Double Jeopardy, Law Reform and the Bowraville Murders

This resource examines the case law and legislation about the legal debate on double jeopardy as it relates to the Bowraville Murders. Tragically, the source of this legal debate arises from the unsolved murders of three Indigenous children in Bowraville, New South Wales in the early 1990s. Protests against double jeopardy are important to the rule of law as they preserve the right to a fair trial and more broadly equality before the law. Sometimes the community/prosecuting bodies or law enforcement form the view that a person who has been acquitted should be tried again. This usually occurs, because of new factual information, suggesting that person's involvement in the crime. But due to the double jeopardy rule they cannot be tried again.

In 2001 Lord Justice Robin Auld, summed up concerns about the double jeopardy rule in a right to a fair trial and more broadly equality before the law. Indigenous children in Bowraville, New South Wales in the early 1990s.

Double Jeopardy and Law Reform in NSW

In 2003, the NSW Government released the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW) which sought to change the rule on double jeopardy. This Bill was intended to amend the Criminal Appeal Act 1912 (NSW) to allow a person to be retried for an offence, if there was ‘fresh and compelling evidence of guilt.’ The government's Bill was debated in NSW Parliament committees, and discussed at federal level, but was ultimately not passed.

In 2006, the government tried again, by introducing the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006, which was an attempt to amend the Crimes (Appeal and Review) Act 2007 (NSW). These amendments were substantially the same as those floated back in 2003. This was passed by Parliament, which amended the Crimes (Appeal and Review) Act 2007 (NSW).

The Bowraville murders were mentioned by a number of parliamentarians during the debate.

Principally, the amended Crimes (Appeal and Review) Act 2001 (“CARA”) now provides in section 100, that:

(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:
   (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and
   (b) in all the circumstances it is in the interests of justice for the order to be made.

The meaning of the words “fresh” and “compelling” are defined in section 102 of the Act.

(2) Evidence is fresh if:
   (a) it was not adduced in the proceedings in which the person was acquitted, and
   (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.

Section 102(3) of CARA provides that:

(3) Evidence is compelling if:
   (a) it is reliable, and
   (b) it is substantial, and
   (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

In 2015, the Honourable James Wood AO QC, former NSW Supreme Court judge and former chairman of the NSW Reform Commission, was asked to prepare a report on whether section 102 of the Act, which defines “fresh” and “compelling” evidence, should be amended. Mr Wood concluded that the amendments would significantly undermine protections against double jeopardy.

After Mr Wood handed down his report, David Shobrooks, the Greens member of the NSW Legislative Council, introduced the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015, which would have amended the Crimes (Appeal and Review) Act 2001 to allow previously inadmissible, but now admissible, evidence to count as “fresh” evidence. This Bill failed to pass in the NSW Parliament.

This means that any cases the prosecution seeks to argue should be an exception to the double jeopardy rule, which should not be, because of concerns that the amendments would significantly undermine protections against double jeopardy.

The Application for a Retrial in NSW

The Aboriginal Community of Bowraville has long pushed for XX to be re-tried for the murders of Evelyn Greenup and Clinton Speedy-Duroux and to be tried for the murder of Colleen Walker. The rule on double jeopardy has been a legal hurdle to these cases proceeding.

In 2016, in the wake of ongoing changes to the Evidence Act 1995 (NSW) regarding the nature of evidence admissible at trial, NSW Attorney-General Gabrielle Vaton announced she would make an application for the retrial of XX for the murders of Clinton ‘Speedy’ Duroux and Evelyn Greenup as well as a trial of XX for the murder of Colleen Walker. The Attorney General applied to have all three trials heard together and for the evidence in one to be evidence in the others.

The application by the Attorney General was made on the basis that:

If the evidence in relation each of the three murders was considered by a jury at a single trial, which allegedly showed that there were similarities in the circumstances of each murder, would indicate that each of the children was murdered by the respondent.

Attorney General for New South Wales v XX [2018] NSWCCA 198 [Headnote]

The Judgment

On 13 September 2018, the NSW Court of Criminal Appeal handed down their decision in the application made by the Attorney General for NSW for a new trial of XX. That case was Attorney General for New South Wales v XX [2018] NSWCCA 198 (”the Judgment”). In the Judgment the Court considered the question of fresh and compelling evidence.

The most important evidence that the Attorney General alleged was “fresh” was in relation to the murder of Colleen Walker, most of which had not been admitted into evidence in either of the earlier trials. The Attorney General said this evidence was also ‘compelling’, because it established similarities between each of the murders in a way that would not have been possible with only the evidence from the two other murders. (Headnote)

Specifically, the evidence put before the Court by the Attorney General as being ‘fresh’ and ‘compelling’, because it had not previously been admitted into evidence, was:

The alleged similarities in the factual circumstances between the death of Evelyn Greenup and Clinton Speedy-Duroux. This evidence was put before the Court by the prosecution in the 1994 trial for the murder of Clinton Speedy-Duroux. However, those facts were not accepted as evidence in the 1994 trial, because of the rules regarding admissible evidence at that time.

Further “fresh” allegations the police had uncovered over the years, included:

(a) evidence of two delivery drivers who claim they saw a white man, mixing X’s description, standing over Bowraville the morning Clinton disappeared.

(b) evidence from the case of Colleen Walker, because it was not relied upon or admitted in either the Speedy-Duroux trials. It was compelling because it was evidence of coincidence.

(c) evidence from four informers that XX had made admissions to them in relation to the offences.

(d) evidence from other persons that the respondent had made admissions to them about possibly being involved in the murders and/or location of bodies.

In the Judgment, the Court considered whether it was appropriate for the above alleged facts to be allowed as “fresh” and “compelling” evidence in any trial of XX for the murders of Clinton Speedy-Duroux and Evelyn Greenup, as well as a trial of XX for the murder of Colleen Walker, on the basis that the three trials would all be heard together.

The Court noted that it was required, under s 105(7) of CARA, to decide if there was fresh evidence in relation to each of the offences separately.

“Fresh” and “Compelling” Evidence

The first test of whether evidence is ‘fresh’ is whether it has been ‘adduced’. Section 102(2)(a) of CARA says that evidence is fresh if it was not ‘adduced’ in the proceedings, in which the person was acquitted. In his application, the Attorney General argued that, as specific factual information had not been admitted into evidence in the trial of XX for the murders of Evelyn Greenup and Clinton Speedy, it had not been adduced.

There is little guidance from previous cases on what the word ‘adduced’ means in section 102(2), and whether it includes evidence that has been put before the court (tendered) or evidence admitted in the trial.

After considering case law in Australia and England, and the Second Reading speech in the NSW Parliament, as well as the report of the Honourable James Wood AO QC, the Court decided that the word ‘adduced’ meant tendered, not admitted into evidence [247].

The Court then considered the second test about whether the evidence could have been tendered in the previous proceedings, if reasonable diligence had been used [248].

The second test in 102(2)(b) CARA considers whether evidence could have been adduced but wasn’t, due to a lack of reasonable diligence by prosecutors.

This means the prosecution cannot say that evidence is ‘fresh’, simply because of poor investigation or decisions made not to take evidence in a previous case. The Court noted that evidence will not be considered fresh just because there is a change in the rules of evidence [249], [243] and [245]. The test is whether it would have been admissible to be adduced. To the same extent, if evidence had previously been inadmissible, it does not automatically mean it cannot now be fresh evidence.

Section 102(3) looks at whether evidence is compelling. This requires the prosecution to prove that the ‘fresh’ evidence is ‘adducible’, ‘substantial’ and ‘probative’. The Court found that each element of a 102 must be proved, that is the evidence is both fresh and compelling [171] and [176]. That meant that if either of those elements could not be proved, the application would fail.

The court found that the evidence was not fresh and that was sufficient under s 102 for the application to fail, without requiring a consideration of whether the evidence was ‘compelling’.

The argument focused critically on the unique strength of a case in which all three cases would be considered together, with evidence in relation to each murder being admissible as coincidence evidence in relation to each other murder” [264].

The Attorney General summarised the evidence as showing that,

the Court found that evidence from the Bowraville Walker matter was available prior to the trial for the murder of Evelyn Greenup. It was therefore not fresh and thus failed the test under s 102(2)(b) of CARA [256]. The Court refused the application for a retrial in the Evelyn Greenup matter [261].

In relation to the application for a retrial for the murder of Clinton Speedy, the court found that the Attorney General did not sufficiently argue that existed. There were no submissions made by either party as to whether the ‘fresh’ evidence was sufficient for a retrial of XX for the murder of Clinton Speedy, without a retrial for the murder of Evelyn Greenup. As the argument had not been put by the Attorney General, the Court could not decide on it.

XX has been charged with the murder of Colleen Walker. However, the Attorney General has announced that he is appealing the decision of the Court of Criminal Appeal to the High Court. The High Court did not grant special leave and there will be no further appeals.
Student Activities

Activity 1 - Law Reform Statements
Evaluate the below statements offered by the following leading figures in the Double Jeopardy law reform debate:

- The President of the Law Society of NSW, Robert Benjamin, launched the Law Society's Law and Order Policy Statement on 20 February 2003. One of the Statement's recommendations was:
  a. As to the Double Jeopardy Rule, it should be noted that it preserves finitude of justice for people acquitted of crimes, ensures that the best possible case is prepared by police and prosecution, and avoids continued persecution of individuals. It should not be changed without proper debate and consultation, outside of the heart of an election campaign…
  b. Former Prime Minister Howard said the following:
    [I]n some instances other countervailing interests which weigh against the principle of double jeopardy. In relation to nearly all circumstances in which...[I]n some instances other countervailing interests also weigh against the application of the principle. An example is the principle that no person should benefit from his or her own wrongdoing.
  c. Dr Mirko Bagaric, School of Law, Deakin University evaluated the arguments for and against the double jeopardy principle and concluded it is necessary to recognise exceptions to it:

Activity 2 - Discussion Questions
Discuss the facts and legal arguments of the Bowraville cases.
1. What is the principle of double jeopardy?
2. What are the processes of law reform?
3. How does law reform shape future laws?
4. What is double jeopardy?
5. What is double jeopardy around double jeopardy? Why?
6. What is the principle of double jeopardy?
7. Who would be interested in law reform around double jeopardy? Why?

Activity 3 - Write a Submission
1. Complete a Law Reform Inquiry scaffold for a current law reform issue being examined by an Australian Law Reform Commission
2. Write a short submission to the Law Reform Commission using the 'How to Write a Submission Guide' – Teacher to determine length of submission - Suggested length 1-2 pages
3. Submit the submission to the Commission and track its progress

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HOW TO WRITE A SUBMISSION
WHAT PREPARATION DO I NEED TO DO?
Read up on any available information about the new or existing government law. Government agencies will usually provide a consultation or discussion paper when announcing a proposed policy or law reform initiative, which will often contain useful links to other reference materials for you to read up on.

Research the law reform issues that are being addressed in your submission. Use the scaffold to plan your submission.

Take the time to map out your response and be clear about those aspects of the government's policy/law/proposed law that you agree or disagree with, and any recommendations that you may have.

TIPS FOR WRITING AN EFFECTIVE SUBMISSION
An effective submission has the following:
An introduction about yourself name and details, education, expertise
Name of the Enquiry
Relevant Terms of Reference - these can be used as headings in your submission
Whether you want your submission made public
Your submission should be concise and clear. It is helpful to number paragraphs
Keep your sentences short and to the point and your language professional, polite, and as objective as possible. This will ensure that your submission retains credibility, and that your audience treats your submission seriously.

WHAT SHOULD I INCLUDE IN MY SUBMISSION?
An opening paragraph that establishes why this enquiry is relevant to you (ie I am a young person and this law reform with affect me in the following ways … and relates to the TQR)
Use headings to ensure that your submission is structured and flows logically, as well as to assist the reader in following your argument. It may be effective if the structure of your headings follows the terms of reference.
Properly reference all materials that you use to support your argument.
State your key concerns, why these issues affect you or why you otherwise feel passionately about them.
Provide legal recommendations on the law reform proposal. Recommendations can include changing the law or keeping it the same.
Back up your argument with examples including research where applicable. The more support materials you use, the stronger and more persuasive your argument will be.

WHAT SHOULD I NOT INCLUDE IN YOUR SUBMISSION?
It is not necessary to write an essay.
Do not delve into information that you do not know about. It is perfectly acceptable for you to leave out any points, or terms of reference that you are not comfortable addressing.
Be sure to maintain a professional and moderate tone.