This means that the question of whether a successive trial is permissible, is determined (*inter alia*) by investigating whether the court could have considered the subject matter in the first trial from the legal perspectives raised in the second trial.

* In German law, a comprehensive two-tiered investigation is undertaken in order to determine whether a successive prosecution for the same subject matter (*dieselbe Tat*) is permissible. First of all, the criteria which are applied to determine the permissibility of the imposition of multiple punishment in a *single* trial are applied also to determine whether a successive prosecution is for *dieselbe Tat*. These criteria were developed in terms of the *doctrine of concurrency* which focuses on the issues of whether there is, in a specific case, a *unit of conduct* (*Tateinheit*, also referred to as *Idealkonkurrenz*) or multiplicity of conduct (*Tatmehrheit*, also referred to as *Realkonkurrenz*). The basic premise is that where *Tateinheit* exists in the substantive law, there will also be only one *strafprozessuale Tat*. In other words, where imposition of multiple punishment is prohibited in a single trial, a successive prosecution will also not be permissible.

* In terms of the doctrine of concurrency, *Tateinheit* is determined in the first place, by focusing purely on the facts. This involves an investigation as to whether the performance of more than one physical act occurred during the same time, in the same space, with a similar intention and whether each of the single acts performed can be viewed (in the ordinary understanding of things) as a *unit of conduct*. However, *Tateinheit* may also be determined by focusing on the legal composition of offences. The approach adopted in German criminal

law to determine "legal identity" as opposed to "factual identity" is different to that followed in Anglo-American systems (which focus mainly on the issue whether crimes qualify as lesser or greater included offences of each other). In German law, the relevant inquiry is whether the court fulfilled its duties (*Kognitionspflicht*), by considering the acts of which the accused is charged from all relevant legal perspectives. (For instance, if a person is charged with the act of appropriation of property belonging to another person, the court is obliged to consider the act from the perspectives of (at least) theft and robbery).

* The investigation as to whether a subsequent trial relates to *dieselbe Tat*, does not only involve application of the criteria developed in terms of the doctrine of concurrency. The protection afforded against successive prosecutions for the same "subject-matter" is much more expansive than the protection afforded against multiple punishment in a single trial. This means that a subsequent prosecution may be barred even if multiple punishment would have been allowed in a single trial. The *Bundesgerichtshof* explained that this is the case if separate acts (in terms of substantive law) are so closely connected that a separate evaluation and adjudication of each of these acts can be regarded as an unnatural splitting of a unit of conduct.

* In previous decisions, the *Bundesgerichtshof* has held that in determining the ambit of the *Rechtskraft*, the court should not merely investigate whether the court of first instance was *de facto* able to adjudicate on the act in its totality, but also if it was *de jure* in a position to do so. In practice, this means that finality also attaches to subject-matter which was impossible to consider in the first trial, for instance the "subsequent death" cases. This position has been severely criticised by legal commentators on the basis that the ambit of *Rechtskraft* should always relate to the matter which could in

actual fact have been established or determined by the court exercising due diligence.

* In recent cases, the *Bundesgerichtshof* has not followed a strict abstract-hypothetical approach in order to determine the permissibility of successive trials for the same subject-matter. In some cases, the court has in fact abandoned a wide "same transaction" approach in favour of a more conservative approach which focuses mainly on the issue whether there is similarity in the aim of the act (*Tatrichtung*) and equivalence in the seriousness of the legal interest infringed (*Unrechtsdimension*) as well as similarity in time, space and intention. On the facts present in most of these particular cases, a strong case could be made out that the public's interest in bringing offenders to justice justified a second trial. Since the court has not as yet categorically rejected a wider abstract-hypothetical approach, it may therefore be concluded that German courts apply a wide "same transaction" approach to determine identity of offences, but make exceptions in individual cases where the interests of justice demand that a person be prosecuted once again.

* German law of criminal procedure provides that if the accused appeals, or the state appeals against a decision prejudicial to the accused, the *nature and degree of punishment* imposed on the accused may not be changed to the detriment of the accused. The rule only applies to punishment and not to the finding of the court. Therefore, if the accused appeals or the state appeals in favour of the accused, the court of appeal may find him guilty of a more serious offence than that of which he has originally been convicted. However, the court may not impose a more severe sentence than that which had been imposed by the trial court. The rule also applies on retrial after appellate reversal of a conviction, and is referred to in German law as the *Verschlechterungsverbot*. The rule is based on a consideration of

reasonableness, namely that an accused ought not be inhibited from using his legal remedies.

* Finally, subject-matter which acquires *materielle Rechtskraft*, may only be re-opened on the grounds of fraud or collusion by the accused, witnesses or the court (in the case of collusion), or if the acquitted person made a credible confession afterwards (in or outside court).

PART SIX

CONCLUSIONS

CHAPTER TEN

PROPOSED INTERPRETATION OF THE CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY

10.1 GENERAL

The recent introduction in South Africa of a supreme constitution¹ with an entrenched bill of rights can be viewed as the most important and far-reaching event in South African legal history since 1910. The adoption by the previous parliament of a constitution containing a higher set of values which direct all state action,² not only resulted in the democratisation of the political institutions of this country but also "turned the entire legal system of South Africa on its head".³

This chapter focuses on the impact that the entrenchment of the common law rule against double jeopardy in the Constitution may have on existing legislation and common law rules which involve double jeopardy issues. However, before considering in any detail whether recognition in the South African Constitution of the common law rule against double jeopardy as a fundamental human right has brought about any changes in this particular area of law, it is essential first to

¹Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

²Interim Constitution of South Africa (Act 200 of 1993).

³See Malan K *Fundamental Rights: Themes and Trends* 1996 V.

give a brief background to the adoption of the final Constitution in 1996.⁴ This will be followed by a consideration of the guidelines laid down by the Constitutional Court for the interpretation of the provisions of the Bill of Rights in the Constitution. Application by the Constitutional Court of these principles in actual cases will subsequently be considered. In final analysis, this thesis will consider the constitutionality of existing common law rules and statutory provisions which involve double jeopardy issues.

10.2 BACKGROUND TO ADOPTION OF THE CONSTITUTION - THE ROLE OF THE INTERIM CONSTITUTION⁵

The establishment in South Africa of a new legal order was initiated with the adoption of an interim Constitution in 1993.⁶ The adoption of the interim Constitution by the previous parliament resulted from political negotiations in which all South African political actors, including previously banned political parties and movements and previously imprisoned leaders of various parties and movements, participated. The first democratic elections were conducted in terms of the provisions of the interim Constitution and it was required of the new Parliament to adopt a final constitution. This is why the 1993 Constitution was referred to as an interim Constitution. Despite being a transitional Constitution, it was nevertheless binding, supreme and fully justiciable.

The adoption of the interim Constitution could be described as a

⁴Act 108 of 1996.

⁵This synopsis draws largely on Erasmus G and Van Riet C *Human Rights practice - a joint project between lawyers for human rights and practical legal training* 1997 7.

⁶Act 200 of 1993.

stepping stone in negotiating a final Constitution for South Africa.⁷ The parliament elected in 1994 served as a Constitutional Assembly in order to achieve this objective. In drawing up a final Constitution, the Constitutional Assembly was bound by 34 Constitutional Principles which were adopted at multi-party negotiations by various parties and interest groups entrusted with the task of creating a new legal order in South Africa. In order to ensure compliance with these 34 Constitutional Principles, the text of the final Constitution had to be certified by the Constitutional Court before it could come into effect.⁸ In October 1996 the final Constitution (Act 108 of 1996) was certified by the Constitutional Court in the decision of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*.⁹

. For the purpose of this study, the most important chapter in the Constitution is chapter two which contains the Bill of Rights. Apart from entrenching specific fundamental rights (*inter alia* the rights of detained and accused persons), this chapter contains various provisions which lay down principles which a court or other competent forum must follow in interpreting the Bill of Rights. The rights set out in the Bill of Rights are subject to certain limitations. Specific provision is made in chapter two for the limitation of rights in certain

⁷In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 29, the court observed that the interim Constitution was intended to provide "a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights". (The court cited the words used in the opening paragraph of the postscript to the interim Constitution).

⁸The Constitutional Court was created in terms of the interim Constitution (Act 200 of 1993).

⁹*Supra*.

defined circumstances.¹⁰

At the time of writing this thesis, the provisions of the final Constitution (which came into effect at the beginning of 1997) have not as yet been interpreted by the Constitutional Court. However, there is a vast body of guidelines laid down in decisions by the Constitutional Court (as well as other divisions of the Supreme Court) which are the result of the interpretation of certain provisions of the interim Constitution. These guidelines are considered in the following paragraphs to the extent which they can still be regarded as valid in terms of the provisions of the final Constitution.

10.3 INTERPRETATION OF THE BILL OF RIGHTS

The Constitution, and more specifically the Bill of Rights, contains certain legal values which, *inter alia*, direct state action. This means that state power is made subject to certain higher constitutional values and should be exercised in accordance with these values.¹¹ The fact that the South African Constitution is based on the recognition of certain higher values has important implications for the interpretation of the Constitution. The first section¹² of the Constitution sets out the core values on which the new legal order is based. It provides as

¹⁰The requirements for a limitation of a fundamental right are set out in section 36(1) and 36(2) of the 1996 Constitution.

¹¹Section 2 of the Constitution provides that it is the supreme law of the Republic; that obligations imposed by it must be fulfilled and that law or conduct inconsistent with it is invalid.

¹²Section 1 of Act 108 of 1996.

follows¹³

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Whereas this provision sets the tone for future interpretation of all the provisions of the Constitution, section 39 (the last provision in chapter three of the Constitution) deals specifically with the interpretation of the provisions of the Bill of Rights. Section 39 provides

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹³The preamble to the 1996 Constitution confirms these values. It states *inter alia*, that the Constitution is adopted to "establish a society based on democratic values, social justice and fundamental human rights...".

Section 39 was inserted in the Constitution to "liberate judges from the shackles of positivism and formalism".¹⁴ The drafters of the Bill of Rights deemed it important that it should be clear from the provisions of the Constitution itself that a positivistic approach to interpretation which focuses essentially on the intention of the legislature can no longer be tolerated in a value-based legal order. It was emphasised that with the adoption of the Constitution, "a value-orientated interpretation has become a respectable and constitutionally endorsed process".¹⁵ Section 39 was therefore inserted in the Bill of Rights with the intention of instructing the courts to adopt a purposive approach instead of a positivistic approach which places all the emphasis on the intention of the legislature. A purposive interpretation is aimed at identifying and protecting the core values which underlie a fundamental right in an open and democratic society based on human dignity, equality and freedom. In other words, "the meaning of the [provisions of] the Constitution is not to be found in a simple decoding of the written text, [but] is to be determined with reference to its underlying values and commitments".¹⁶

¹⁴See *Overview of method of work prepared by Technical Committee of Theme Committee four* obtained from Internet at <http://www.constitution.org.za> (hereinafter referred to as *Report - Theme Committee four*). According to this overview, members of the Technical Committee entrusted with the task of drafting the Bill of Rights expressed the opinions that judges had pretended in the past that their function had merely been to declare the law instead of make the law. The point of view was expressed *inter alia*, that judges discouraged open discussion of the judicial role in the interpretation of statutes on the basis that interpretation in a Westminster system with parliamentary sovereignty is a purely mechanical exercise to determine the intention of the legislature. In this process, judges arguably had furthered the aims of apartheid.

¹⁵See *Report - Theme Committee four*.

¹⁶See Chaskalson M *et al Constitutional law of South Africa* 1996 11-16. See also Botha H "The values and principles underlying the 1993 Constitution" *South African Public law* vol 9 no 2 1994 233, referred

In interpreting the provisions of the Bill of Rights, South African courts have easily made the transition from a positivistic style of interpretation to a broader value-orientated approach. In one of the first decisions dealing with the interpretation of the interim Constitution, a division of the Supreme Court held that the search for the intention of the legislature was no longer a cardinal principle of interpretation "for the simple reason that the Constitution is sovereign and not the legislature".¹⁷ The judgment in *Quozeleni v Minister of Law and Order*¹⁸ also set the tone for future interpretation of the Constitution. Froneman J stated that because the Constitution is the supreme law against which all law is to be tested, "it must be examined with a view to extracting from it those principles or values against which such law ... can be measured".¹⁹ He added that the Constitution must be interpreted so as "to give clear expression to the values it seeks to nurture for a future South Africa".²⁰

to as Botha *Values* ("[t]he new Constitution is the supreme law of the land: the testing power of the court is no longer limited to procedural matters, but extends to the question whether legislation is consistent with the substantive norms and values embodied in the Constitution. A positivistic approach has, therefore, become wholly inappropriate."); Davis D "Democracy - its influence upon the process of constitutional interpretation" *South African Journal on Human Rights* Vol 10 no 1 1994 103, 104 ("[t]he Constitution ... makes a decisive break with the Westminster tradition ...") and Kruger J "Is interpretation a question of common sense? Some reflections on value judgments and section 35" *Comparative International Law Journal of Southern Africa* Vol XXVIII 1, 1995 7 ("[i]n a constitutional state courts give meaning to the system of values and norms called into being by the bill of rights...").

¹⁷See *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) BCLR 592 (SE) 597F.

¹⁸1994 (1) BCLR 75 (E).

¹⁹At 80.

²⁰*Id.*

However, the *locus classicus* on interpretation of the South African Constitution is undoubtedly the very first decision handed down by the Constitutional Court namely, *S v Zuma*.²¹ In *Zuma* the Constitutional Court approved of the Canadian approach to interpretation set out in the case of *R v Big M Drug Mart Ltd*²² where Dickson J (later Chief Justice of Canada) said the following with reference to the Canadian Charter of Rights²³

The meaning of right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.

Kentridge J who delivered the judgment in *Zuma*, pointed out that in the *Drug Mart* case it was emphasised also that cognizance must be taken of the legal history, traditions and usages of the country concerned if the purposes of its constitution were to be fully

²¹1995 (4) BCLR 401 (SA).

²²(1985) 18 DLR (4th) 321 (SCC).

²³At 395-396, cited in *Zuma* at para 15.

understood.²⁴ However, he warned that²⁵

constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.²⁶

In *Zuma* Mr Justice Kentridge expressed himself in favour of "a generous interpretation ... suitable to give individuals *the full measure of the fundamental rights and freedoms referred to*".²⁷ However, he cautioned that this does not mean that the language which is used in the Constitution must be neglected. The court emphasised that in interpreting a provision of the Constitution, the language used in the provision must still be respected; ignorance of the language used in the Constitution in favour of a general resort to "values" would, in the court's view, "result ... not in interpretation but divination".²⁸ Nevertheless, adopting a liberal approach in interpreting the provisions

²⁴*Id.*

²⁵*Id.* Mr Justice Kentridge referred to his own dissenting opinion in *Attorney-General v Moagi* 1982 (2) Botswana LR 124, 184.

²⁶In *Shabalala v Attorney-General of Transvaal* 1995 (12) BCLR 1593 (CC) para 26 the Constitutional Court once again emphasised that "the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable ... The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment". (*Cf* also *S v Williams* 1995 (7) BCLR 861 (CC) para 51 to the same effect).

²⁷At para 14. The court cited the words of Lord Wilberforce of the Privy Council in the case of *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) 328-329.

²⁸At para 18.

of the Constitution, the court concluded that²⁹

a constitution "embodying fundamental rights should *as far as its language permits* be given a broad construction".

In *S v Makwanyane*³⁰ the Constitutional Court referred with approval to the generous and purposive approach adopted in the interpretation of fundamental human rights (entrenched in the Bill of Rights) by Mr Justice Kentridge in *Zuma*.³¹ However, the court also laid down other guidelines for interpretation. In his judgment, Chaskalson P added that provisions of the Bill of Rights should not be considered in isolation, but in its context, "which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part."³² Favouring an interpretation which secures for "individuals the full measure"³³ of its protection, Chaskalson P added that background material, for instance the reports of the Technical Committees involved in the drafting of the Constitution, may be used as an aid to constitutional interpretation where it is clear, is not in dispute and is relevant to showing why particular provisions were or

²⁹*Id.* Mr Justice Kentridge cited his own words in *S v Moagi supra* 184.

³⁰*Supra.*

³¹At para 9.

³²At para 10.

³³*Id.* The court cited the words used by Lord Wilberforce in the *Fisher* case (at 128-129) which were also referred to by Mr Justice Kentridge in *Zuma*.

were not included in the Constitution.³⁴

Furthermore, Chaskalson P observed that in interpreting the provisions of the Bill of Rights, comparative "bill of rights" jurisprudence will be of importance, particularly in the early stages of transition when there is no developed South African jurisprudence from which to draw.³⁵ However, he cautioned that although the Bill permits recognition of foreign law, it will not *necessarily* offer a safe guide to the interpretation of the provisions of the Bill of Rights.³⁶

In *Makwanyane* the court made extensive use of contextual interpretation. In dealing with the question of whether the imposition of the death sentence could be regarded as constitutional, the court treated the right to life, the right to equality and the right to dignity as together giving meaning to the prohibition of cruel, inhuman and degrading punishment in section 11(2) of the interim Constitution.³⁷

³⁴At paras 17-19, 12-14. Chaskalson *et al* submit (at 11-18 - 11-19) that by holding that the reports of the technical committees on the drafts may be consulted, the court had not resorted to an "intention of the legislature" approach. Instead they suggest that the "recourse to historical background is part of the process of purposive interpretation". This means that these reports may be consulted to determine the values which underlie the provisions of the Constitution.

³⁵At para 37.

³⁶*Id.* Chaskalson P emphasised that there is no injunction to consider foreign law. See also the judgment of Mokgoro J, at para 304 to the same effect.

³⁷This approach was also followed in *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC). In *Levin*, the majority of the Constitutional Court rejected a broad interpretation of the right to freedom of the person (section 11(1) of the interim Constitution); in other words, the court rejected an interpretation which offers protection beyond that of the physical integrity of a person. This was done on the basis that the provision must be interpreted concomitantly with other provisions which have in common the protection of physical

In a subsequent case, *Mhlungu v the State*,³⁸ a majority of the Constitutional court held (per Mahomed J) that where the literal meaning of a provision of the Constitution gives rise to arbitrariness and perpetuation of injustice, an alternative approach which avoids such consequences must be sought.³⁹ The majority judgment in *Mhlungu* suggests that if an interpretation more consonant with the values of the Constitution can "reasonably" be accommodated within the text, such an interpretation should be preferred to a literal interpretation.⁴⁰

The minority (per Kentridge J) expressed the opinion that where the language used in the Constitution is clear, a court has to give effect to it.⁴¹ However, this does not imply that the minority opinion favoured a narrow interpretation of the language used in the Constitution; it suggests merely that the language used in a provision "is not infinitely malleable, but defines the limits of a generous

liberty. These are the prohibitions of "detention without trial", "torture" and "cruel, inhuman and degrading treatment".

³⁸1995 (7) BCLR 793 (CC).

³⁹See para 15 and paras 8 - 9.

⁴⁰*Id.*

⁴¹At para 78. Mr Justice Kentridge referred to *Zuma* where it was emphasised that respect has to be paid to the language used in the Constitution. In *Mhlungu* he concluded (at para 84) that "there are some provisions, even in a Constitution, where the language used, read in its context, is too clear to be capable of sensible qualification. It is the duty of all courts ... to promote the values which underlie a democratic society ... In the long run, I respectfully suggest, these values are not promoted by doing violence to the language of the Constitution in order to remedy what may seem to be hard cases".

interpretation".⁴²

The guidelines laid down by the Constitutional Court in the cases discussed above may be summarised as follows

- (a) In interpreting any of the provisions of the Bill of Rights, the courts should follow a value-orientated approach. This means that the courts must identify and protect the values which underlie the particular fundamental right relied upon (*Makwanyane* and *Zuma*).
- (b) In identifying the values underlying a fundamental human right, a court should adopt a generous approach which gives to individuals the "full measure of the fundamental rights and freedoms referred to" (*Zuma* and *Makwanyane*). Restrictions ought not to be read into provisions in order to bring them into line with the common law (*Zuma*).
- (c) In interpreting a provision of the Bill of Rights, it should not be considered in isolation; it must be considered in its context, which includes the history and background to the adoption of the Constitution and in particular the provisions of the Bill of Rights of which it is part (*Makwanyane*).
- (d) A court may also have regard to the identification and protection of values underlying fundamental human rights in

⁴²See Chaskalson *et al* 11-29. These legal commentators explain (at 11-30) the difference between the majority and the minority opinions in *Mhlungu* on the following basis: the minority regarded clarity of language as conclusive of the meaning of the provision, whereas the majority regarded language as "the outer perimeter within which the expression of constitutional values is ultimately confined".

comparable foreign law, and must have regard to the protection of these values in international law. However, in considering foreign case law, a court should exercise caution not to import principles which cannot be applied in the South African legal context (*Makwanyane*).

- (e) In determining the values which underlie a constitutional provision, the court cannot ignore or neglect the language of the Constitution (*Zuma*). However, a broad interpretation of the language used in a constitutional provision is preferred to a narrow interpretation (*Zuma*). Moreover, if a literal interpretation would give rise to arbitrariness and injustice, an interpretation which is consonant with the values which underlie the Constitution should be preferred if such an interpretation can reasonably be accommodated within the text (*Mhlungu*).

For the purpose of future interpretation of the provisions of the Bill of Rights in the final Constitution,⁴³ it is also important to discuss briefly the judgment of the Constitutional Court in the *Certification* case.⁴⁴ This case was not concerned with interpretation of the provisions of the Bill of Rights as such, but focused solely on the question of whether the text adopted in the final Constitution complied with the Constitutional Principles set out in the interim Constitution.⁴⁵ However, the court made certain statements in the

⁴³Chapter three of Act 108 of 1996.

⁴⁴See *supra*, text at note 9.

⁴⁵Section 71 of the interim Constitution (Act 200 of 1993) required that the new constitutional text approved of by the Constitutional Assembly be certified by the Constitutional Court as being compliant with the Constitutional Principles set out in Schedule 4 of the interim Constitution.

Certification case which may be of value to courts in interpreting provisions of the Bill of Rights in future.

Firstly, the court expressed itself in favour of a purposive and teleological approach in interpreting the Constitutional Principles.⁴⁶ The court stated that it follows logically from this approach that the Constitutional Assembly need not to have repeated the same constitutional protections in the new text as those contained in the interim Constitution; the only question would be whether "the discipline enjoined by the Constitutional Principles is respected".⁴⁷ In interpreting Constitutional Principle II, namely that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties ...", the court had to consider certain objections to the new text. Objections raised *inter alia*, were that certain provisions contained in chapter two (the Bill of Rights in the final Constitution) should fail certification because the scope of the new text of these provisions either falls short of, or goes further than the corresponding provisions in the interim Constitution.⁴⁸ The Constitutional Court rejected this argument, reasoning as follows⁴⁹

To the extent that the IC [interim Constitution] afforded rights which went beyond the "universally accepted" norm, *the Constitutional Assembly was entitled to formulate rights more generously than would be required by the "universally accepted" norm, or even to establish new rights.* It should be emphasised that the Bill of Rights drafted by the Constitutional Assembly is as extensive as any to be found in any national constitution.

⁴⁶At paras 32-39.

⁴⁷At para 40.

⁴⁸My emphasis.

⁴⁹At para 52. (My emphasis).

The significance of this statement is that in interpreting the scope of a fundamental human right, the courts will be allowed to construe the right as giving broader protection to the individual than afforded in terms of the same fundamental human right in international law, or in the law of foreign jurisdictions.

10.4 STRUCTURE OF INTERPRETATION: A TWO-STAGE ANALYSIS

It is universally recognised that no rights are absolute. In some constitutions, for instance the German and Canadian constitutions, specific provision is made in the constitutions for the limitation of rights. These provisions are better known as "limitation clauses".⁵⁰ These so-called "limitation clauses" lay down definite norms and criteria in terms of which an infringement of a fundamental right may be allowed. Other constitutions, for instance the Constitution of the United States of America, do not contain limitation clauses. This does not mean that rights cannot be limited in these jurisdictions. In legal systems with constitutions without express limitation clauses, the courts "have been obliged to find limits to constitutional rights through the narrow interpretation of the rights themselves".⁵¹ In other words, where a Bill or Rights has no general limitation clause, limitations must be read into the definition of the right.⁵²

⁵⁰De Ville J "Interpretation of the general limitation clause in the chapter on fundamental Rights" *South African Public law* vol 9 no 2 1994 287, 289 explains that limitation clauses "give expression to the simple truth that fundamental rights and freedoms are not absolute, but need to be restricted in certain instances to safeguard other important societal interests".

⁵¹Per Chaskalson P in *Makwanyane* para 102, describing the methodology followed by the Supreme Court of the United States of America in the limitation of rights.

⁵²See Chaskalson *et al* 11-31.

The drafters of the South African Constitution considered it appropriate to follow the Canadian example. The South African Constitution contains a general limitation clause which contains certain criteria in terms of which the permissibility of a limitation of a fundamental right must be determined.⁵³

It is obvious that the permissibility of a limitation of a fundamental human right can only be determined after it has been determined that a right has in fact *prima facie* been infringed. In other words, the presence of a limitation clause in a constitution means that constitutional analysis proceeds in two stages.⁵⁴ First, it must be considered whether there has been an infringement of a constitutionally guaranteed right. If so, it must be considered in a second stage of analysis, whether the infringement could be regarded as permissible in terms of the norms and criteria laid down in the limitation clause.

The distinction between these two stages of analysis is important for a number of reasons. These are the following

- * Because the first enquiry deals with the question of whether the law or act under scrutiny infringes at all on the right relied on, it involves a determination of the ambit or scope of the right itself. This stage of analysis demands an identification of the values which underlie the right and the interests which it seeks

⁵³The Canadian Constitution contains a similar general limitation clause, whereas the German Constitution contains only specific limitation clauses attached to most of the fundamental rights. See Erasmus and Van Riet 82.

⁵⁴In *Makwanyane* (para 100) the Constitutional Court endorsed the two-stage analysis.

to protect.⁵⁵ In other words, the ambit of the right is determined by adopting a purposive approach.

- * The onus is on the petitioner to show that the infringement occurred in the first stage of analysis.⁵⁶ The burden has to be discharged on a balance of probabilities.⁵⁷
- * If the court is persuaded that the values advanced by the petitioner underlie and serve to protect the right in question, the petitioner must further convince the court that the law or act interferes with these values or interests and therefore infringes his or her fundamental human right.
- * If the petitioner succeeds in demonstrating that a right has been infringed by the law or conduct in question, the onus then shifts to the respondent (for instance the state or the party relying on the legislation) to show, in the first place, that the infringement is justifiable; in other words, that it complies with the requirements laid down in the limitation clause.⁵⁸
- * The standard to be met by the party who would justify a limitation is proof on a preponderance of probability.⁵⁹

⁵⁵*Cf* the *Drug Mart* case (at 359-360) approved of in *Zuma* (para 15).

⁵⁶See *Quozeleni v Minister of Law and Order* 87D.

⁵⁷*Id.*

⁵⁸See *Makwanyane* para 102.

⁵⁹See *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 228F. In *Makwanyane* it was held (at para 146) that a "clear and convincing" case was required to justify the death sentence as a penalty for murder. Henderson A "Who, how and how much? The onus, manner and sufficiency of proof in a dispute involving fundamental rights" *De Rebus* 1995 641, 645 submits that *Makwanyane* lends support for the general notion of "a very high degree of probability".

Erasmus and Van Riet point out that there is a vital difference between questions of interpretation (the first stage of enquiry) and limitation (the second stage of enquiry).⁶⁰ They explain that

[t]he question of limitation of rights is much more factual than the question of interpretation and needs to be resolved with appropriate evidence. A court cannot determine in the abstract whether the limitation of a right or freedom is "reasonable" or "justifiable in an open and democratic society based on human dignity, equality and freedom". This determination requires evidence, such as sociological or statistical data, on the impact of the legislative restriction on society. In this regard rule 34 of the Constitutional Court's 1994 rules made provision for the introduction of factual material which is relevant to the determination of the issues before the Court provided that the facts are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature and capable of easy verification.

In *Zuma* and *Makwanyane* the Constitutional Court suggested that the first stage of enquiry (the interpretation stage) requires a generous interpretation.⁶¹ As will become clear from the following paragraphs, the court has also adopted this approach in subsequent cases. However, before considering these cases in any detail, it is necessary first of all to consider the requirements laid down in the Constitution for the limitation of fundamental human rights.

10.5 CRITERIA FOR LIMITATION OF RIGHTS

The limitation clause of the South African Constitution is contained in chapter two, (the Bill of Rights) section 36. It provides as follows

⁶⁰At 83.

⁶¹See *Makwanyane* para 100 (discussed *supra* under 10.3) and *Zuma* para 21 (discussed *supra* under 10.3).

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided for in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Before discussing in any detail the requirement set out above, it is necessary to refer briefly to the background to the adoption of this clause in the final Constitution. As will become clear from the discussion that follows, section 36 is in fact based on an analysis in *Makwanyane's case*⁶² of the limitation clause contained in the interim Constitution.⁶³ However, the previous limitation clause was in certain respects different from the present one. Although it laid down the requirement that a limitation be reasonable and justifiable in an open and democratic society based on equality and freedom,⁶⁴ it also required that the limitation "shall not negate the essential content of the right in question".⁶⁵ Moreover, the previous limitation clause subjected certain specific rights (including the rights of accused persons) to a higher level of scrutiny than other rights. It required that

⁶²At para 104 (discussed *infra*, text at note 94).

⁶³Section 33 of Act 100 of 1993.

⁶⁴Section 33(1)(a).

⁶⁵Section 33(1)(b).

limitation of the latter rights must also be "necessary".⁶⁶

The requirement that the limitation should not negate the "essential content" of the right was omitted in the final Constitution.⁶⁷ The members of the Technical Committee involved with the drafting of the final Bill of Rights also decided to do away with the bifurcated approach adopted in the interim Constitution by subjecting certain rights to more severe scrutiny than others.⁶⁸ The committee members explained that the word "necessary" obliges the state to show that the restriction is of paramount concern to the government; is not designed to impair the right more than is strictly proportionate to the objective pursued; and presupposes that there is no alternative to the means chosen.⁶⁹ In the view of the members of the committee, it would be better to extend the necessary requirement to

⁶⁶Section 33(1)(b) (aa) and (bb).

⁶⁷The drafters of the final Constitution felt that in practice this point will seldomly be reached as limitations essentially do not aim to destroy the essential content of the right; in most cases arguably, courts will limit themselves to the balancing of state and individual interests in order to ensure that the limitation imposed is proportionate to the objective pursued. The fact that this requirement was doubtful in content (even in German law - from which it was originally taken) also convinced the drafters (the members of Technical Committee four) that it would be better to exclude it from the final Constitution. See in general *Report - Theme Committee Four*.

⁶⁸See *id.*

⁶⁹*Id.* The construction of the "necessary" requirement by the members of the committee is based upon the construction of the same requirement in the Canadian Charter of Rights in the Canadian Supreme Court decision of *R v Oakes* 1986 26 DLR (4th) 200 (SCC). See also Woolman S "Riding the push me pull you: constructing a test that reconciles the conflicting interests which animate the limitation clause" *South African Journal on Human Rights* Vol 10 no 1 1994 60, 88 who suggests that in terms of *Oakes* the "necessary" requirement "force[s] the government to search for the least restrictive means of achieving its objects".

cover all rights because this would allow the courts to adopt a more flexible approach by applying a stricter test of scrutiny for rights of special importance.⁷⁰ The Committee therefore suggested that it should be provided for in the limitation clause of the final Constitution that a limitation be both "reasonable" and "necessary" and that the courts should be allowed to decide on the application of "reasonableness" and "necessity" in individual cases.⁷¹

As is apparent from the wording of section 36, the word "necessary" was nevertheless not expressly included in the final Constitution. However, it is submitted that scrutiny on the basis of whether an infringement of a fundamental right is "necessary" was not altogether abandoned in the new limitation clause. In section 36(e) it is provided that a court, in considering whether a limitation is reasonable and justifiable, is obliged to take into consideration *inter alia* whether there is a "less restrictive means to achieve the purpose". It is submitted that the obligation to consider whether there are alternative means available to achieve the purpose which the state seeks to achieve by the limitation in question, involves a consideration of the "necessity" of the limitation, albeit as a component of the inquiry as to whether the limitation is "reasonable and justifiable" in terms of section 36(1).

This assumption is strengthened by the analysis of the limitation clause contained in the interim Constitution by Chaskalson P in

⁷⁰*Id.* The members of the Committee took notice of the approach followed in American constitutional jurisprudence, namely by applying variable levels of scrutiny (at the court's discretion) depending on the importance of the particular right in question.

⁷¹*Id.*

Makwanyane. The court analysed the provision as follows⁷²

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1) IC [interim Constitution]. The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, *and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.*

It is clear that the new text of the limitation clause is in fact based on the analysis by Chaskalson P in *Makwanyane* of the "reasonable and necessary" requirements in the previous limitation clause.⁷³ In fact, the commentators Erasmus and Van Riet suggest that "there is no reason why [the passage in *Makwanyane*] should not apply with equal force to the interpretation of s36 of the 1996 Constitution".⁷⁴

⁷²At para 104 (my emphasis).

⁷³Section 33 of the Interim Constitution.

⁷⁴At 86. See *supra*, text beneath note 61 for the provisions of the new limitation clause (section 36 of Act 108 of 1996).

The authors conclude that because the new text corresponds so closely with the *Makwanyane* analysis, it is hard to avoid the conclusion that it was adopted to confirm the court's approach in *Makwanyane*.⁷⁵ This author fully agrees with their argument: the guidelines for interpretation laid down in *Makwanyane* and applied subsequently in all cases dealing with the interpretation of provisions of the interim Constitution, apply equally to interpretation of the limitation clause in the 1996 Constitution. The requirements laid down in the new limitation clause (as interpreted in *Makwanyane* and applied in subsequent cases) are discussed in detail below.

10.5.1 Law of general application

In terms of section 36(1) the rights in the Bill of Rights may be limited only in terms of law of general application. Both statutory rules (parliamentary legislation and laws of the new provincial legislatures) and rules of common law may limit fundamental rights.⁷⁶ In *Shabalala v Attorney General of Transvaal*⁷⁷ the Constitutional Court held that law of general application within the meaning of the limitation clause includes rules of common law.⁷⁸

In *S v Makwanyane* it was argued that section 277 of the Criminal Procedure Act,⁷⁹ which provides that a person may be sentenced to death, could not constitute a law of "general application" because it

⁷⁵*Id.*

⁷⁶This is clear also from the Afrikaans text: "algemeen geldende reg".

⁷⁷*Supra.*

⁷⁸At para 23.

⁷⁹Act 51 of 1977.

did not apply uniformly to the whole of South Africa.⁸⁰ The court rejected this argument on the basis that disparities between the legal orders in different parts of the country could not for that reason alone be said to render the laws such that they would not be of general application.⁸¹

Legal commentators point out the the requirement "law of general application" has little relevance to the question whether laws are applicable only to one area or to one class of persons. Instead, it is suggested that the requirement "prevents laws which permit of arbitrary application from qualifying as a limitation of a fundamental right in terms of s 36".⁸² In order to understand what is meant by "laws which permit of arbitrary application" it is necessary to refer to the Constitutional Court's interpretation of the concept "equality". The equality clause which provides *inter alia*, that⁸³

[e]veryone is equal before the law and has the right to equal protection and benefit of the law

has been interpreted by the Constitutional Court to mean that differentiation does not amount *per se* to unequal treatment in the constitutional sense. The court expressed the view that the section rather prevents the state from drawing arbitrary or irrational distinctions between people, whether it be in conferring benefits or in

⁸⁰This argument was based on the fact that the death sentence had been abolished by military decree in the Ciskei bantustan in 1990.

⁸¹At para 32. The court pointed out that the interim Constitution itself (section 229) allows different legal orders to exist side by side until a process of rationalisation has been completed.

⁸²See Erasmus and Van Riet 84.

⁸³Section 8(1) of the interim Constitution (section 9(1) of the 1996 Constitution).

applying sanctions.⁸⁴ In *Makwanyane* Ackerman J explained the concept "arbitrary" as follows⁸⁵

Arbitrary action or decision-making, is incapable of providing a *rational explanation* as to why similarly placed persons are treated in a substantially different way. Without such a *rational justifiable mechanism*, unequal treatment must follow.

It is submitted that laws which permit of arbitrary application in the sense explained above, may be construed as infringing on the provisions of the equality clause. Conversely, the limitation clause⁸⁶ precludes their justification.⁸⁷

10.5.2. Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

In the first decisions in which divisions of the Supreme Court interpreted the limitation clause,⁸⁸ they were guided by Canadian law in giving content to the concepts "reasonable" and "justifiable."⁸⁹ In particular, South African courts have applied the criteria laid down

⁸⁴See the judgment of Ackerman J in *Makwanyane* (para 156). Cf also *S v Ntuli* 1996 (1) BCLR 141 (CC) paras 18-20; *S v Rens* 1996 (2) BCLR 155 (CC) para 29 and *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783 (E) at 792D.

⁸⁵At para 156.

⁸⁶Section 36 of the 1996 Constitution.

⁸⁷See Erasmus and Van Riet 84.

⁸⁸Section 33 of the interim Constitution.

⁸⁹See *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 167ff; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) 454-455A and *Khala v Minister of Safety and Security supra* 236-237.

in the decision of the Supreme Court of Canada in *R v Oakes*.⁹⁰

In *Oakes* the Supreme court of Canada held that the reasonableness and justifiability of a limitation on a fundamental human right is determined by considering whether the objective of government action is sufficiently important to override a constitutionally protected right or freedom.⁹¹ The court held that this objective of governmental action will, at minimum, be regarded as of sufficient importance if it relates to matters which are "pressing and substantial" in a free and democratic society.⁹² Once this requirement is complied with, the court must also consider in a second stage of analysis whether the means chosen to achieve the objective are reasonable and demonstrably justified. This involves a proportionality test which entails a further three stage enquiry,⁹³ namely

- (a) Is the government infringement of the right *rationally connected* to its objective and not arbitrary, unfair or based on irrational considerations. In other words, it must be determined whether it is carefully designed to achieve its objective.
- (b) Even if rationally connected to the objective in the first sense, it is also required that the government infringement should *impair as little as possible* the right or freedom.

⁹⁰*Supra*.

⁹¹At 227.

⁹²*Id*.

⁹³At 227-228.

- (c) Finally, there must be a proportionality between the *effects* of the measures which are responsible for limiting the constitutional right or freedom, and the *objective* which has been identified as of sufficient importance. The court pointed out that even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.

In *Makwanyane* Chaskalson P, in laying down the factors relevant to an inquiry concerning the reasonableness and justifiability of a limitation, followed the Canadian approach set out above. The court stated that the limitation of constitutional rights in a democratic society "involves the weighing up of competing values, and ultimately an assessment based on proportionality".⁹⁴ The court added that in the balancing process, the relevant considerations will include⁹⁵

- (a) the nature of the right that is limited
- (b) its importance in an open and democratic society based on freedom and equality
- (c) the purpose for which the right is limited and the importance of that purpose to such a society
- (d) the extent of the limitation
- (e) its efficacy, and particularly where the limitation has to be necessary
- (f) whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

It is submitted that (a) and (b) relate to the first stage of enquiry as

⁹⁴At para 104.

⁹⁵*Id.*

laid down in *Oakes*, whereas (c)-(f) incorporate a proportionality test which relates to the question of whether the means chosen to achieve the objective are reasonably and demonstrably justifiable. The Constitutional Court, nevertheless, also stated in *Makwanyane* that it could see no apparent reason "to attempt to fit our analysis [of the limitation clause] into the Canadian pattern" or for that matter to fit it into the pattern of limitation analysis followed by any of the other foreign courts.⁹⁶ In other words, although the court relied on Canadian limitation jurisprudence in identifying the relevant factors which ought to be considered in determining the reasonableness and justifiability of a limitation, it did not limit the enquiry to these factors. The court in actual fact chose a more flexible approach, by adding the following statement⁹⁷

The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality" means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of these principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.

The approach of Chaskalson P in *Makwanyana* may be summarised as follows. The limitation test depends on the circumstances. This means that the criteria for reasonableness and justifiability will not always and in each case be the same. However, there are certain

⁹⁶At para 110. In *Zuma* Kentridge J followed the same approach. He stated that although the Canadian criteria may be of assistance to our courts in cases where a delicate balancing of individual rights against societal interest is required, there is no reason "in this case [*Zuma's* case] ...to attempt to fit our analysis into the Canadian pattern". (At para 35.)

⁹⁷At para 104.

important criteria which ought to be taken into consideration in determining the reasonableness and justifiability of a limitation. On the one hand, these criteria focus on the purpose of the limitation, and on the other hand involve a proportionality test. The proportionality test requires of a court to make an assessment of the importance of the purpose of the limitation, the gravity and extent of the infringement caused by the limitation as well as the efficacy of the limitation. The efficacy of the limitation involves the question of whether there is a rational connection between the limitation and the objective it seeks to achieve. In determining the reasonableness and justifiability of a limitation, a court should also consider whether the objective can reasonably be achieved by other less restrictive means.

10.6 INTERPRETATION AND LIMITATION IN ACTUAL CASES

In *Makwanyane* it was argued that imposition of the death sentence for murder was cruel, inhuman and degrading punishment which was also inconsistent with the right to life entrenched in the Constitution. The arguments advanced were that the death sentence could not be rectified in the case of an error and that its application was arbitrary. The Attorney-General contended that the death sentence is a necessary and acceptable form of punishment which is not cruel, inhuman or degrading in terms of the relevant provision in the Constitution.⁹⁸ The Attorney-General observed that the death sentence was recognised as a legitimate punishment in many parts of the world because it serves as a deterrent to violent crime; the death sentence of necessity has a greater deterrent value than life imprisonment because it ensures that the worst murderers would not be able to endanger the lives of others.⁹⁹ It was also contended that

⁹⁸Section 11(2) of the Interim Constitution.

⁹⁹At para 27.

its retention was required in the light of the high level of violent crime in South Africa. Moreover, it was submitted that public opinion supports the retention of the death sentence.

By adopting a purposive, generous and contextual approach,¹⁰⁰ Chaskalson P interpreted the provision which prohibits cruel, inhuman and degrading punishment¹⁰¹ not in isolation, but also in the light of other provisions of the Bill of Rights, in particular the right to equality and the right to life.¹⁰² By focusing on the values which underlie these rights, the court reached the conclusion that imposition of the death penalty for murder amounts to an infringement of the right against cruel, inhuman and degrading punishment. The court then considered whether the imposition of the death penalty could nevertheless be justified in terms of the limitation clause.

Chaskalson P first considered the justifiability of the infringing legislation in terms of the criteria laid down in *Oakes*: whether the limitation was rationally connected to its objective; impaired the right as little as possible and whether there was proportionality between the effects of the measure and the objective which it sought to achieve.¹⁰³ He concluded that although there was a rational connection between capital punishment and the purpose for which it was prescribed, the elements of arbitrariness, unfairness and irrationality *in the imposition of the punishment* were factors that had

¹⁰⁰See *supra* under 10.3 for a discussion of these different approaches employed by the Constitutional Court in interpreting provisions of the Bill of Rights.

¹⁰¹Section 11(1) of the interim Constitution.

¹⁰²At para 10.

¹⁰³See *supra* for a discussion of these criteria.

to be taken into account.¹⁰⁴ In other words, the court found that because the imposition of the punishment was inherently unfair, irrational and arbitrary, it could not be said that there was a rational connection between the limitation and the objective it sought to achieve. The court then stated that the fact that a severe punishment in the form of life imprisonment was available as an alternative sentence is relevant to the second question, namely whether the death sentence impaired the right as "little as possible". According to Chaskalson P, the pertinent question was whether the possibility of being sentenced to death rather than being sentenced to life imprisonment had a marginally greater deterrent effect.

However, as indicated above, the court did not consider itself bound to the Canadian test. The court (per Chaskalson P) formulated its own more flexible test, incorporating the criteria laid down in *Oakes*. Applying the more flexible approach Chaskalson concluded that¹⁰⁵

[i]n the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment and, the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet ... It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the

¹⁰⁴At para 106.

¹⁰⁵Paras 145-146.

possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of section 33(1) [the limitation clause] have accordingly not been satisfied ...".

¹⁰⁶

Of importance is that the court also rejected the contention advanced by the state that the death sentence should be retained because public opinion favoured it. Chaskalson P emphasised that public opinion in itself is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear and favour. The court observed that¹⁰⁷

[i]f public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to parliament which ... is answerable to the public for the way its mandate is exercised ...".¹⁰⁸

In *S v Williams*¹⁰⁹ the Constitutional Court was asked to consider the constitutionality of legislation which provides for corporal

¹⁰⁶*Cf* also the conclusion of Didcott J at paras 183-184. Kriegler J held that the legislation was not saved by the limitation clause because it did not pass the test of reasonableness because no empirical study had demonstrated that capital punishment had a greater deterrent value than a lengthy sentence of imprisonment. He concluded that it could not be reasonable "to sanction judicial killing without knowing whether it had any marginal deterrent value". (At para 213.) See also the judgment of O'Regan J at paras 339-342.

¹⁰⁷At para 88.

¹⁰⁸At para 89 the court added that it "cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public".

¹⁰⁹1995 (7) BCLR 861 (CC).

punishment of juveniles¹¹⁰ in terms of the "cruel and unusual punishment" provision in the Constitution,¹¹¹ the equality clause,¹¹² the right to dignity¹¹³ and the provision which protected the rights of children.¹¹⁴ Making extensive use of comparable foreign constitutional jurisprudence, Langa J adopted a purposive approach, emphasising the values which underlie all of these rights.¹¹⁵ However, he pointed out that in seeking the purpose of a particular right, it is important to place it in the context of South African society.¹¹⁶ He concluded that the imposition of corporal punishment on juvenile offenders was *prima facie* unconstitutional because the establishment of the new constitutional order amounted to a rejection of violence.¹¹⁷ The fact that South African courts have in the past criticised the permissibility of the infliction of corporal punishment also contributed to the court's conclusion that it should be regarded as unconstitutional.¹¹⁸

The court then proceeded to the second stage of analysis, namely whether the infringement could be regarded as justifiable in terms of the limitation clause. The court indicated that the enquiry involves a "testing [of] the measures adopted against the objective sought to be

¹¹⁰Section 294 of the Criminal Procedure Act 51 of 1977.

¹¹¹Section 11 of the interim Constitution.

¹¹²Section 8 of the interim Constitution.

¹¹³Section 10 of the interim Constitution.

¹¹⁴Section 30 of the interim Constitution.

¹¹⁵See paras 23-49.

¹¹⁶At para 51.

¹¹⁷At para 52.

¹¹⁸At para 53.

achieved".¹¹⁹ The court observed that the test relied on proportionality: a process of weighing up the individuals' rights against the objective which the state seeks to achieve. This evaluation has to take place "against the backdrop of the values of South African society *as articulated in the Constitution* and in other legislation, in the decisions of our courts and generally against our own experiences as a people".¹²⁰

It was argued on behalf of the state that sentencing alternatives for juveniles were limited and that South Africa did not have a sufficiently well-established physical and human resource base which was capable of supporting the imposition of alternative punishments.¹²¹ In other words, it was argued that because society has not yet established other mechanisms to deal with juveniles who find themselves in conflict with the law, it is justifiable that juveniles be subjected to corporal punishment. The court commented that this is just another way of saying that the price to be paid for the state of unreadiness of society to deal with juvenile offenders is to subject juveniles to punishment that is cruel, inhuman or degrading.¹²² The court rejected this submission of the state as being pragmatic rather than principled, and stated that it is "diametrically opposed to the values that fuel our progress towards being a more humane and caring

¹¹⁹At para 58.

¹²⁰At para 59.

¹²¹At para 63.

¹²²*Id.* The court pointed out (at para 74 note 88) that there are several more humane sentencing options available in current legislation (for example correctional supervision in terms of section 276A of the Criminal Procedure Act). In the court's view, the state should regard it as a challenge to create the necessary infrastructures to deal with juvenile offenders in terms of these more humane sentencing options.

society".¹²³

The state also emphasised the deterrent nature of juvenile whipping. The court accepted deterrence as a legitimate objective which may be pursued by the state in crime-ridden society, but added that the means employed to effect deterrence must be "reasonable and demonstrably justifiable".¹²⁴ The court found that no evidence which proved that juvenile whipping was a more effective deterrent than other available forms of punishment had been submitted. In the light of all the circumstances, the court concluded that the legislation which provided for corporal punishment could not be saved by the limitation clause because it was neither reasonable, nor justifiable and also not necessary.

In *Brink v Kitshoff*¹²⁵ a provision in the Insurance Act¹²⁶ was struck down by the Constitutional Court on the basis that it violated the right to equality.¹²⁷ Broadly speaking, the relevant section provided that if a husband cedes a life policy to his wife, and upon his death his estate is sequestrated as insolvent, the proceeds of the policy return to his insolvent estate. The court held that the provision infringed on the right of married women against discrimination: no similar provision had been made in respect of married male beneficiaries or anyone else for that matter.¹²⁸ Consequently, the court concluded that the provision discriminated on the basis of sex

¹²³At para 63.

¹²⁴At para 80.

¹²⁵1996 (6) BCLR 752 (CC).

¹²⁶Section 44(1) and (2) of Act 27 of 1943.

¹²⁷Section 8 of the Interim Constitution.

¹²⁸See para 43.

and marital status. The court then considered whether the provision could nevertheless be regarded as justifiable in terms of the provisions of the limitation clause.

In her judgment, O'Regan J stated that the limitation clause involves a proportionality exercise in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused.¹²⁹ The respondents argued that the purpose of the provision was to protect the interests of creditors of an insolvent estate. Recognising that it was a valuable and important purpose, the court nevertheless ruled that in order to achieve the purpose, it was unnecessary to draw a distinction between married women and married men. Therefore, the court concluded that it could not be said that the provision was reasonable or justifiable.¹³⁰ In the court's view, a gender neutral provision would have served the interests of the creditors much better. As indicated above, this consideration, namely whether there is a rational connection between the limitation and the objective sought to be achieved, is also recognised in section 36(3) (the limitation clause in the 1996 Constitution).¹³¹

The rationality of the relation between the limitation and its purpose has also been an important factor in determining reasonableness and justifiability in cases where the onus is reversed. In *S v Zuma*,¹³²

¹²⁹At para 46.

¹³⁰At para 50.

¹³¹It is submitted that the "rational connection" enquiry is made when a court considers "the relation between the limitation and its purpose" as required in terms of section 36(d). See *supra*, text beneath note 61 for the wording of this provision.

¹³²*Supra*.

S v Bhulwana; *S v Gwadiso*,¹³³ *S v Mbatha*; *S v Prinsloo*,¹³⁴ *S v Julies*¹³⁵ and *Scagell v Attorney-General of the Western Cape*¹³⁶ statutory presumptions which shifted the onus from the state to the accused were struck down by the Constitutional Court. In all of these cases, the state's attempts to justify the encroachment on the right of an accused person to be presumed innocent until proven guilty¹³⁷ failed.

In *Bhulwana* the challenged legislation provided that where an accused was found in possession of a quantity of dagga in excess of 115 gram, it would be presumed "until the contrary is proved" that he or she was dealing in dagga.¹³⁸ The court found that the provision infringed the right of the accused to be presumed innocent, entrenched in the Bill of Rights.¹³⁹ The court argued that this presumption required of the prosecution to prove all the elements of the offence; a presumption which relieved the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt of his guilt.¹⁴⁰ Therefore, it created a risk that an innocent person may be found guilty.

¹³³1995 (12) BCLR 1579 (CC).

¹³⁴1996 (3) BCLR 293 (CC).

¹³⁵1996 (7) BCLR 899 (CC).

¹³⁶1996 (11) BCLR 1446 (CC).

¹³⁷Section 25(3)(c) of the interim Constitution. This right is currently recognised in section 35(3) of the 1996 Constitution.

¹³⁸Section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992.

¹³⁹Section 25(3)(c) of the interim Constitution.

¹⁴⁰At para 15.

The court then considered whether the provision could nevertheless be justified in terms of the limitation clause. The state argued that the purpose of the presumption was to assist in controlling illegal drug trade because it would ensure the imposition of heavier sentences on drug offenders.¹⁴¹ Recognising that effective prohibition of abuse of illegal drugs is "a pressing social purpose", the court nonetheless expressed doubt as to whether this purpose was in fact furthered by the presumption.¹⁴² O'Regan J argued that although the sentencing discretion granted to a court is greater for dealing than for possession, the maximum penalty for possession only is also extremely severe. Therefore, it is unlikely that sentences in excess of the maximum penalty for possession will ever be imposed in cases where the presumption will be a material factor in finding guilt.¹⁴³ The court indicated that where a large quantity of dagga was found in the accused's possession, an inference of dealing might in any event be justified without any reliance on the presumption.¹⁴⁴ If, however, any doubt remained as to whether the accused was dealing, he was entitled to the benefit of the doubt. The court concluded on this basis that the provision could not be justified in terms of the limitation clause.

In *Mbatha* the Constitutional Court was faced with the issue whether a presumption in the Arms and Ammunition Act was valid. The legislation provided that persons who found themselves in the immediate vicinity of an unlicensed weapon were presumed possessors of that weapon for the purpose of proving the offence of

¹⁴¹At para 20.

¹⁴²*Id.*

¹⁴³At para 21.

¹⁴⁴*Id.*

possessing an illegal firearm, unless they could establish the contrary.¹⁴⁵ The state argued that the objective of the presumption was to assist in combating the escalating levels of crime as part of the state's duty to protect society.¹⁴⁶ The state submitted that without such a presumption it would be practically impossible to prove the mental and physical elements of possession.

The court recognised that combating crimes of violence, particularly those involving firearms, is a real and pressing social concern.¹⁴⁷ However, the court observed that the issue before it was whether the means to be used to obviate these concerns were in accordance with the provisions of the Constitution.¹⁴⁸ The court pointed out that it had to consider the importance of the right in an open and democratic society and the extent to which that right has been limited.¹⁴⁹

After consideration of the state's arguments, the court recognised that it might be difficult to show that a particular person (against whom the presumption operated) was in fact guilty of the crime of possession. The court conceded that if that person was in fact guilty, the absence of the presumption might enable him to escape conviction. However, the court explained that¹⁵⁰

this is inevitably a consequence of the presumption of

¹⁴⁵Section 40(1) read with sections 32(1)(a) and 32(1)(e) of the Arms and Ammunition Act 75 of 1969.

¹⁴⁶At paras 16 and 17.

¹⁴⁷At para 18.

¹⁴⁸*Id.*

¹⁴⁹At para 18.

¹⁵⁰At para 20.

innocence; this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence. After all, the consequences of a wrong conviction are not trivial.

The court found that the the provision was problematic in that it contained no inherent mechanism which excluded those who were innocent from its reach. The court explained its concern by giving the following example: if a single firearm were to be found on a crowded bus, each and every person would be presumed guilty unless he or she could establish their innocence.¹⁵¹ In view of this consideration, the court concluded that the provision was neither reasonable nor justifiable. The court also added that it had not been demonstrated that the objective of the provision could not reasonably be achieved by other means less damaging to constitutionally entrenched rights.¹⁵² The provision was consequently unconstitutional.

In a recent civil case, *D v K*,¹⁵³ the fact that a less intrusive measure was available to achieve a legitimate objective was an important factor taken into account by the court in determining justification of a limitation of a fundamental human right, namely the right to privacy. The facts were that the applicant applied for an order of court compelling the respondent to subject himself to a blood test for the purpose of determining whether or not he could be excluded as the possible father of a minor child. The court found that the taking of blood samples from a person amounts to a violation of that person's

¹⁵¹At para 22.

¹⁵²At para 26.

¹⁵³1997 (2) BCLR 209 (N).

privacy.¹⁵⁴ However, it had to be determined also whether the intrusion might, in terms of the limitation provisions of the Constitution, be justifiable.¹⁵⁵ The court concluded that compulsion to undergo a blood test to establish paternity could not be regarded as reasonable or justifiable because there were less intrusive methods available to achieve the desired results.¹⁵⁶ These less intrusive measures were identified as following from certain presumptions in the Children's Status Act¹⁵⁷ which become operative once the court found as a proven fact that sexual intercourse had taken place between the mother and the person alleged to be the father at the time that the child was conceived.¹⁵⁸

From the discussion of the above cases it is clear that the Constitutional Court as well as other courts have assessed the reasonableness and justifiability of a limitation by following the guidelines laid down by Chaskalson P in *Makwanyane's* case. It is also clear that the emphasis placed on each of the specific guidelines set out in *Makwanyane* (and recognised in the new limitation clause) differ from case to case. In other words, it is apparent that the factors regarded as of utmost relevance in determining whether a limitation is reasonable and justifiable depend on the unique facts present in each case.

In the paragraphs below an interpretation of the constitutional guarantee against double jeopardy is proposed in view of the principles

¹⁵⁴Section 13 of the Interim Constitution.

¹⁵⁵At 221A.

¹⁵⁶At 221A-B.

¹⁵⁷Act 82 of 1987.

¹⁵⁸At 218D-F.

laid down in the cases discussed above. In order to determine the ambit of the rule, it is necessary to identify the values which underlie the rule. Thereafter, it will be considered whether present legislation and common law rules which involve double jeopardy issues can withstand constitutional scrutiny. The final proposals will draw largely from the principles laid down in foreign case law (considered on a comparative basis in this thesis) inasmuch as these principles can be reconciled with the guidelines laid down for interpretation of provisions of the Constitution by the Constitutional Court.

10.7 PROPOSED INTERPRETATION OF THE DOUBLE JEOPARDY PROVISION

10.7.1 The values which underlie the constitutional guarantee against double jeopardy

The historical and comparative study undertaken in this thesis has demonstrated that the constitutional guarantee against double jeopardy protects the accused's interest in finality. The underlying idea is that the accused should be protected against harassment by the state; he should be protected against repeated attempts by the prosecution to get a conviction for what is basically the same criminal conduct. The most important effect of the rule is that it places certain restraints on the prosecutor's powers to institute criminal proceedings. It follows that the broader purpose of the rule is to prevent abuse by the state of the criminal process.

The values which underlie the rule were identified by the United

States Supreme Court which stated that¹⁵⁹

The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense (*sic*), thereby [1] subjecting him to embarrassment, expense and ordeal and [2] compelling him to live in a continuing state of anxiety and insecurity, as well as [3] enhancing the possibility that even though innocent he may be found guilty.

It has been suggested that the first value, that of protecting the accused from "embarrassment and expense" is not such an important consideration.¹⁶⁰ The argument advanced is that it is just as embarrassing and financially burdensome to endure repeated preliminary and bail hearings as it is to endure repeated trials. However, it is universally accepted that jeopardy only attaches at the commencement of the trial.¹⁶¹ This thesis argues that although this first-mentioned value may be of lesser importance than the other values under consideration, it cannot be regarded as immaterial. The comparative study has demonstrated that in many jurisdictions even repetitive pre-trial proceedings have been viewed as a violation of the rule against double jeopardy.¹⁶² In the English legal system, for

¹⁵⁹See *Green v US* 187-188 discussed in chapter six *supra* under 6.5.3, text at note 147.

¹⁶⁰See the dissenting judgment of Justice Powell in *Crist v Bretz* at 437. (This case is discussed in chapter three *supra* under 3.5.2, text at note 154). *Cf* also the views of Westen and Drubel *General Theory* 87-88.

¹⁶¹Westen and Drubel *General Theory* 87-88.

¹⁶²See the position in English law discussed in chapter three *supra* under 3.2.2, text at note 55; Indian law, discussed in chapter three *supra*, under 3.4.2, text at notes 133 and 134 and South African law discussed in chapter three *supra* under 3.6.2, text at note 294.

instance, courts have prohibited repeated preliminary hearings on the basis that they have become vexatious or amounted to an abuse of process by the prosecuting authorities; the abuse, *inter alia* lying in the undue embarrassment and expense caused to the defendant.¹⁶³

The second value, namely that the accused ought not to live in "a continued state of anxiety and insecurity", is substantially more significant from the perspective of the double jeopardy implications of repetitive trials. In fact, the identification of this value in American constitutional jurisprudence has undoubtedly had an impact on the rules of attachment developed in that legal system. It was pointed out in chapter three that the United States Supreme Court held in *Crist v Bretz* that the accused's interest in finality becomes particularly acute with the commencement of trial for the very reason that it is at this stage in the proceedings that the accused becomes vulnerable to a possible conviction; "stress and possible harassment of the defendant is from then on sustained".¹⁶⁴

The value that the accused ought not to be subjected indefinitely to anxiety and insecurity can also be viewed as part of his greater interest in finality. It is submitted that the accused's right to finality is served by having his trial completed by the first tribunal he encounters which is vested with jurisdiction to make an adjudication of his culpability for the crime(s) charged. The American commentators Westen and Drubel however, point out that the accused's right to finality does not guarantee that the proceedings will end with the first tribunal; "it merely gives him an opportunity to have

¹⁶³See the discussion of *R v Horsman Justices, Ex parte Reeves* and *Brooks v Director of Public Prosecutions* in chapter three *supra* under 3.2.2, text at notes 55 and 59.

¹⁶⁴Per Justice Blackmun at 38. See the discussion of the *Crist* case in chapter three *supra* under 3.5.2, text at note 154.

the proceedings ended by means of a verdict of not guilty. If the defendant is convicted and his conviction reversed on appeal, the state may be able to insist on putting him to trial a second time".¹⁶⁵

This brings us to the final value recognised in *Green*: the state ought not be allowed repeated attempts to convict an accused for the same offence because it may "enhance the possibility that even though innocent he may be found guilty".¹⁶⁶ It has been suggested that this value "lies at the core of the problem...".¹⁶⁷ The importance of the value (in the context of protection against double jeopardy) is described as follows¹⁶⁸

In many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And, knowing that a second proceedings is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge he may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial.

The risk that an innocent person may be convicted is undeniably a consideration of utmost importance in determining the permissibility of successive prosecutions. In fact, this consideration is the core value which sustains the majority of the rights of arrested, detained and

¹⁶⁵Westen and Drubel *General Theory* at 90 note 57.

¹⁶⁶At 188 of the *Green* case.

¹⁶⁷Friedland 4.

¹⁶⁸*Id.*

accused persons. It is submitted that this value sustains at least the following rights: ¹⁶⁹ the right to remain silent;¹⁷⁰ not to be compelled to make confessions or admissions which could be used in evidence against the person;¹⁷¹ to consult with a legal practitioner;¹⁷² to have a fair trial which includes the right to be informed of the charge with sufficient detail;¹⁷³ to be present when being tried;¹⁷⁴ to be presented by a legal practitioner;¹⁷⁵ to be presumed innocent until proven guilty and to remain silent and not to testify during the proceedings;¹⁷⁶ to adduce and challenge evidence;¹⁷⁷ to appeal or take the matter on review to a higher court.¹⁷⁸

However, there are rights of accused and detained persons which serve other values. A value of particular importance is that the individual ought to be treated with dignity and respect. Constitutional rights of accused and detained persons which protect these values, for instance, are the right to conditions of detention which are consistent

¹⁶⁹For an in-depth discussion of the values which underlie a system of due process of law, see Joubert JJ "Die legaliteitsbeginsel in the strafprosesreg" *LLD Dissertation* 1995 80 *et seq* (hereinafter referred to as Joubert *Dissertation*).

¹⁷⁰Section 35(1)(a) and (b) of the 1996 Constitution.

¹⁷¹Section 35(1)(c).

¹⁷²Section 35(2)(b).

¹⁷³Section 35(3)(a).

¹⁷⁴Section 35(3)(e).

¹⁷⁵Section 35(3)(g).

¹⁷⁶Section 35(3)(h).

¹⁷⁷Section 35(3)(i).

¹⁷⁸Section 35(3)(o).

with human dignity,¹⁷⁹ to communicate with next of kin and a medical practitioner¹⁸⁰ and to have the trial begun and concluded without unreasonable delay.¹⁸¹ An American commentator also considers the right to protection against double jeopardy as essentially an affirmation of the value that individuals ought to be treated with dignity and respect.¹⁸²

However, it must be emphasised that rights of arrested, detained and accused persons entrenched in the Bill of Rights in the South African Constitution not only serve the values identified above, but also serve to uphold the integrity of the legal system. This is achieved by employing the criminal process itself to impose sanctions for violations of fundamental human rights. In other words, the criminal process is also employed to correct its own abuses.

That the drafters of the final Constitution of South Africa had in mind the creation of a new order which not only concerns itself with the maximisation of the reliability of fact finding processes and the protection of the individual's dignity, but also one which compels respect for the integrity of the criminal justice system, is apparent from the inclusion in the final Bill of Rights of section 35(5). This section provides that

¹⁷⁹Section 35(2)(e).

¹⁸⁰Section 35(2)(f).

¹⁸¹Section 35(3)(d).

¹⁸²See Kadish SH "Methodology and criteria in due process adjudication - a survey and criticism" *The Yale Law Journal* Vol 66 1957 319, 347. The classification by Kadish of the values which underlie particular constitutional rights are discussed in detail by Joubert *Dissertation* 81-83.

[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

By recognising that violation of certain rights (for instance, the right of an arrested person not to be coerced to make any confession or admission which may be used in evidence against him)¹⁸³ may be vindicated through the criminal process itself, (namely by excluding such evidence), the drafters of the South African Constitution have demonstrated that full effect should be given to the ideas of protection of fundamental rights of individuals and limitation of state power.¹⁸⁴

To return to the values which underlie the double jeopardy provision in the Constitution. It is submitted that the guarantee serves both the following basic values which underlie constitutional rights of detained and accused person: (a) the minimisation of the possibility that an innocent person be convicted and (b) the value that the individual ought to be treated with dignity and respect. However, there is an important difference between the guarantee against double jeopardy and most of the other constitutional rights of accused persons. The guarantee against double jeopardy determines *the number of times* that a person may be tried and not merely *the way in which* he may

¹⁸³Section 35(1)(c).

¹⁸⁴Packer explains (at 165) that by employing the criminal process itself to impose sanctions for the violation of fundamental human rights, a legal system gives effect to values "which can be expressed in ... the concept of the primacy of the individual and the complementary concept of limitation of official power".

sanctioned in a constitutional state.¹⁹⁰

It remains to be considered whether the other two requirements, namely that the accused be convicted or acquitted on a valid indictment and on the merits can withstand constitutional scrutiny. The constitutional guarantee against double jeopardy stipulates that "every accused person has a right to a fair trial which includes the right not be tried for an offence in respect of an act or omission for which that person has previously been acquitted or convicted".¹⁹¹ The interpretation of the provision will proceed first by determining the literal meaning of the words used in the provision. The word which is relevant to the issue of attachment of jeopardy is "acquittal". According to the Oxford Dictionary the word "acquittal" means or denotes "the deliverance from a charge by a verdict".¹⁹² Adopting a broad interpretation of the language used in the Constitution which

¹⁹⁰An example which may be advanced is the so-called "people's courts" employed during the late 1980's and early 1990's by political activists to "try" suspected criminals or people not sympathetic to their cause. As indicated in the introduction (chapter 1), this thesis does not consider the double jeopardy implications of successive trials by tribunals with concurrent jurisdiction. (It is not considered for instance, whether a person may be charged and either convicted or acquitted first by a prison disciplinary body or a military court, and thereafter for essentially the same conduct by a court of law). The conclusion reached above namely, that "jurisdiction" is an essential requirement in a constitutional state before effect may be given to determinations of liability for conduct, does not imply that only courts of law qualify as tribunals with jurisdiction to adjudicate upon criminal conduct. It is merely required that the tribunal be vested *by law* with jurisdiction to adjudicate upon the guilt or innocence of the accused person for the conduct charged.

¹⁹¹Section 35(3)(m).

¹⁹²The Concise Oxford Dictionary 1963 5th ed 13.

secures for the individual "the full measure" of its protection,¹⁹³ it is submitted that the word "acquittal" denotes a discharge of the accused by the trial court at a stage after plea; in other words, "acquittal" means a discharge¹⁹⁴ of the accused by the first factfinder that he encounters, who is vested with the required jurisdiction to make an adjudication of the guilt or innocence of the accused for the crime(s) charged.

The literal interpretation suggested above also complements a purposive interpretation which focuses on the values which underlie the rule and the purposes which the rule seeks to achieve. It is clear that a second trial after the accused has been discharged in the first trial at a stage after the trial has commenced will cause expense, insecurity and anxiety to the accused. However, the most important consideration is that it creates the risk that an innocent person may be convicted. By getting a second opportunity to prosecute the accused and have him convicted, the state obtains an unfair advantage. A new trial gives the state an opportunity to correct the mistakes that it made in the first trial and to refine the presentation of its case. Moreover, the trial, when it was terminated in favour of the accused, may already have reached a stage at which the prosecution had had ample opportunity to identify the weaknesses in the case for the defence. Finally, the accused may have run out of resources. This puts the prosecution in a much better position at the second trial. As indicated in the historical and comparative study undertaken in this thesis, this is exactly the kind of abuse of the criminal process which the rule against double jeopardy circumvents.

¹⁹³Per Mr Justice Kentridge in *Zuma* para 10, citing from the *Bermuda Fisher* case (see *supra* under 10.3, text at note 27).

¹⁹⁴The word "discharge" is also described as meaning an "acquittal" in terms of the Oxford Dictionary (at 3471).

The double jeopardy provision protects the accused's interest in finality. The interest in finality as indicated above¹⁹⁵ encompasses the right (or rather the opportunity)¹⁹⁶ of the accused to have his trial completed by the first tribunal he encounters, provided the tribunal is duly empowered by law to make an adjudication of the guilt or innocence of the accused for the offence(s) charged. If the first trier of fact concludes the trial on the basis that, as a matter of fact, the accused cannot be convicted of the offence and must be acquitted, the accused cannot be tried again for the same offence. This is the traditional approach followed in South African law. However, it is submitted that the values which underlie the constitutional provision against double jeopardy require that even if the accused is discharged (at a stage after plea) on any other basis, for instance that the court could not proceed to find that he is guilty as a result of an error such as a defective indictment which could not be amended because this would have prejudiced the accused in his defence, he may not be tried again for the same offence in a new trial. Apart from achieving the important values set out above, this approach pre-eminently protects the integrity of the legal system: the organs of state ought not to benefit from their own incompetence. In other words, the practical effect of this approach is that it forces the prosecution to prepare adequately before it brings its case against an alleged offender.

As indicated in the comparative study, a similar approach has recently been adopted by the Supreme Court of Canada.¹⁹⁷ The

¹⁹⁵See *supra* under 10.7.1, text at note 165.

¹⁹⁶See *id* for the views of the American commentators Westen and Drubel.

¹⁹⁷See chapter three *supra* under 3.3.2 for the discussion of the decisions of *Riddle* and *Moore*, text at notes 72 and 91.

court rejected the idea that a trial must have been concluded on the merits before the accused may rely on the plea of former acquittal. Instead, the court suggested that the idea of a "trial on the merits" means only that the previous dismissal must have been made by a court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge.¹⁹⁸ It must be pointed out, however, that the Supreme Court of Canada did not give full effect to the "one trial" principle; it left open the door for a second prosecution by expanding the concept "jurisdiction" and employing the "in jeopardy" analysis. In *Moore*¹⁹⁹ for instance, the court held that an accused discharged on the basis of a defective indictment may not be tried again in a new trial if the indictment could have been amended at the first trial. The court argued that if the indictment could have been amended it means that the accused was "in jeopardy" of a conviction. If, conversely, the indictment could not have been amended because it would have caused prejudice to the accused, the court argued that "the dismissal would be tantamount to an acquittal" which would bar a second trial.²⁰⁰ However, the court retained the principle advanced in common law that if the charge was a "nullity," in other words, so defective that no person could have been convicted on it, the accused was never in jeopardy and could therefore be charged again in a new trial.²⁰¹ The court explained

¹⁹⁸See *Riddle* discussed in chapter three *supra* under 3.3.2, text at note 83.

¹⁹⁹See chapter three *supra* under 3.3.2, text at note 91 for a detailed discussion of this case.

²⁰⁰At 312. See chapter three *supra* under 3.3.2, text at note 97.

²⁰¹*Id.* As pointed out in chapter three *supra* under 3.6.2 (text at note 290) it is highly unlikely that a discharge on this basis can still occur in South African law. This is so because South African courts have extensive powers to allow amendments of charge sheets. Moreover, defective charge sheets may be cured by evidence presented at the

that the justification for allowing a second trial in the case where the first indictment was a "nullity" was that the court then had no "jurisdiction" to try the matter.²⁰²

This thesis argues that broader protection should be afforded to the accused in terms of the double jeopardy provision in the South African Constitution than in Canada. It is submitted that the values which underlie the rule against double jeopardy do not allow that the permissibility of a second trial be made dependent on the question of whether a person was "in jeopardy" of a conviction at the first trial. The "in jeopardy" analysis was employed in the common law not so much as a means to protect the accused against repetitive prosecutions, but rather to effect new trials if the prosecution made errors in the presentation of its case in the first trial (for instance, by drawing up a defective indictment which excluded a conviction of the accused). Because the courts had no power to allow amendments of indictments, new trials were effected by declaring the first trial a "nullity". Since the first trial, as a result of the error, was regarded as a "nullity", it was argued that the accused could be tried again. The reason advanced was that he was never "in jeopardy" of a conviction at the first trial.²⁰³

The rejection by the Supreme Court of Canada of the "trial on the merits" requirement can be regarded an important breakthrough in the law of double jeopardy. However, by retaining the "nullity theory" and expanding the concept "jurisdiction", the court has not succeeded in giving full effect to the values which underlie the rule against double

trial.

²⁰²At 311. See chapter three *supra* under 3.3.2, text at note 97.

²⁰³See the discussion of the common law cases of *Drury* and *Green* in chapter two *supra*, text at notes 68 and 71.

jeopardy. In practice, employment of the "nullity theory" and the concept "absence of jurisdiction" may still have the effect that the prosecution can benefit from an error made in the preparation of its case, by getting a second opportunity to convict the accused.

Rather than relying on the technicalities outlined above, this thesis argues that the permissibility of a second trial for the same offence after a discharge of the accused should be determined by focusing purely on achievement of the values underlying the double jeopardy provision in the Constitution. It is submitted that in order to achieve these values, the accused *should be deemed* to be "in jeopardy" of a conviction at the stage when the trial commences, in other words, at the pleading stage. The reason is that a second trial defeats the accused's right to finality (his right to have his trial completed by the first tribunal which has jurisdiction to try him on the issue of guilt or innocence of the offence(s) charged). Moreover, in order to achieve the values which the rule seeks to protect, a narrow meaning should be given to the concept "jurisdiction", rather than the expanded "term of art" meaning mentioned above. This thesis submits that the question should merely be whether the tribunal was empowered in terms of law to try the accused on the issue of guilt or innocence for the offence(s) charged.

It now remains to be considered in a second stage of analysis whether a second prosecution may nevertheless be justified in terms of the provisions of the limitation clause. As pointed out in *Makwanyane*,²⁰⁴ justification for limitation of a fundamental right is determined by balancing the interests of the accused against that of the state. This involves a proportionality enquiry: the court must weigh opposing interests against one another, placing the purpose,

²⁰⁴At para 104.

effects and importance of the limitation on the one side of the scales and the gravity and extent of the infringement of the fundamental right caused by the limitation on the other side.²⁰⁵

To determine whether a second prosecution may follow on a discharge of the accused at a stage after jeopardy had attached, the interest of the public in having the prosecution present all the evidence it has available in an error-free trial must be weighed against the interest of the accused in having his trial concluded by the first tribunal with required jurisdiction. It is submitted that in serving the valid interest of society without making too great an inroad into the fundamental right of the accused in finality, the state should get a *reasonable and fair opportunity* to present its best case to the court. This thesis submits that the state is denied a reasonable opportunity to present its best case if the court acted with *mala fides* in discharging the accused or if the accused obtained an acquittal as a result of behaviour which may be viewed as *mala fide*. An example would be where the court acquitted the accused as a result of fraud or collusion. It is furthermore submitted that even in the absence of proof of *mala fides*, there may be deserving cases in which the accused's interest in finality is outweighed by the state's interest in bringing offenders to justice. This thesis argues that the state is also denied a reasonable opportunity to present its case if the court acted in breach of the rules of natural justice. For instance, a second trial will also be justified if the court unreasonably refused to hear the prosecution's case. Finally, it is submitted that a second trial will also be justified if the trial was terminated prematurely by an extrinsic factor, for example illness or other inability of the presiding officer to continue with the case.

²⁰⁵See *Makwanayane* discussed *supra* under 10.5.2, text at note 95.

However, it is submitted that the state is not denied a reasonable opportunity to state its case if it is barred from charging the accused once again in a second trial because it made mistakes in its preparation of the first prosecution. Moreover, it is submitted that the state is *not* denied a reasonable opportunity to state its case if a premature discharge of the accused can be ascribed to a so-called jurisdictional error made by the court. As pointed out by Mr Justice Brennan in a dissenting opinion in the United States Supreme Court case of *Scott*, "the government's means of protecting its vital interest in convicting the guilty is its participation as an adversary at the criminal trial where it has every opportunity to dissuade the trial court from committing erroneous rulings favorable to the accused".²⁰⁶ A second trial would, in these circumstances, not be reasonable or justifiable; the guarantee against double jeopardy does not allow organs of the state to benefit from its own mistakes at the cost of the accused.

10.7.3 The constitutional permissibility of a successive prosecution for a "different" offence

This analysis focuses on the issues considered in chapter four, namely whether the rule against double jeopardy prohibits a successive prosecution for an offence which is not identical to the offence charged in the previous trial, but nevertheless arose from the same facts.

The guarantee against double jeopardy in the South African Constitution provides that "[e]very accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission of which he or she has previously been acquitted

²⁰⁶At 84. See chapter six *supra* under 6.5.5, note 188.

or convicted".²⁰⁷ It is submitted that the literal meaning of these words is that a person may not be tried for an offence if in order to prove some or all of the elements of the offence, the state has to rely on conduct for which the accused has previously been acquitted or convicted.

This construction of the literal meaning of the provision can be explained as follows. The words "acquitted or convicted" refer to the words "act or omission" in isolation, and not to the words "offence in respect of an act or omission".²⁰⁸ If the drafters of the provision intended that the words "acquitted or convicted" refer to the word "offence", it would have been senseless to include the words "act or omission"; the minimum requirement for the performance of *all* offences is either an act or an omission. Therefore, it is submitted that the only reasonable explanation for the inclusion of the words "act or omission" in the provision is that the provision was intended to protect the accused, not only against a successive prosecution for the same offence (in the sense of an identical offence or a lesser or greater included offence as recognised in the common law),²⁰⁹ but also against re-prosecution for the same conduct; in other words, conduct ("an act or omission") for which the accused has previously been acquitted or convicted. As indicated in chapter four, a "same conduct" standard offers expanded protection.

²⁰⁷Section 35(3)(m) of the 1996 Constitution.

²⁰⁸*Cf* also the Afrikaans text of the provision set out in chapter one under 1.1 note six.

²⁰⁹As indicated in the comparative overview of the definitional issue of "same offence" (chapter four), protection against successive prosecution for lesser and greater included offences has been effected in the common law by means of application of the "same evidence" (*Vandercomb*) test and the "in peril" test. See chapter four *supra* under 4.6.1 - 4.6.4 for a discussion of the application of these tests in South African law.

against successive prosecutions; it prevents re prosecution for conduct of which the accused had previously been acquitted or convicted.²¹⁰

It is clear from the discussion of contemporary South African law in chapter four that the literal meaning attributed to the double jeopardy provision in the Constitution by this writer (namely as introducing a same conduct standard), cannot be viewed as a radical break with the past. Broader protection against multiple prosecutions has been recognised by South African courts since the 1960's. First in the case of *Davidson* and then in *Ndou*, the courts (in determining the permissibility of a successive prosecution), applied a standard which involves the question whether prosecution for an offence amounts to reconsideration of liability for conduct of which the accused has previously been acquitted or convicted.²¹¹

It must, however, be considered also whether the literal interpretation of the constitutional guarantee proposed above can be reconciled with a purposive interpretation which focuses on the values which underlie the constitutional guarantee against double jeopardy. The relevant question is whether the prohibition on re prosecution for for conduct of which the accused has already been acquitted or convicted sufficiently serves the accused's right in finality. In other words, does it protect the accused against embarrassment, anxiety, expense, insecurity and the risk of being convicted despite being innocent?

²¹⁰See chapter four *supra* under 4.5.6 for a discussion of the American case of *Grady*.

²¹¹See chapter four *supra* under 4.6.5 and 4.6.6 for a discussion of these cases.

law.²²¹ A same transaction test has also recently been approved of in a decision of a provincial division of the Supreme Court in South Africa (*S v Khoza*)²²² as an effective measure to protect the accused against state abuse of the criminal process.²²³

It is submitted that determination of the ambit of the concept "same criminal episode" or "same transaction" in an individual case would not present major difficulties for the courts. In developing a body of jurisprudence in this particular field, our courts may draw extensively on the treatment of this issue in English and German law. However, in developing criteria to determine the boundaries of the concept "same transaction", the courts must not lose sight of certain differences between substantive German criminal law and law of criminal procedure on the one hand, and South African criminal law and law of criminal procedure on the other.²²⁴

This thesis submits that in determining the boundaries of the concept "same transaction", the broader enquiry ought to be whether separate crimes (in terms of substantive law) are so closely connected

²²¹ See chapter nine *supra* under 9.4.3.2.

²²² See chapter four *supra* under 4.6.8 for a discussion of the decision in *Khoza*.

²²³ See chapter four *supra* under 4.6.8 for a detailed discussion of the decision in *Khoza*. The court expressed itself against the practice of proceeding on charges arising from the same criminal episode or transaction in a piecemeal fashion. The court recognised that it has inherent discretionary powers to stay criminal proceedings on the basis that a second prosecution would amount to abuse of the criminal process by the state.

²²⁴ The application in practice of the German criterion known as *Verklammerung* is dependent on the definitions of substantive offences in that jurisdiction. It can therefore not be applied on a similar basis in South African law. See chapter nine *supra* under 9.4.3.1, text at note 103.

that a separate evaluation and adjudication of each of these crimes may be regarded as an unnatural splitting up of a unit of conduct.²²⁵

Closer scrutiny may involve an investigation of whether

- (a) there is a connection between the offences in terms of criteria such as time and place of execution and similarity (albeit not identity) in the acts of execution
- (b) there is similarity of intention in the sense that the crimes can be regarded as one project, or are part of a common scheme or plan
- (c) the crime(s) charged successively could have been charged in the alternative to crime(s) charged in the first trial.

It is however, an open question whether the Constitutional Court will go as far as interpreting the constitutional provision in the sense that it prohibits successive prosecutions for crimes arising from the same transaction or facts. Even a broad interpretation of the words used in the constitutional guarantee in my view, cannot be construed as prohibiting successive prosecutions for all crimes arising from the same facts. However, if the more flexible approach introduced in *Mhlungu* is followed, namely that an interpretation consonant with the values underlying the constitutional guarantee should be preferred to a literal interpretation if such a literal interpretation would perpetuate arbitrariness and injustice (provided the broader interpretation can reasonably be accommodated within the text)²²⁶, the Constitutional Court may very well go so far as interpreting the provision in accordance with the proposals in this thesis. Moreover, the court may

²²⁵As indicated in chapter nine *supra* under 9.4.3.1 and 9.4.3.2 this is the basic approach followed in German law.

²²⁶See *supra* under 10.3, text at note 38 for a discussion of the approach followed in *Mhlungu*.

adopt a same transaction test on the basis of the accused's broader right to a fair trial.

If the Constitutional Court nevertheless decides that neither the accused's broader right to a fair trial nor the double jeopardy provision in the Constitution can be interpreted as meaning that successive prosecutions for crimes arising from the same facts or transaction are prohibited, it becomes essential to consider also whether the provision incorporates the rule of issue estoppel.²²⁷

In the discussion of South African law in chapter four, it was indicated that the Appellate Division rejected the idea (in *O'Neill*) that the broader concept of *res judicata* also covers cases of estoppel in respect of particular facts which led to the verdict.²²⁸ As indicated in that discussion, the court in *O'Neill* relied (for this particular conclusion) on its previous decision of *Manasewitz*. However, as indicated in chapter four, the decision in *Manasewitz*, in this respect, can only be regarded as authority for the proposition that issue estoppel may not be raised by the prosecution to the prejudice of an accused who pleads *autrefois acquit*.²²⁹ In other words, it was demonstrated in chapter four that the rejection in *O'Neill* of the idea that issue estoppel may be raised in favour of the accused, cannot be justified in terms of the decision in *Manasewitz*. It was also pointed out that a division of the Supreme Court in fact recognised the application of the rule of issue estoppel in our law in *Vermeulen's*

²²⁷It is submitted that recognition of the doctrine of issue estoppel (as a separate rule) will become largely immaterial if the double jeopardy provision in the Constitution is interpreted as offering the accused protection against successive prosecutions for offences arising from the same facts or transaction.

²²⁸See chapter four *supra* under 4.6.9.

²²⁹See chapter four *supra* under 4.6.9, text at note 566.

case, albeit under the guise of action estoppel.²³⁰

This thesis argues that the broader concept of *res judicata* introduced in *Manasewitz* laid the foundation for the recognition of issue estoppel in our law. Moreover, it is argued that recognition of the accused's common law right to protection against double jeopardy as a fundamental right in the Constitution now obliges the courts to give effect to the principle of issue estoppel. It is submitted that a literal as well as a purposive interpretation of the constitutional guarantee against double jeopardy requires that the state be prohibited from relitigating issues previously decided in favour of the accused. This submission is based on the accused's broader interest in finality: an issue determined in favour of an accused by a tribunal vested with the power to make an adjudication of the accused's guilt or innocence for criminal conduct, cannot be re-opened in a second trial. The underlying idea is that the prosecution should not be allowed to build a case around proof of conduct for which a person has already been acquitted.

The rule of issue estoppel is applied in Indian, Canadian and American federal law. The reason why it has been rejected in English law is because it is extremely difficult in that system of law to identify and isolate issues determined by the jury in favour of the accused. This is so because the jury need not give reasons for its decisions.²³¹ Courts in South Africa do not have to deal with this problem. Furthermore, it is submitted that the principle of issue estoppel follows from a literal as well as a purposive interpretation of

²³⁰See chapter four *supra* under 4.6.9, text at note 581 for a detailed discussion of *Vermeulen's* case.

²³¹See chapter four *supra* under 4.2.3 for a discussion of the case of *Humphrys*.

the constitutional guarantee: the words "acquitted" of an "act or omission" are broad enough to include also a finding of fact in favour of the accused (for example, that the accused was not present at the scene of the crime). In view of all these considerations, it is proposed that the constitutional provision be interpreted as incorporating the rule of issue estoppel. Consonant with the purposes underlying the constitutional provision, issue estoppel should be applied only in favour of the accused and not be available to the state.²³² Moreover, it is proposed that similar to the position in Canadian and Indian law, application of the rule be confined to situations where the parties in the second trial are the same as in the first trial.²³³

It remains to be considered in a second stage of analysis whether justification for a successive prosecution for crimes arising from the same criminal transaction (or facts) may be found to exist in terms of the provisions of the limitation clause. The comparative study undertaken in this thesis has led this writer to the conclusion that successive prosecutions for crimes arising from the same facts may well be reasonable and justifiable in the following circumstances

- (a) Where the accused through collusion with a public official obtained a conviction on a lesser charge to escape prosecution on a greater charge.
- (b) Where the crime charged in the second trial has not yet been completed at the time of the first trial (the "subsequent death" or "intervening death" exception).

²³²As indicated in chapter four under 4.3.5, (text at note 156) recognition of issue estoppel in favour of the crown amounts to a violation of the fundamental right of the accused to be presumed innocent until proven guilty by the state.

²³³See chapter four *supra* under 4.3.5 and 4.4.4.

- (c) Where the crime charged in the second trial has not been discovered by the prosecution at the time of the first trial, despite the exercise of reasonable diligence by the prosecutor's office.
- (d) Where joinder of offences in one charge, in one single trial, would have been prejudicial to the prosecutor or prejudicial to the accused.
- (e) Where the accused is responsible for the separation of trials.
- (f) Where the offence(s) charged in the second trial are based on the same conduct of which the accused has previously been held to be in contempt of court.²³⁴
- (g) Where an issue decided in favour of the accused may again be re-opened in a second trial if it was obtained as a result of fraud, for instance perjury. It is submitted, furthermore, that in determining justification for violation of the rule of issue estoppel in subsequent perjury charge type cases, our courts may draw extensively from rules developed in Canadian law.²³⁵ Consonant with the values which underlie the rule against double jeopardy, the Canadian Supreme Court held in *Grdic*²³⁶ that the crown may only re-open an issue if to prove the allegation (of fraud), *additional evidence* is rendered; in other words, evidence not put to the trier of fact in the previous proceedings. Moreover, *Grdic* exemplifies that even if this additional evidence was available at the first trial to the crown (using reasonable diligence), but the crown failed to render it, the

²³⁴It is submitted that in previous conviction for contempt cases, the state's interest in enforcing court orders (namely, to ensure that violation of its orders do not go unpunished) outweighs the accused's interest in finality. *Cf* the approach adopted in English law discussed in chapter three *supra* under 3.3.2, text at note 21.

²³⁵See chapter four *supra* under 4.3.5 for a discussion of the relevant principles borne out in Canadian case law.

²³⁶See chapter four *supra* under 4.3.5, text at notes 151-153 for a discussion of the approach adopted in *Grdic*.

crown may not rely on it in a subsequent trial to prove perjury.

By way of *excursus*, it must be conceded that apart from the instances set out above, there may be other cases in which the state may make out a convincing case that limitation of the rule (namely that all charges arising from the same transaction should be joined in one charge) may be justified. This involves legislation which creates various related offences (not necessarily lesser or greater included offences) with the specific object of combating continuous organised criminal activity (for example drug trafficking). The state may then argue that in order to combat continuous, organised criminal activity, it should be empowered to charge the accused in successive prosecutions for different substantive offences (in terms of the traditional "same evidence" and "in peril" tests), *committed in different places and at different times*, despite the fact that these offences form part of essentially the same project or scheme or plan. The Constitutional Court (if it interprets the double jeopardy provision as introducing a broad same transaction approach), will then have to weigh this interest of the state against the accused's interest in finality. Due to constraints of length, this thesis cannot explore this problematic area. It is simply submitted that the determination of justification for successive prosecutions of offenders involved in organised, continuous criminal activity, will require closer scrutiny of the considerations set out in the limitation clause than undertaken in the instances set out in (a) - (g) above.²³⁷

Finally, it is suggested that the common law should be reformed

²³⁷It will have to be considered, for instance, whether there is not a less restrictive measure to combat continuous, organised criminal activity.

in order to bring it into line with the values which underlie constitutional protection against double jeopardy. It is recommended that the reform be achieved by inserting a compulsory joinder rule in the Criminal Procedure Act. This thesis proposes that the provisions essentially be based on the recommendations recently made in this regard by the Law Reform Commission of Canada. With minor amendments (introduced by this writer), the rule proposed by the Law Reform Commission of Canada reads as follows²³⁸

1. (1) Unless otherwise ordered by the court in the interests of justice - such as preventing prejudice - or unless the accused acquiesces in a separate trial, an accused should not be subject to separate trials for multiple crimes charged or for crimes not charged but known at the time of the commencement of the first trial that
 - (a) arise from the same transaction or facts (being closely connected in time, place and occasion) or
 - (b) are part of a common scheme or plan.
- (2) In assessing whether it is in the interests of justice to have separate trials, a court should be permitted to consider, among other factors
 - (a) the number of charges being prosecuted
 - (b) whether the effect of the multiple charges would be to raise inconsistent defences
 - (c) whether evidence introduced to support one charge would prejudice the adjudication on the other charge(s)
 - (e) the timing of the application of severance.

As indicated above, the joinder rule proposed above makes provision that a court may order separate trials "in the interests of

²³⁸See at 50 *et seq* of Working Paper 63.

justice". The concept "interests of justice" is clarified by insertion of the words "such as preventing prejudice" and further elucidated by a list of factors which may be taken into account in determining whether separation will be "in the interests of justice". It is submitted that a provision to this effect will give guidelines to prosecutors in drawing up charges, and also to courts in determining whether the interests of justice require that separate trials be held for crimes arising from the same transaction or facts.

10.7.4 The constitutionality of a prosecution appeal on a point of law only

As indicated in chapter six, the present Criminal Procedure Act²³⁹ allows the state to appeal against acquittals handed down in lower as well as superior courts, albeit on a point of law only. Consideration of the constitutionality of these provisions²⁴⁰ will involve a literal as well as a purposive interpretation of the constitutional guarantee against double jeopardy. The constitutional guarantee provides that "every accused person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted".²⁴¹ The question posed here is whether it can be said that a person is "tried" again for the same unlawful conduct of which he or she has previously been acquitted if a court of appeal reconsiders the merits of his acquittal on the record of the proceedings, and solely on the basis of whether the trial court made an error of law in acquitting the accused.

²³⁹Act 51 of 1977.

²⁴⁰Sections 310 and 319 of the Act.

²⁴¹Section 35 (3)(m) of the 1996 Constitution.

The Oxford Dictionary defines the word "try" as to "subject (person) to trial (for murder etc.)".²⁴² The word "trial" on the other hand is defined as a "judicial examination and determination of issues between parties by judge ...".²⁴³ It is submitted that a broad interpretation of these words includes a reconsideration of legal issues only by a court of appeal on the record or proceedings which took place in the first trial.²⁴⁴ Moreover, this interpretation is supported by the fact that the drafters of the provision did not add the proviso that the person relying on the provision should have been "finally" acquitted or convicted. As indicated in chapter three, this is provided for in the double jeopardy provision of the Canadian Charter of Rights.²⁴⁵ As indicated in chapter six, the Supreme Court of Canada regarded the inclusion of the word "finally" in the double jeopardy provision in the Canadian Charter of Rights as an indication that the drafters intended that the practice be retained that the crown may appeal against an acquittal on a point of law.²⁴⁶

It is submitted that a purposive interpretation leads to the same conclusion as the suggested literal interpretation: an appeal by the prosecution against an acquittal, albeit on a point of law only, violates the accused's right to finality, namely his right to have his trial

²⁴²At 1398.

²⁴³At 1387.

²⁴⁴See *Zuma* (discussed *supra* under 10.3, text at notes 27 - 29) where the Constitutional Court expressed itself in favour of a broad interpretation of the words used in a constitutional guarantee in the Bill of Rights.

²⁴⁵See chapter three *supra* under 3.3.1, text at note 61 for the wording of this provision.

²⁴⁶See chapter six *supra* under 6.3.2, text at note 69 for a discussion of the *Morgentaler* case.

completed by the first tribunal he encounters vested with jurisdiction to make an adjudication of his guilt or innocence of the crime(s) charged.

However, it may be argued on behalf of the state that an appeal by the prosecution on a point of law alone poses no risk whatsoever that an innocent person may be convicted. In support of this contention it may be said that only new trials (following on previous acquittals or convictions) create this danger. In a new trial, as opposed to an appeal on the record on a point of law only, the prosecution may bring additional evidence and improve on the presentation of its case by anticipating the evidence already offered by the accused at the first trial. In other words, it may be argued that it is only in a new trial that the state obtains an undue advantage over the accused which enhances the risk that although being innocent, the accused may nevertheless be convicted. This is true, but, as the comparative and historical study has demonstrated, there are also other values at stake which are not necessarily of less importance than the value that the risk should be minimised that an innocent person be convicted.

Apart from the fact that a second trial (albeit an appeal) creates embarrassment, anxiety, insecurity and expense, an appeal by the prosecution also undermines the value or idea that the state, being more powerful than the individual, ought not to benefit from its own mistakes. In other words, an important objective of the constitutional guarantee against double jeopardy is that the individual ought not to pay the price for incompetence of organs of the state. This means that if the prosecution or the adjudicator (the court) made mistakes which lead to the acquittal of the accused, the accused ought not (as a rule) to be subjected to further proceedings in order to correct those mistakes. That this is an important value which underlies constitutional protection against double jeopardy can also be inferred

from the treatment of state appeals against acquittals in other jurisdictions.

In chapter six it was pointed out that the prohibition on state appeals against acquittals in American federal jurisprudence cannot be ascribed solely to the fact that employment of juries as factfinders in that jurisdiction makes appellate review of acquittals inappropriate.²⁴⁷ Instead, the fact that the state is also prohibited from appealing on a point of law against an acquittal handed down by a judge sitting as sole adjudicator of the facts in a so-called bench trial, has demonstrated that the "one trial" principle has been the decisive consideration in determining the constitutional permissibility of prosecution appeals.²⁴⁸ Although English legal commentators have not considered the rationale which underlies the prohibition on state appeals against acquittals handed down in superior courts on a point of law only, it can also not merely be assumed that the only reason why the state is prohibited from appealing on a point of law in that jurisdiction is the fact that superior courts employ juries as factfinders.²⁴⁹

A discussion of German law on the other hand, has demonstrated that the fundamentally different inquisitorial trial procedures followed in that jurisdiction (which, for instance allow the prosecution to appeal

²⁴⁷See chapter six *supra* under 6.5.7. As indicated, the theory that the prohibition on state appeals against acquittals can be ascribed only to the fact that it is impossible to identify on what basis the jury acquitted the accused (because a jury need not give reasons for its finding and may acquit against the evidence), has been proved to be an over-simplification of the rationale underlying the prohibition in American constitutional double jeopardy jurisprudence.

²⁴⁸See *id.*, and in particular the submissions of Thomas *Elegant theory* (under 6.5.7, text at notes 250 - 251).

²⁴⁹*Cf* the comments in chapter six *supra* under 6.2.2, text at note 24.

on a point of law as well as on the facts on behalf of the state as well as on behalf of the person who has been convicted), invalidates any argument to the effect that, because the state may appeal against an acquittal in that jurisdiction, it should likewise be recognised as constitutional in the South African legal system.²⁵⁰ Finally, the comparative study has shown that an appeal on a point of law as well as on the facts is allowed in India for the simple reason that their constitutional provision against double jeopardy protects the accused only against a second trial after he has been *convicted and punished*.

To return to South African law. The rule that the state may appeal against an acquittal on a point of law has never been part of our common law; it was only introduced by the legislature in the 1940's. In the cases of *V* and *Magmoed* the Appellate Division pointed out that legislation which provides for state appeals against acquittals amounts to a violation of the common law rule that sanctity should be accorded to acquittals.²⁵¹ In *Magmoed* the court gave a narrow interpretation to the concept "question of law"; it observed that to hold otherwise "would be opening the door to appeals by the prosecution against acquittals contrary to the traditional policy and practice of our law".²⁵² In view of all these considerations, it is submitted that the statutory provisions which provide for an appeal on a point of law against an acquittal amount to an infringement of the

²⁵⁰See chapter nine *supra* under 9.2, text at note 22.

²⁵¹See the discussion in chapter six of the *Magmoed* case under 6.6.2.3, text at note 324. As indicated, the court in *Magmoed* pointed out that the traditional policy and practice in our law has always been that an acquittal by a competent court should be regarded as final and conclusive. See also to the same effect the Appellate Division case of *V* discussed in chapter eight *supra* under 8.6.2.2, text at note 349.

²⁵²At 101h. See chapter six *supra* under 6.6.2.3, text at note 324.

accused's fundamental right against double jeopardy.

It remains to be considered whether the legislation which provides for state appeals on a point of law against acquittals handed down by lower as well as superior courts may nevertheless be viewed as reasonable and justifiable in terms of the provisions of the limitation clause. The state may for instance raise the argument that it has a valid interest in appealing against an acquittal on a point of law because such an appeal serves the general interest of the public that offenders should be convicted and punished. Moreover, it may be argued that a state appeal on a point of law serves the interests of the public in the proper administration of justice and legal certainty. These interests (arguably) cannot be served effectively if the courts make errors of law which the system does not allow to be corrected.

It is submitted that the interest of the public that offenders should be convicted and punished is not sufficient to be weighed against the accused's interest in finality. This argument (namely that offenders should be convicted and punished), may also be raised to justify appeals by the state on the facts as well as a new trials after accused have been acquitted on the factual merits. However, it is submitted that the other interests of the public set out above, namely the interests in the proper administration of justice and legal certainty, is of sufficient importance to be weighed against the accused's interest in finality. These interests relate to matters which are pressing and substantial in a free and democratic society.

However, it will also have to be considered whether the means chosen to achieve the objective can be regarded as reasonable and justifiable. It is submitted that the limitation (state appeal against an acquittal) is in fact rationally connected to its objective; it is not arbitrary, unfair or based on irrational considerations. Moreover, the

limitation is not of such a nature and extent that it can be said that it will have such a deleterious effect on the individual that it cannot be justified by the purposes it is intended to serve; the appeal is limited to the record and to a point of law only. Moreover, our courts have opted for a narrow interpretation of the concept "question of law".²⁵³ This may be construed as an indication that the legislation infringes as little as possible on the accused's right to finality.

However, it is submitted that it will be less easy for the state to demonstrate that the objectives of the limitation cannot be achieved by less restrictive measures.

The moot appeal as provided for in English law²⁵⁴ in actual fact presents a model of a less restrictive measure to achieve the objectives set out above; it may serve the purpose of stating the correct legal principles for future reference in order to prevent perpetuation of application by the courts of incorrect principles. In fact, the moot appeal is a means whereby these objectives can be achieved without in any way infringing on the accused's right to be protected against double jeopardy.

However, it may also be argued that if only a moot appeal is allowed (instead of an appeal which, if successful, results in the setting aside of the acquittal afforded the accused in the trial court), it may lead to inequality of treatment of accused persons: some may be convicted and punished for crimes while others may go free merely because the court misinterpreted the law. It is submitted that in order to

²⁵³See the discussion of the *Magmoed* case in chapter six under 6.6.2.3, text at note 308.

²⁵⁴See chapter six *supra* under 6.2.3 for a discussion of the moot appeal procedure provided for in English law.

substantiate this argument, the state will have to show that the inequality which flows from the absence of an appeal on a point of law (which affects the acquittal afforded the accused) can be viewed as arbitrary and irrational distinctions drawn between people.²⁵⁵ It is submitted that it would be difficult to show that the inequality which flows from the absence of legislation which provides for such an appeal by the prosecution is arbitrary and irrational if it can be ascribed to an attempt to protect the accused's fundamental right to be protected against double jeopardy; the objective of protecting the accused against double jeopardy offers a "rational explanation" of why similarly placed people (accused) are treated differently.²⁵⁶

The state may, however, be in a much stronger position to make out a case that a prosecution appeal on a point of law which affects the acquittal afforded the accused should be retained (at least in respect of acquittals handed down in lower courts) if it can show that the administration of justice in these courts have reached such a low level that it would bring the law into disrepute and undermine the proper administration of justice if the state is not allowed one reasonable opportunity to bring offenders to justice.

As pointed out in the comparative study in chapter six, an appeal on a point of law is allowed (presumably on the latter basis) against decisions handed down in lower courts in the English legal system.²⁵⁷ However, as indicated in chapter six, the administration

²⁵⁵As indicated *supra* under 10.5.1 (text at note 84), inequality of treatment is determined in our law by focusing on whether discrimination between people is arbitrary and irrational.

²⁵⁶See the opinion of Ackerman J in *Makwanyana's* case para 156, discussed *supra* under 10.5.1, text at notes 84 and 85.

²⁵⁷See chapter six *supra* under 6.2.2.

of justice in the lower courts in this jurisdiction is essentially administered by lay people.²⁵⁸ This is not the position in the present South African legal system. Therefore, for the present, it is submitted that the state would not succeed with this argument; the administration of justice by the lower courts in South Africa has not reached such a low standard that an appeal by the state can be viewed as an essential means to maintain respect for the administration of justice. In view of the above considerations, it is concluded that the legislation which currently provides for a state appeal against an acquittal handed down in a lower as well as a superior court cannot survive constitutional scrutiny.

10.7.5 Review of an acquittal

This thesis has argued consistently that the accused's interest in finality requires that he be subjected only to one trial before a finder of fact vested with jurisdiction to decide upon his or her guilt or innocence of the crime(s) charged. It has been emphasised in this chapter that a trial *de novo* after the accused has previously been discharged by a competent court at a stage after he or she has pleaded, undermines the values which underlie the constitutional guarantee against double jeopardy.²⁵⁹ New trials not only cause anxiety, expense and insecurity, but (unlike state appeals on a point of law only) also create the risk that an innocent person may be convicted.

It follows that a review of an acquittal amounts to an infringement of the constitutional guarantee against double jeopardy; the setting aside by a court of appeal of an acquittal on the basis of

²⁵⁸Under 6.2.2, note 23.

²⁵⁹See *supra* under 10.7.2.

a defect or an irregularity in the proceedings opens the door for the prosecution to institute *de novo* proceedings against the accused. New trials (as indicated above), defeat the objectives of the constitutional guarantee against double jeopardy.

As indicated in chapter six, English and Canadian courts allow reviews of acquittals by invoking the so-called "nullity" theory and the concept of "absence of jurisdiction".²⁶⁰ Indian and German courts also allow reviews of acquittals which may lead to new trials. However, a comparison of the latter two systems to the South African system in this particular regard is not appropriate; a "continuous jeopardy" approach is followed in these jurisdictions. In American federal law on the other hand, new trials may follow upon declaration of a mistrial, unless the motion for a mistrial can be viewed as prosecutorial overreach or an attempt to manipulate the trial.²⁶¹

In South Africa, review by a higher court of proceedings in lower courts has traditionally been regarded as a remedy available to the convicted person only. However, as pointed out in chapter six, the Transvaal Provincial Division of the Supreme Court held in the 1980's that it may rely on its inherent powers to also set aside an acquittal

²⁶⁰Although the traditional policy has always been that an acquittal may not be challenged by the state, the House of Lords recently held that a person must be *lawfully acquitted* before he or she may invoke the plea of former jeopardy. See chapter six *supra* under 6.2.5, text at note 50 for a discussion of the *Harrington* case. As also indicated in chapter six, Canadian courts have allowed reviews of acquittals on the basis that the trial court made a jurisdictional error (for example by failing to take into account all factors in deciding to order a stay of proceedings on constitutional grounds). See the case of *Thompson* discussed in chapter six at *supra* under 6.3.5, text at note 98. See however the arguments against this approach raised under 10.7.2 above.

²⁶¹See chapter three *supra* under 3.5.2.1.

handed down by a magistrate in a lower court.²⁶² This approach was disapproved of in two subsequent cases handed down by the Eastern Cape Provincial Division of the Supreme Court. It was indicated in chapter six that in *Makopu* the Eastern Cape Division of the Supreme Court argued that "even if the court had the inherent power to make this sort of order [the setting aside of an acquittal] it should not do so".²⁶³ The court based its conclusion on "policy considerations which require certainty and finality in criminal cases ...".²⁶⁴ In a subsequent case, *Ntswayi*, the court expressed the view that the interests of justice are not served if the state is given an opportunity (in a second trial) to correct mistakes which it had made at the first trial.²⁶⁵

This thesis agrees with the approach followed in the *Makopu* and *Ntswayi* cases. Review of an acquittal infringes the traditional policy of our law that the acquitted person ought not to pay the price for judicial incompetence by being subjected to a second trial. It must, however, also be considered whether there are circumstances in which review of an acquittal may nevertheless be viewed as reasonable and justifiable in terms of the provisions of the limitation clause. As indicated above,²⁶⁶ this thesis submits that an accused who has been "acquitted" by a tribunal which had no jurisdiction to try his case in the first place, cannot rely on the constitutional provision

²⁶²See chapter six above under 6.6.2.6, text at note 353 for a discussion of the *Lubisi* case.

²⁶³At 578b of the judgment discussed in chapter six *supra* under 6.6.2.6, text at note 358.

²⁶⁴At 578b-c.

²⁶⁵At 401g and 402b. See chapter six *supra* under 6.6.2.6, text at note 360 for a discussion of this case.

²⁶⁶See the discussion under 10.7.2.

against double jeopardy. However, it is submitted that no justification exists (in terms of the provisions of the limitation clause), to extend the ambit of the traditional concept of "jurisdiction" to situations where the presiding officer, in acquitting the accused, made a so-called jurisdictional error in his assessment of the evidence,²⁶⁷ or performed any other irregularity which can be construed as an action "without jurisdiction" in the expanded sense of the word (as suggested by Canadian courts).

As indicated above, this thesis argues that a second trial (including a review of an acquittal) may only be justified if the state was denied a fair and reasonable opportunity to present its case before the first trier of fact.²⁶⁸ Consistent with this approach, it is submitted that review of an acquittal will only be justified in terms of the provisions of the limitation clause in the following circumstances

- (a) where an acquittal was obtained as a result of corruption, bias or mala fides on the part of the judicial officer presiding at the first trial, irrespective of whether the mala fides was induced by the accused
- (b) where it was obtained as a result of mala fides by the accused or
- (c) where the court acted in breach of the rules of natural justice by, for example, unreasonably denying the state an opportunity to present its case.

²⁶⁷See the approach in Canadian law discussed in chapter six *supra* under 6.3.5.

²⁶⁸See the submissions under 10.7.2.

10.7.6 The constitutionality of a state appeal against sentence

The present Criminal Procedure Act makes provision that the state may appeal to a higher court against sentence imposed on the person convicted in a lower as well as a superior court.²⁶⁹ The constitutional guarantee against double jeopardy provides that everyone has a right to a fair trial which includes the right not to be tried for an offence "in respect of an act or omission for which he or she has previously been acquitted or convicted".²⁷⁰ At first glance, the words used in the constitutional provision does not seem to bar a reconsideration or re-adjudication of the appropriateness of a sentence imposed on the convicted person. In fact, even a broad interpretation of the words does not lead to the conclusion that a sentence imposed by a trial court may not be challenged by the prosecution; the words "acquitted or convicted" refer to an "act or omission" (conduct) and not to a sentence. Moreover, in all the legal systems under consideration in this comparative study a state appeal against sentence imposed on the convicted accused is allowed.²⁷¹

A purposive approach, on the other hand, may lead to a different conclusion. It is submitted that the accused's interest in finality, namely that his trial be completed by the first tribunal with jurisdiction he encounters, also encompasses the right *not* to be subjected to a reconsideration by a court of appeal of the appropriateness of a sentence imposed by the trial court. This thesis argues that a *state-*

²⁶⁹See sections 310A and 316B of Act 51 of 1977 discussed in chapter six *supra* under 6.6.2.5.

²⁷⁰Section 35(3)(m) of the 1996 Constitution.

²⁷¹See chapter six *supra* for the position in English, Canadian Indian and American law. See also chapter nine for the position in German law.

initiated review of a sentence by a higher court can be viewed as an infringement on the accused's right to be protected against double jeopardy for the following reasons. In considering an appropriate sentence, a judge performs an exercise which is similar to an adjudication of the guilt or innocence of an accused for certain unlawful conduct. In meting out a sentence, a judge makes a factual determination of the "guilt or innocence" of an accused *in respect of a particular sentence*. This means that failure to impose a more severe sentence, like failure to find guilty of a higher degree of liability, amounts to an "acquittal" of that more severe sentence. In other words, it is submitted that when a particular punishment is selected from a range of prescribed punishments (irrespective of the ambit of the range), the sentencing judge *impliedly "acquits"* the accused of any greater punishment that he could have imposed on the accused.²⁷² In terms of the constitutional provision, an "acquittal"

²⁷²See the decision of the American Supreme Court in *Bullington* discussed in chapter six *supra* under 6.5.6, text at note 218. As indicated in chapter six, the United States Supreme Court first held in *DiFrancesco* that a prosecution appeal against sentence does not amount to a violation of the constitutional provision against double jeopardy. However, it was pointed out that the court made an exception to this rule in *Bullington*. The court held that an appeal by the prosecution against sentence will in fact be prohibited (in terms of the constitutional guarantee against double jeopardy) if the sentencing proceeding followed by the trial court resembled a trial on the issue of guilt or innocence. The court argued *inter alia*, that because the trial court (in *Bullington*) did not have unbounded discretion to select a punishment from a variety of authorised sentences (as in *DiFrancesco*), but could only choose between two possible sentences (the death sentence or life imprisonment), it must of necessity have "acquitted" the accused of the sentence of death when imposing a sentence of life imprisonment. This thesis argues, on the contrary, that the question whether the state may appeal against sentence cannot be made dependent on the ambit of the discretion of the sentencing judge. Instead, it is suggested that even if the sentencing judge had a wide discretion (in the sense that he could choose between a variety of sentences), the double jeopardy provision in the Constitution should be interpreted in the sense that the state is prohibited from challenging

of criminal conduct ("an act or omission") offers the accused protection against double jeopardy. By analogy it may be argued that an "acquittal" (albeit an implied acquittal) of a more severe sentence also offers the accused protection against reconsideration of the appropriateness of that particular sentence.

It is submitted that, in order to give full effect to the values which underlie the constitutional guarantee against double jeopardy, the interpretation proposed above is preferred to a strictly literal interpretation. This may be achieved by invoking the more flexible criteria introduced in *Mhlungu* or by relying on the broader right of the accused to a fair trial. The prohibition of an appeal against sentence serves the important interests of the accused not to be subjected to embarrassment, anxiety, insecurity and expense. Moreover, it excludes the risk that a person, "innocent" of a particular sentence, may nevertheless be "found guilty" of that particular sentence.²⁷³ Finally, it also gives effect to the idea which underlies the guarantee that the accused ought not to pay the price for errors made by organs of the state.

The historical overview in chapter six has indicated that an appeal by the prosecution against sentence was a recognised practice at the

the appropriateness of the sentence. (*Cf* the arguments raised by American legal commentators in chapter six under 6.5.6, text at notes 230 - 233).

²⁷³Although, in theory, the powers of review of a court of appeal are narrowly defined (see chapter six *supra* under 6.6.2.6, text at note 342) the possibility exists that in practice, a reviewing court may impose a sentence which is perhaps too severe. This may occur because a court reviewing a sentence is usually limited to the record of proceedings and therefore in a much weaker position than the trial judge who sees and hears the witnesses and the accused.

beginning of the nineteenth century.²⁷⁴ However, it was not provided for in legislation (consolidating rules of criminal procedure) introduced in 1917.²⁷⁵ As indicated in chapter six, it was only re-introduced in South African law in 1990.²⁷⁶ As indicated above, this thesis argues that legislation which provides for state appeals against sentences amounts to a violation of the constitutional provision against double jeopardy.

However, it must also be determined in a second stage of analysis whether the relevant legislation may nevertheless be justifiable in terms of the provisions of the limitation clause. In defence of the current legislation, the state may raise the argument for instance, that imposition of a too lenient sentence for a crime may cause a public outcry and consequently bring the administration of justice into disrepute. Furthermore, it may be argued that an appeal by the state against sentence, as currently provided for in legislation, ensures that uniformity is accomplished in the meting out of sentences for the same or similar offences. In other words, the institution of a prosecution appeal against sentence enables superior courts to lay down guidelines which have to be followed by judges and magistrates in sentencing offenders.

It is submitted that the first argument raised above cannot on its own justify limitation of the accused's right to be protected against

²⁷⁴See chapter six *supra* under 6.6.1.

²⁷⁵Act 31 of 1917.

²⁷⁶Provision was made by means of Act 107 of 1990 for a state appeal against a sentence imposed by a lower as well as a superior court. As indicated in chapter six under 6.6.2.5, this step was taken probably as a result of strong reaction in the press (at the time) against lenient sentences imposed by white magistrates on white accused convicted of assault and culpable homicide in respect of black victims.

double jeopardy. The argument may likewise be raised in favour of state appeals against acquittals on the merits and new trials after acquittals on the merits; the public may also be outraged because, in their view, a "guilty" person is acquitted. However, the second argument, that the prosecution appeal against sentence performs the important function of rationalising sentencing decisions, presents a substantial and pressing interest of the state which ought to be balanced against the accused's interest in finality. Consideration of the relevant legislation also reveals that it is carefully designed to infringe as little as possible on the accused's right to be protected against double jeopardy. It is provided, for instance, that on application for leave to appeal or an appeal in terms of the Act (by the prosecution against sentence) the judge or the court may order the state to pay the accused concerned the whole or any part of the costs to which he might have been put in opposing the application or appeal.²⁷⁷ Moreover, as pointed out in chapter six, it has been emphasised in the case law that this right ought to be exercised sparingly and confined to instances where, in the opinion of the prosecution, it is so inappropriate that the trial court did not exercise its discretion reasonably or judicially.²⁷⁸ As indicated in chapter six, the court (in *Maraga*) warned that the prosecution appeal against sentence is a drastic measure and that the courts should prevent "as far as is absolutely possible, an accused person from going unnecessarily through the ordeal of an appeal against his sentence by the state".²⁷⁹

²⁷⁷Sections 310A(6) and 316B(3). See chapter six *supra* under 6.6.2.5.

²⁷⁸See chapter six *supra* under 6.6.2.5, text at note 342 for the principles laid down in the case of *Maraga*.

²⁷⁹At 609d of the judgment, discussed in chapter six *supra* under 6.6.2.5, text at note 343.

The crucial issue, however, is whether there is a less restrictive means available than the prosecution appeal against sentence which may be employed by the state in order to achieve the objective of uniformity in the imposition of sentences for the same or similar offences. This thesis argues that there is at least one less restrictive measure available to achieve this objective: the legislature may incorporate a body of sentencing guidelines in the Criminal Procedure Act. Suggestions to this effect has already been made by various legal commentators.²⁸⁰ The value of a body of sentencing guidelines lies in the fact that it lays down recommended sentences (within strict parameters) for particular crimes, which crimes are categorised in conjunction with other factors such as age, previous criminal history etcetera.

The decision of the Constitutional Court in *Williams* has taught that the fact that society has not yet established mechanisms to deal with certain problems does not justify infringement of fundamental rights of the individual.²⁸¹ Likewise it may be argued that the absence of other mechanisms in our system of criminal justice to rationalise sentencing decisions cannot justify the infringement of the double jeopardy provision. The new constitutional order requires of the state

²⁸⁰See in general Van Rooyen JH "The odd couple: more on *Holder* 1979 (2) SA 70 (A) *South African Journal for Criminal Law and Criminology* 1979 88; Van Rooyen JH "Thunder and lightning: has the *Scheepers* case on sentencing been struck down?" *South African Journal for Criminal Law and Criminology* 1979 48. Van Rooyen JH "The decision to imprison - the courts' need for guidance" *South African Journal for Criminal Law and Criminology* 1980 228; Van Rooyen JH "Doelgerigte straftoemeting: 'n regsvergelende ondersoek na wyses om straftoematingsdiskresie te reguleer" *Tydskrif vir Hedendaagse Romeins-hollandse reg* Vol III 1992 386 and Vol IV 575; Terblanche SS "Die boete as strafvorm *LLD dissertation* 1990 chapter three and further *passim* and Van der Merwe DP *Sentencing* 1996 Annexure A "Minnesota Sentencing guidelines".

²⁸¹See *supra* under 10.6, text at note 121.

to develop mechanisms which may improve the standard of administration of justice.²⁸² It is submitted that there is no reason why mechanisms such as sentencing guidelines cannot be as effective as a prosecution appeal against sentence in order to achieve the valid interest of the state in rationalising sentencing decisions.

10.7.7 The constitutionality of certain rules dealing with the powers of courts of appeal

In these paragraphs, the constitutionality of the following rules of criminal procedure are considered

- (a) the rule that a court of appeal may find an accused guilty of a more serious offence than the one against which he appealed and
- (b) the rule that a court of appeal may impose a more severe sentence in disposing of an appeal by the accused against his conviction and/or sentence.

As indicated in chapter eight²⁸³ the Criminal Procedure Act provides that a court of appeal may, in setting aside a conviction, "... give such judgment as ought to have been given at the trial or impose such sentence as ought to have been imposed at the trial".²⁸⁴ The Appellate Division held that this provision empowers a court of appeal to set aside a conviction and substitute it for a conviction for a more

²⁸²*Cf Williams* discussed *supra* under 10.6, text at note 109.

²⁸³See *supra* under 8.6.2.2, text at note 327.

²⁸⁴Section 322(1)(b) of the Criminal Procedure Act 51 of 1977, which sets out the powers of a court of appeal in disposing of an appeal against a conviction handed down in a superior court. A similar provision exists in respect of appeals against convictions handed down in lower courts (section 304(2)(c)(iv)).

serious offence, provided that the accused was originally charged with the more serious offence.²⁸⁵ However, as indicated in chapter eight, the Appellate Division recently criticised this rule (in *Morgan*) on the ground that it amounts to an encroachment by the legislature on the fundamental common law principle that an acquittal is sacrosanct and may therefore not be challenged by the prosecution or altered by a court of appeal to a conviction.²⁸⁶ Moreover, the court (per Corbett CJ) expressed itself in favour of what is referred to in American double jeopardy jurisprudence as an "implied acquittal" doctrine:²⁸⁷ a conviction of a lesser offence should be regarded as an implied acquittal of the greater offence.

The comparative study has demonstrated that in the majority of legal systems considered on a comparative basis in this thesis, substitution of a conviction for a conviction of a more serious offence is not allowed. It is not allowed in English, Canadian, Indian and American federal law. Moreover, it has even been prohibited in Indian law, where a "continuing jeopardy" theory is approved of in the context of appeals. The basic premise in all these systems is that a conviction of a lesser offence should be regarded as an acquittal of a greater offence.

It is submitted that the "implied acquittal" argument may also be raised to challenge the constitutionality of the practice that a court of appeal may impose a more severe sentence on the accused who

²⁸⁵See the decisions of *Makwanazi* and *E* discussed in chapter eight *supra* under 8.6.2.2, text at notes 335 and 336.

²⁸⁶At 161b. See chapter eight *supra* under 8.6.2.2, text at note 339 for a discussion of the court's decision in *Morgan*.

²⁸⁷See chapter eight *supra* under 8.5.4, text at note 250 for a discussion of the doctrine as introduced in *Green*.

appeals against his conviction and/or sentence. As indicated above, the Constitutional Court has given a broad interpretation (which focuses on the values which underlie the relevant guarantee) to other fundamental rights entrenched in the Bill of Rights.²⁸⁸ This thesis has argued that a state appeal against an acquittal infringes upon the fundamental right of the accused against double jeopardy because it amounts to a redetermination of the "guilt or innocence" of the accused of a particular sentence.²⁸⁹ The same argument may be raised in the context discussed in these paragraphs: imposition of a more severe sentence on appeal initiated by the accused infringes upon his right in finality because it amounts to a redetermination of his "guilt or innocence" for a sentence of which he has previously been acquitted. As indicated above, this interpretation (which serves the values which underlie the constitutional guarantee against double jeopardy), can be reconciled with a literal interpretation in terms of the criteria laid down in *Mhlungu*, or may be accommodated under the general right of the accused to a fair trial.²⁹⁰ This interpretation is also in line with the approach adopted in a number of the legal systems under consideration in this comparative study: imposition of a more severe sentence on appeal instituted by the accused is prohibited in the German, Indian and English systems of criminal procedure.²⁹¹

In South Africa, a division of the Supreme Court recently held (in the case of *Sunday*) that a statutory provision (section 309(3) of the

²⁸⁸See *supra* under 10.6.

²⁸⁹See *supra* under 10.7.6, text at note 272.

²⁹⁰See under 10.7.6, text at note 273.

²⁹¹See chapter eight *supra* under 8.2.2, 8.4.2 and chapter nine under 9.5.

Criminal Procedure Act) which empowers the court of appeal to increase a sentence at its own initiative cannot be challenged on constitutional grounds.²⁹² The court argued *inter alia* that by appealing, the applicants had re-opened the *lis* between themselves and the state and could therefore not "be heard to complain".²⁹³ In other words, the court advanced a "waiver" theory to support its argument that the rule did not violate the accused's fundamental right to a fair trial.²⁹⁴ This thesis argues that the court in *Sunday* failed to appreciate that exercise of a fundamental right, for instance, the right of appeal to a higher court, cannot be construed as a "waiver" of another fundamental right, for instance, the right to be protected against double jeopardy. Moreover, it is an open question whether the right to appeal or to review to a higher court can be exercised by an accused to its full measure if it can only be exercised under the danger that by appealing he may receive an even more severe sentence than was originally imposed.²⁹⁵

In final analysis it is submitted that these practices can also not be viewed as "reasonable and justifiable" in terms of the provisions of the

²⁹²See chapter eight *supra* under 8.6.2.3, text at note 423 for a discussion of the decision in *Sunday*. As indicated in that discussion, the constitutionality of the provision was challenged not in terms of the double jeopardy guarantee but on the basis that it violates the accused's right to a fair trial in general, and, more particularly, the rights to have recourse by way of appeal to a higher court and to adduce and challenge evidence.

²⁹³At 821f-g. See chapter eight *supra* under 8.6.2.3, text at note 429.

²⁹⁴See chapter eight *supra* under 8.5.2, text at note 176 for a discussion of the fallacies of a "waiver theory" as an argument to justify infringement of the rule against double jeopardy.

²⁹⁵This is the main reason why the practice is prohibited in Germany. See chapter nine *supra* under 9.5.

limitation clause.²⁹⁶ This thesis argues that the rules which allow that an accused who appeals against his conviction and/or sentence may be convicted of a more serious offence and receive a more severe sentence, fails to meet the requirements or reasonableness and justifiability set out in the limitation clause. It is submitted that the state's interest in bringing offenders to justice cannot outweigh the accused's interest in finality in circumstances where the state has already had a *complete opportunity* to state its case before a trier of fact which concluded the trial by making a finding on the factual merits of the case, namely by convicting the accused of a particular crime or crimes, and imposing a particular sentence. Moreover, it is submitted that rules which have the effect of inhibiting the accused in the exercise of his fundamental rights (entrenched in the Constitution) can hardly be viewed as being reasonable and justifiable in terms of the limitation provision in the Constitution.

10.7.8 The constitutionality of new trials on appellate reversal of convictions

This thesis has argued consistently that a literal as well as a purposive interpretation of the constitutional provision against double jeopardy means that the state is prohibited from instituting criminal proceedings against a person who has previously been discharged by a tribunal vested with jurisdiction to try him or her on the issue of guilt or innocence for the crimes charged. It was emphasised that this interpretation serves the values which underlie the constitutional provision. These values (which need not be repeated here) require that the accused ought not to pay the price if an organ of state made an error which precluded an adjudication on the merits of the case. Consistent with this approach, it is argued here that a retrial on

²⁹⁶Section 36 of the 1996 Constitution.

appellate reversal of a conviction can also be viewed as an infringement of the fundamental right of the accused to be protected against double jeopardy. However, the difficult issue that presents itself in this context is whether a new trial on appellate reversal of a conviction may nevertheless be justified in terms of the provisions of the limitation clause.

As pointed out in chapter eight, current legislation provides that a court of appeal may if it confirms the appeal order a new trial in the following circumstances

- (a) where the court which convicted the accused was not competent to do so or
- (b) where the indictment on which the accused was convicted was invalid or defective in any respect or
- (c) where there has been any other technical irregularity or defect in the procedure.

It must accordingly be considered whether these provisions can be regarded as reasonable and justifiable limitations of the accused's fundamental right against double jeopardy. It has already been argued that a legal system operating in a constitutional state cannot give effect to a finding by a tribunal not vested by law to make a determination of the guilt or innocence of a person for criminal conduct. In the context discussed here, it means that a person may be tried again if his conviction was set aside on the basis that the court lacked the necessary jurisdiction to try him or her in the first place. Therefore, it only remains to consider the reasonableness and justifiability of the provisions set out in (b) and (c) above. The basic idea that underlies both the exceptions set out in (b) and (c) is that the state may institute new proceedings against the accused if his conviction was set aside by a court of appeal on a basis other than the

factual merits of the case.

This thesis has argued consistently that the values which underlie the constitutional provision against double jeopardy require that, as a rule, the accused should be subjected only to one trial before a finder of fact vested with the power to make an adjudication of his guilt or innocence for the crime(s) charged. In other words, it has been argued that a "trial on the merits" is not necessarily a prerequisite for protection against a second prosecution for the same criminal conduct. This thesis argued that if the state had a reasonable opportunity to present its case and there was no mala fides on the part of the accused or the court, a second trial would not be justified merely because the trial was not concluded on the factual merits of the case.

The question that presents itself in this discussion is whether the traditional rule, namely that a second trial will only be barred if the accused was acquitted on the factual merits of the case, can survive constitutional scrutiny *if the acquittal (or discharge) was obtained as a result of an appeal by the accused against his conviction*. In other words, is it reasonable and justifiable that where the accused appeals against his conviction and the conviction is set aside on a basis other than the factual merits of the case, the state may get another opportunity to convict by instituting new proceedings against him?

The comparative study has demonstrated that the modern trend in Anglo-American systems of criminal justice is to allow more readily new trials on appellate reversal of convictions. This is the position in English, Canadian and American law. A comparison of Indian and German law, however, is not apposite in this context because both these systems follow a "continuous jeopardy" approach. In other words, these systems do not regard appeals and new trials as a violation of the rule against double jeopardy. In the English, Canadian

and the American systems the basic approach is that new trials are allowed if a conviction is reversed by a court of appeal on the basis of trial error (a technical irregularity) as opposed to insufficiency of evidence. In other words, a new trial is allowed if the error or irregularity was of such a nature that it precluded the court of appeal from making a finding on the factual merits of the case (a finding that there was insufficient evidence to convict the accused). As indicated in chapter eight, this is also the approach followed in South African law.

As is clear from the comparative study undertaken in this thesis, justification for new trials on appellate reversal of convictions cannot be found in abstract theories of double jeopardy. The advancement of theories such as a "waiver" theory or a "continuous jeopardy" theory has been answered by valid counter-arguments.²⁹⁷ However, valuable contributions have been made by the Supreme Court of the United States in an attempt to identify the rationale which underlies the exception that a new trial may be allowed if the court of appeal discharged the accused on a basis other than the factual merits of the case. The court explained in *Tateo* that justification for new trials on appellate reversal of convictions can be explained as follows²⁹⁸

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would

²⁹⁷See chapter eight *supra* under 8.5.2, text at note 176 for the criticism of Mr Justice Holmes of the "waiver" theory in *Kepner*. The "continuous jeopardy" theory, on the other hand, inevitably leads to the conclusion that the state may also appeal against an acquittal. It would therefore be hypocritical to apply the "continuous jeopardy" theory only in cases where the accused appealed against his conviction.

²⁹⁸At 466. (My emphasis). See the discussion of *Tateo* in chapter eight under 8.5.2, text at note 180.

be a high price indeed for society to pay were every accused granted immunity from punishment because of a defect sufficient to constitute reversible error in the proceedings leading to the conviction. *From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrials serves defendants' rights as well as society's interests.*

This writer fully agrees with the above argument. It is submitted that, in terms of the provisions of the limitation clause of the South African Constitution, it is reasonable and justifiable to allow new trials in circumstances where the court of appeal was prevented from considering the merits of a case as a result of an irregularity or defect in the proceedings. It is reasonable and justifiable because the purpose of the limitation is not only to protect the state's interest in bringing offenders to justice, but also to protect the *accused's interests* as identified by the United States Supreme Court in *Tateo*. Moreover, there is a rational connection between the limitation and its purpose, and there is not a less restrictive means to achieve the purpose.

However, it is submitted that in order to limit as little as possible the accused's right to be protected against double jeopardy, the state should be prohibited from bringing additional evidence at the second trial. As indicated in chapter eight, our courts have been reluctant to remit cases for further evidence.²⁹⁹ This thesis argues that the bringing of additional evidence at a second trial is unconstitutional and cannot be justified in terms of the provisions of the limitation clause.

²⁹⁹See chapter eight *supra* under 8.6.2.3, text at note 446.

It is submitted that the prohibition on additional evidence will serve to prevent that the state gets an unfair advantage over the accused at the second trial and will minimise the possibility that an innocent person may be convicted.

Consistent with the approach adopted above, it is furthermore submitted that the accused may not be convicted (on retrial) of a more serious offence than that of which he was previously convicted, and that a more severe punishment may not be imposed on him than originally imposed (at the first trial).³⁰⁰

However, this thesis argues that there is one instance where a new trial on appellate reversal of a conviction (on the basis of trial error) would *not* be reasonable and justifiable in terms of the limitation clause. This instance is where the irregularity that occurred at the trial can be viewed as a serious violation of a fundamental human right entrenched in the Constitution. It is submitted that retrial in such cases can never be regarded as justifiable or reasonable because it would undermine compliance by organs of state with the values on which the state is based.

An English legal commentator recently criticised the reluctance of the English Court of Appeal to use its newly acquired powers, (namely to order retrials "if the interests of justice so requires")³⁰¹ to allow more appeals and prohibit retrials in cases of serious violations of due process values.³⁰² The commentator observed that allowing a retrial in such instances would mean that "an important opportunity for

³⁰⁰See the submissions under 10.7.5 above.

³⁰¹See chapter 8 *supra* under 8.2.2, text at note 11 for the relevant provision.

³⁰²See Sanders *A Criminal Justice* 1994 444.

affirming fundamental due process values would be lost".³⁰³ He also questioned³⁰⁴

[whether] ... the police, the prosecution or the trial judge [would] remain faithful to the dictates of due process if the worse that can happen in the event of infidelity is that the initial adversarial fight is declared void and a rematch ordered ...

The Supreme Court of Canada has recognised in *Conway* that a court may exercise its discretion to stay proceedings on the ground that unfair or oppressive treatment of an accused disentitles the crown to carry on with the prosecution.³⁰⁵ The court explained that³⁰⁶

[t]he prosecution is set aside, not on the merits, ... but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine [of abuse of process] is one of the safeguards to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society". It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. *Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.*³⁰⁷

³⁰³*Id.*

³⁰⁴At 445.

³⁰⁵See the discussion of the decision in *Conway* in chapter three *supra* under 3.3.2, text at note 115.

³⁰⁶At 301-302, citing Lamer J in *Rothman v The Queen* (1981) 59 CCC (2d) 30, 69 (SCC).

³⁰⁷My emphasis.

South Africa has an unfortunate history of violation of fundamental human rights. The Constitution was adopted to create a *Rechtsstaat*, a state under the rule of law, a state in which legality is respected. By recognising that new trials may be barred if a conviction is set aside on appeal as a result of an irregularity which amounts to a serious violation of human rights, the double jeopardy provision may serve the important purpose of compelling respect for the values on which our new order is based.

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