Jewell, Renae

Submission 3

PUBLIC
upon tabling of Committee's Report

From: Mark Trowell [trowellqc@wolffchambers.com.au]
Sent: Friday, 30 September 2011 4:55 PM
To: Jewell, Renae
Subject: Criminal Appeals Amendment (Double Jeopardy) Bill 2011

Dear Ms. Jewell

I refer to a recent invitation extended to me by the Standing Committee on Uniform Legislation and Statutes Review to provide to it a written submission on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011.

Unfortunately, I must travel overseas tomorrow and will be away for about two weeks. As such, I regret that I shall not be able to provide a comprehensive submission by the 7 October 2011.

May I at least make some brief observations about the legislation, which hopefully may assist the Committee.

Double jeopardy, or more accurately autrefois acquit or autrefois convict, is the ancient legal principle that a person cannot be tried twice for the same alleged crime. There was a sound basis for that principle because it meant that there was some finality in the legal process and it also prevented the the state from arbitrarily and repeatedly prosecuting a citizen despite that person having been previously acquitted or convicted of the same offence.

These were things obviously in the public interest

However, in modern times the ability to solve crimes by using modern forensic science has meant that there are occasions when evidence, that could not have been known about at the time of an accused's trial, is found and calls into question the jury's verdict of acquittal. It may be compelling fresh evidence of a technical nature, such as DNA. The accused may have made a subsequent admission of guilt or a witness who was previously unknown comes forward with damning evidence against the accused. The trial might have been tainted by jury tampering or by the interference with witnesses.

It could hardly be said that any of these situations offer finality or that it is in the public interest to respond merely by saying that it is just "too bad" because the law is absolute and that none of these things should have an effect on the legitimacy of an accused's acquittal. The community has every right to expect that justice is done. The fact that nothing can be done to correct an obvious wrong, simply holds the justice system up for ridicule. It weakens the community's confidence in the law.

Finality in the law is desirable, but accused persons have the right to appeal both their conviction and sentence. Does that create uncertainty? Not really. There is finality, but only after an accused has exhausted his or her legal rights. That is as it should be.

Lawyers traditionally resist change often arguing that to interfere with established legal principles effectively erodes the rights of citizens. There may be occasions when that is so, but the mere fact that something has been around for a long time doesn't mean that where appropriate it cannot be reformed.

The law often reflects community expectations or at least what politicians believe the community wants. Lawyers tend to focus on the rights of an accused person, but the parliament must consider the rights of all members of the community. That's the way a democratic system should work. Politicians, elected by the community, make the laws and lawyers are charged with interpreting the legislature's intention and giving effect to those laws. The system doesn't intend that unelected lawyers impose their own views about what the laws should be. Of course, what lawyers think about reforms to the law should be respected and taken into account by the legislature, but ultimately these are decisions that only it can make.

The proposed legislation sensibly does not abolish the rule, but provides only that there be exceptions to it. For example, where there is "fresh and compelling" evidence or in the case of tainted acquittals or where there is evidence of the commission of offences against the administration of justice during the course of the trial. At the same time, there are sufficient safeguards in the proposed legislation to ensure that there is no arbitrary exercise of the power to prosecute, including that a court must first determine whether it is in the interests of justice to prosecute.

In my view, the proposed legislation is a sensible and timely reform of the law.

Yours faithfully,

MARK TROWELL QC

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