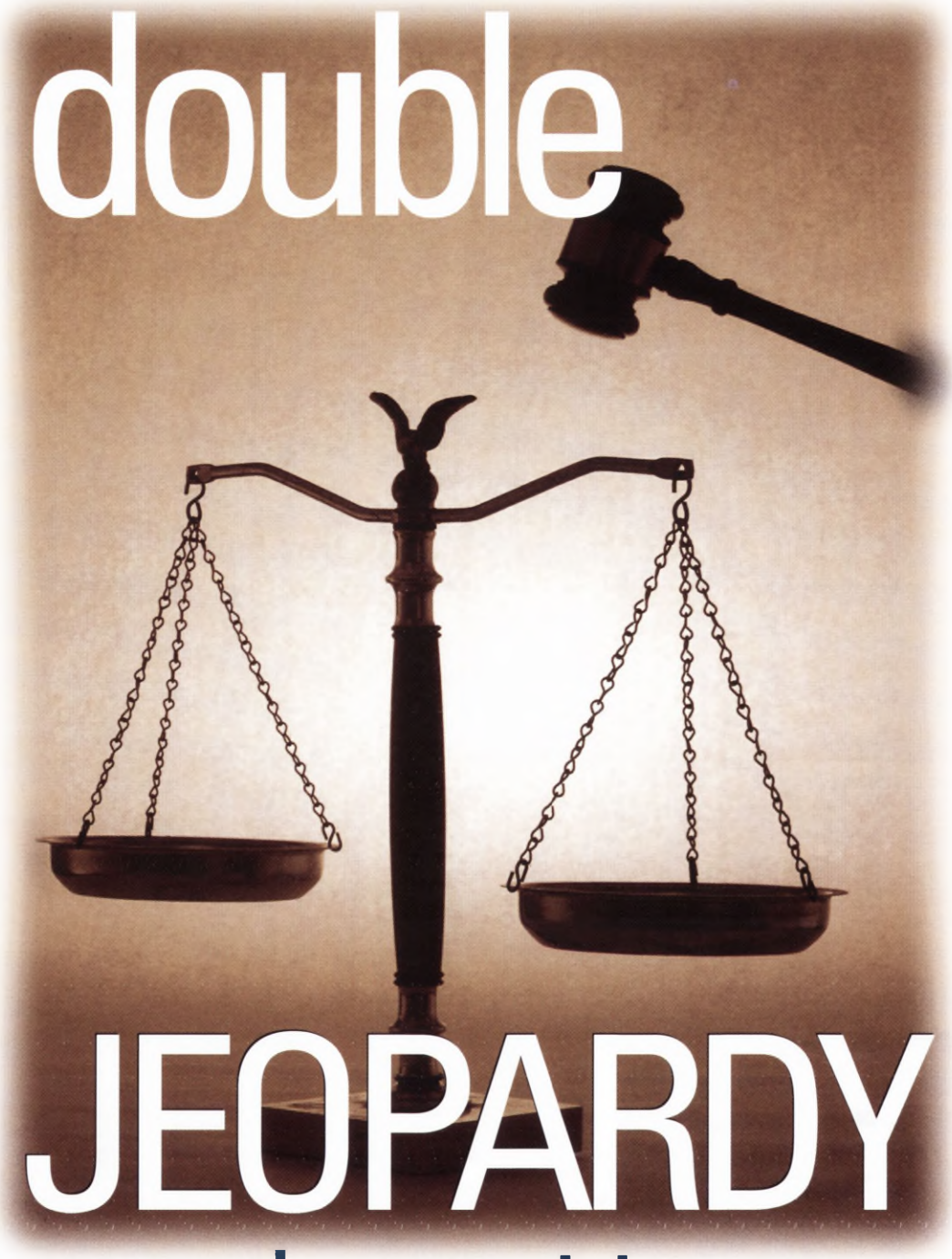

to amend or not to amend?

By Angelo Vasta QC

State attorneys-general have recently contemplated changes to the rule of double jeopardy. In some states, those changes have already been passed. The controversial High Court decision in *R v Carroll*[1] played a large part in triggering the current debate. Angelo Vasta QC, the Supreme Court judge who presided over Mr Carroll's trial at first instance, challenges the ultimate decision of the High Court and, while supporting double jeopardy, suggests a limited way of abrogating the principle in the case of serious offences.

The recent publication of Debi Marshall's book, *Justice in Jeopardy,* has stimulated further discussion on the topic. This carefully researched work, written in a most splendid literary style, does much to convince the great majority of readers that the principle embodied in the rule of 'double jeopardy' should be set aside. Were it not for such a rule, the argument goes, a person, said by 24 independent jurors to be a brutal killer of a baby girl, would not be walking free today. But does Carroll really owe his freedom to the application of this rule?

In my view, there is nothing amiss with the double jeopardy rule. Rather, Carroll enjoys his freedom because the High Court of Australia has unnecessarily widened the rule beyond that intended by Sir Samuel Griffith, the author of Queensland's Criminal Code and by the Queensland legislature.

In *Connolly v Meagher*,[2] Griffiths CJ observed:

> 'The point sought to be raised is, no doubt, in one sense an important one. It is provided by s16 of the Criminal Code that no person shall be twice punished for the same act or omission. That is not quite the same as the law, which allows the defence of 'autrefois convict', which is dealt with in ss17 and 598 of the Code [WA, ss17 and 616]. The rule in s16 may or may not be identical with the common law, but it is the law of Queensland.'

What Sir Samuel Griffith was referring to in that case as 'autrefois convict' is the rule that a person cannot twice be convicted for the same offence. This is a common law concept. It has been refined over the years by judges in the same way as are other common law principles. This principle is referred to in the US as 'double jeopardy'. The courts in America have no doubt considered the cases in England dealing with the pleas of 'autrefois convict' or 'autrefois acquit' in the case law relating to double jeopardy. All of this is very interesting, but it should have precious little to do with the criminal law of Queensland because all of the principles embodied in notions of 'autrefois convict', 'autrefois acquit' and 'double jeopardy' were intended to be contained in two sections of the Criminal Code of Queensland. Whether or not ss17 and 598 incorporated all of the common law principles contained in these notions is irrelevant. There is no doubt at all that what was intended by enacting these two sections (and indeed all of the Criminal Code) was that they be interpreted in the same manner as one interprets any other statute.

At paragraphs 12 to 14 of the joint judgments of the Chief Justice and Hayne J in *Carroll's case* (supra) there is a discussion about the pleas that were available to Carroll upon his trial for perjury. It was observed that neither s17 nor s598 (2)(d) had any application to the matter.

Section 17 of the Code provides:

'It is a defence to a charge of any >>

offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.

Section 598 (2)(d) provides:

Pleas

(1) ...

(2) If the accused pleads the person may plead either –

(a) ...

(b) ...

(c) ...

(d) That the person has already been acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment of an offence of which the person might be convicted upon the indictment;

(e) ...

(f) ...

(g) ...'

The High Court then observes that the defence, not having these provisions available as pleas, were in effect arguing that to proceed against Carroll for perjury would amount to an abuse of the processes of the court.

There is ample authority for the proposition that a superior court has inherent jurisdiction to prevent its processes from being abused. My point, however, is that when the specific grounds upon which the claim of abuse of process is based concern matters that relate to double jeopardy, the provisions that have codified those principles in Queensland are the last word on that subject. Therefore, if such a person does not come squarely within those provisions, he or she should not be given the benefit of other common law principles. One either codifies the criminal law or one does not. The fact that you do not come within the provisions of ss17 and 598 (2)(d) may be good reason as to why the prosecution is not abusing court processes.

In my view, a verdict of 'not guilty' delivered by an accused's peers is sacrosanct.

Since the High Court has spoken, one must conclude that the common law principles of double jeopardy have survived the enactment of the Queensland Criminal Code. There is, however, a further observation concerning the High Court's application of this principle.

In my respectful opinion, the High Court made a fundamental error in ruling that Carroll's second trial of perjury offended the double jeopardy rule. That error stems from the fact that the Court identified the verdict of 'not guilty', entered by the Court of Criminal Appeal in the original murder appeal, with a verdict of 'not guilty', which is entered by a jury after a trial. In my view, a verdict of 'not guilty' delivered by an accused's peers is sacrosanct. It ought not to be revisited under any circumstances. I therefore violently disagree with those who advocate re-charging a person with any charge (including the crime of murder) after that person has been acquitted of that charge by a jury.

The main reason for my objection is that there is no statute of limitations against the Crown. The Crown chooses to launch prosecution proceedings at a time when it considers the evidence against an accused to be sufficient to prove, beyond reasonable doubt, the charge on the indictment or presentment. Once a jury acquits, that should be the end of the matter.

However, if in the course of the jury reaching its verdict, it took into account the sworn evidence of the accused that he did not commit the offence, then the Crown should be allowed to bring a prosecution for perjury if there is sufficient evidence to prove that charge. Such occasions will be rare indeed, but why should an accused person be given immunity from prosecution and possible punishment for the crime of perjury? After all, the reason for the existence of such a charge is to maintain the integrity of our trial system of justice. The rule that witnesses should give truthful evidence should be applied equally, whether they are the accused, an accuser or any other witness. Moreover, it should make no difference whether the particulars of the perjured evidence were a statement that denied culpability for the offence or some other material evidence. In view of the High Court ruling, the retention of this right by the Crown will require legislative intervention. In this regard, I would favour such an amendment to the law.

However, in cases where the acquittal has not been entered by a jury, the double jeopardy rule should not apply to any retrial on the very charge upon which the accused person was originally charged, provided the charge is a serious one – in Queensland, one that carries a maximum sentence of imprisonment for life.

In *The Queen v Glennon*[3] the following observations were made in the joint judgment of Mason CJ and Toohey J:

'Although, at common law, an appeal did not lie at the suit of the Crown from a verdict of acquittal by a jury because the verdict of the jury was sacrosanct, a Crown appeal from a judgment of acquittal given by a court of criminal appeal stands in a different position, as Mason CJ explained in Benz (1989) 168 CLR 110, at pp111-113. To quote the words of Evatt J in R v Weaver (1931) 45 CLR 321, p356:

"The verdict of acquittal entered by the Supreme Court as a Court of Criminal Appeal, whatever it may be in point of form, differs greatly in substance from an original verdict of a jury to whom an accused person has been given in charge upon an indictment and who have acquitted. The jury's verdict of not guilty has a special constitutional finality and

> sanctity which are always regarded as an essential feature of British criminal jurisprudence."

We do not propose to repeat the views expressed by Mason CJ in Benz. After examining them in the light of argument in this case, we are convinced of their correctness.'

In *Glennon's* case, the Court of Criminal Appeal in Victoria entered verdicts of acquittal. Because those verdicts were entered by a court and not by a jury, the Crown was able to appeal, and effectively re-try the accused on the charges upon which he was originally tried. The situation should be no different when the principles relating to double jeopardy are being considered.

Generally, when a court of appeal enters a verdict of 'not guilty', it does so after ruling as inadmissible certain portions of crucial evidence led by the prosecution. It then concludes that, on the remainder of the evidence, a verdict of 'guilty' would be 'unsafe and unsatisfactory'. Such a decision by an appellate court should not later give rise to a plea of double jeopardy should there emerge some compelling and admissible evidence concerning the appellant's guilt on the charge upon which the appeal court entered an acquittal.

In Queensland, in order to address the problem now created by the High Court, I would advocate an amendment that makes a distinction between very serious offences and all other offences. This could be achieved by an amendment to s668 E(2), which provides:

> 'Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgement and verdict of acquittal to be entered.'

This provision would be renumbered (2A) and I would suggest the addition of two new sections, which would read:

> '(2B) In cases where the conviction for the offence charged would have made the appellant liable to imprisonment for life, notwithstanding the provisions of ss16, 17 and 598 of the Criminal Code and the power in a court to stay an indictment, the entry of a judgment and verdict of acquittal under s668 E (2A), shall not be a bar to any proceedings against the appellant for the original charge. (2C) In all cases, the entry of a judgment and verdict of acquittal under s668 E (2A), shall not be a bar to any proceedings against the appellant for any offence arising out of the appellant's giving evidence at the trial in respect of which the conviction was entered.'

The addition of this provision would overcome the problem associated with bringing a charge for 'perjury' (s123 Criminal Code Qld) and 'fabricating evidence' (s126 Criminal Code Qld).

My proposed amendment would be a conservative one, since it would go only part of the way to abolishing the plea of double jeopardy. Under my proposed amendment, a person who was acquitted by a court of appeal may continue to raise the plea of double jeopardy if he or she were re-indicted upon the same offence, where that offence was one that did not provide for a maximum punishment, imprisonment for life. However, the door that Carroll's case has opened – namely, the proposition that a person acquitted of an offence could not be prosecuted for any related offences concerning the administration of justice – would be firmly closed. Under my proposed amendments, irrespective of what charge the Court of Appeal entered the verdict of acquittal, a prosecution could be brought for perjury and for other related offences contained in the chapter concerning the administration of justice. ■

Notes: **1** *R v Carroll* [2002] HCA 55. **2** *Connolly v Meagher* (1906) 3 CLR 682. **3** (1992) 173 CLR 592, para 2.

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