CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Second Reading

Resumed from an earlier stage of the sitting.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [5.07 pm] — in reply: I was dealing with recommendation 4 of the report of the Standing Committee on Uniform Legislation and Statutes Review, in summary, regarding when leave is given to retry a person on the basis of a tainted acquittal. The legislation does not prevent an application for leave to retry a third time. However, in practical terms, the Court of Appeal would be unlikely to grant leave to retry a person more than once. If it did so, it would, in the government's view, be done in very extreme circumstances. Additionally, as one of the checks in the system, an authorised officer would be very unlikely to apply for the third trial except in very extreme circumstances. The most obvious argument that an accused who has been acquitted would use would be that a third or subsequent trial would be an abuse of the process of the court and be oppressive in all the circumstances.

Recommendation 5 reads —

> The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

As I indicated, the effect of proposed section 46E(2) is that, when leave is given to retry a person on the basis of fresh and compelling evidence, an application cannot be made for leave to retry the charge a third time. That is sufficiently clear from the terms of the section. However, this provision does not prevent an application for leave being made to retry, for a third time, a person who has been retried on the basis of a tainted acquittal. I suppose, strictly, that would be a second trial on the basis of the charge of an administration of justice offence, and it does not prevent the retrial of one of those offences. In practical terms, however, the Court of Appeal would be unlikely to grant leave to retry a person more than once. That would be, very arguably, an abuse of process.

Recommendation 6 relates to finding 2, and states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney-General provide justification for why an acquitted accused is denied the opportunity to attend the leave application in proposed subsection 46E(5).**

I think I have already covered the principles involved in that. The application for leave is simply to initiate the process, and it will be noted from proposed section 46F that as soon as practicable after a leave application is made, the Court of Appeal—without dealing with the merits of the application, and unless it is satisfied that the application is an abuse of process—must either issue a summons requiring the acquitted accused to attend court, or issue an arrest warrant to ensure that the acquitted accused is given notice of the leave application and is brought before the court. To the best of my recollection, that reflects the current practice in the case of an acquitted accused who is the subject of an appeal by the prosecution against a directed acquittal. There has to be some mechanism by which an accused is brought to the court and the process commenced. I may be wrong about that, but it is not dissimilar to the need to initiate something and get an accused to be brought along, so that he or she is aware of the proceedings. It is at that stage, after they are either arrested or summonsed, that they then have knowledge of the proceedings and are able to argue their case.

The first step in the process is for the authorised officer to make the application for leave, which may be done without giving notice to the accused. The merits of the application cannot be determined at that point; it is after the application is made that the Court of Appeal issues either the summons or the arrest warrant to have the acquitted accused brought before it under proposed section 46F. The court at no time deals with the merits of the matter without the accused being aware and having been given notice of it. When the acquitted accused is brought before a court following the issue of a summons or warrant, the court will consider whether the acquitted accused should be released unconditionally, granted bail, or kept in custody pursuant to proposed section 46F(4). The procedure is used in response to a concern expressed by the Director of Public Prosecutions, quite legitimately, that an acquitted accused might very well flee the jurisdiction on getting notice that an application has been made to issue a new charge. This is to ensure that he or she is brought within the control of the court.

Recommendation 7 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General:**
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> **(1) confirm the persons that are intended to fall within the term "*authorised person*" in proposed subsection 46M(1); and**

> **(2) amend the Bill so as to make clear and put beyond doubt, the Executive's intent with respect to those persons.**

In this respect, the committee has identified an error which was meant to be addressed by parliamentary counsel but which slipped through the net. There is before the house a supplementary notice paper, issue 2, and in that supplementary notice paper is an amendment that proposes to amend proposed section 46M(1) by changing the reference from "authorised person" to "authorised officer" to then pick up the definition of "authorised officer" in proposed section 46A.

Recommendation 8 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General advise the Legislative Council whether it is the intent of the Executive to remove the double jeopardy defence for an acquitted accused under the age of 18. If so, explain the rationale and amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**
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> **Furthermore that the Bill be amended to make clear and put beyond doubt, the Executive's intention with regard to how this law will be applied against an acquitted accused under the age of 18 at the time of the original offence who is later, as an adult, charged with a "*serious*" or "*administration of justice*" offence.**

The exclusive criminal jurisdiction of the Children's Court of Western Australia extends to the trial of a person who has attained the age of 18 years in respect of an offence allegedly committed by the person before the age of 18. That is apparent from section 19(1) of the Children's Court of Western Australia Act. Section 19(2) of the Children's Court of Western Australia Act gives the various options available and will apply to a serious charge for which leave is given under the proposed act. As I have mentioned, once leave is given, the Court of Appeal remands the accused to a court of competent jurisdiction, and, as a matter of law, a charge against a person for an offence allegedly committed by that person when under the age of 18 is triable by the Children's Court of Western Australia unless certain exceptions apply. One such exception is that the child, or adult who was at the relevant time a child, charged with an indictable offence may elect to be tried on indictment by the Supreme Court or the District Court under section 19B of the Children's Court of Western Australia Act. I should add that that does happen from time to time. I recall having tried a case some years ago in Fremantle that involved a boy who stabbed to death his mother's partner after extreme provocation and elected a trial by jury in the Supreme Court. It does happen from time to time. Another circumstance in which the trial of a child on indictment in a superior court is appropriate is when a child and an adult are charged with the same offence, and the adult is indicted in the matter. Again, the child may be charged along with the adult in the superior court; otherwise two trials are going on in separate jurisdictions. Plainly, the adult, who has always been an adult, cannot and should not be tried in the Children's Court. It is appropriate in those circumstances that the proceedings be kept together, and it may occur in that case. Another possibility is when the person is over 18 years of age at the time of the charge, the court may order the transfer of the matter to the Magistrates Court having regard to the seriousness of the offence, the existence of an adult co-offender, the time since the offence occurred, or any other good cause. That possibility would be available under the act as well.

Debate adjourned, pursuant to temporary orders.