

## DOUBLE JEOPARDY

Written by *Shubhangi Singla\** & *Puneet Goyal\*\**

\* 3rd Year BA LLB Student, Bhai Gurdas College of Law, Sangrur

\*\* 3rd Year BA LLB Student, Bhai Gurdas College of Law, Sangrur

### INTRODUCTION

**Jeopardy** refers to the danger of conviction that an accused person is subjected to when he is put to trial for a criminal offence.

**Double Jeopardy** means the act of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted.

Article 20(2) of our constitution says that “no person shall be prosecuted and punished for the same offence more than once”. This clause embodies the common law rule of *memo debet vis vexari* which means that no man should be put twice in peril for the same offence. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defense of his formal acquittal or conviction.<sup>1</sup>

### HISTORY AND ORIGIN OF THIS PRINCIPLE

Judicial and academic statements on the principle that a person should be protected against double jeopardy tend to either assume or imply unquestioningly the belief that the rule is one with along historical background and sound doctrinal foundation.<sup>2</sup>The principle of double jeopardy was not entirely unknown to the Greeks and Romans, although the legal environment was quite different.<sup>3</sup>In modern times, remnants of double jeopardy exist in many countries, including Australia, Canada, the United Kingdom, parts of Asia, and the United States. It exists as a constitutional right in many countries such as United States, Canada, Mexico and India.

<sup>1</sup> Dr. J.N.Pandey, Constitutional law of India, 239 (52<sup>nd</sup> ed., 2015)

<sup>2</sup> Jill Hunter, The Development of rule against Double Jeopardy

<sup>3</sup> 4 Jay A. Sigler, A History of Double Jeopardy, The American Journal of Legal History,(283, Oct. 1963)

The protection is also given under this rule has gained international recognition also through various international documents, for instance, Article 14(7) of the International Covenant on Civil and Political Rights, Article 4(1), Protocol 7 to the European Convention of Human Rights and Article 50 of the Charter of Fundamental Rights of the European Union. The states are bound to cope with the relevant provisions of the Convention to which they are parties.<sup>4</sup>

## **WHEN JEOPARDY ATTACHES AND TERMINATE**

Jeopardy attaches during a jury trial when the jury is empaneled. In criminal cases tried by a judge without a jury, jeopardy attaches when the first witness is sworn in. If the defendant enters a plea agreement with the prosecution, jeopardy does not attach until the court accepts the plea. Once jeopardy terminates, the defendant can no longer be hauled into court for additional proceedings on the same matter without raising double jeopardy questions. Jeopardy will terminate upon a jury's verdict of acquittal. The verdict may be overturned on appeal even in the face of overwhelming proof of defendant's guilt as a measure meant to entrust a jury with the power to nullify prosecutions tainted by police, prosecutorial or judicial misconduct.

Similarly, assuming jeopardy has attached, a subsequent dismissal granted by the trial court for errors, defects or a lack of evidence in the trial terminates jeopardy and serves as an absolute barrier to prosecution. The U.S. Supreme Court has held, however, that dismissal for reasons unrelated to a defendant's guilt or innocence will not bar future prosecution and does not raise double jeopardy issues.<sup>5</sup> Jeopardy also terminates if a mistrial is granted, normally done when jurors fail to reach a unanimous verdict or when it has become impracticable to finish a case. Importantly though, either a dismissal or a mistrial at the defendant's request or consent will not terminate jeopardy and thus will not preclude retrial.<sup>6</sup>

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<sup>4</sup> Sonakshi Verma, Guarantee Against Double Jeopardy, ACADEMIKE(ISSN:2349-9796)

<sup>5</sup> United States v. Scott, 437 U.S. 82 (1978)

<sup>6</sup> IBJ, Criminal Defense Wiki, Double Jeopardy

## INDIAN LAWS AND DOUBLE JEOPARDY

The protection against double jeopardy is a constitutional as well as a statutory guarantee in India. The principle has also been recognized under the provision of General Clauses Act. The Constitution of India recognize only *autrefois convict* where as the Code of Criminal Procedure, 1973 incorporates *autrefois convict* as well. The rule against double jeopardy has been recognized as a fundamental right in the Constitution of India. The most important thing to be noted is that, sub-section (2) of the Article 20 has no application unless there is no punishment for the offence in pursuance of a prosecution.

**Article 20(2) of the Constitution of India:** No person shall be prosecuted or punished for the same offence more than once. It is to be noted that this provision does not provide for a continuing offence. The Double Jeopardy principle was existed in India prior to the enforcement of the Constitution of India as well.

**Section 26 of the General Clauses Act** states that as to offences punishable under two or more enactments, where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

**Section 300(1) of Criminal Procedure Code, 1973** provides that “a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence...”

**Section 71 of Indian Penal Code** provides that, “where anything which is an offence is made up of parts is itself an offence, the offender shall not be punished of more than one of such his offences, unless it be so expressly provided”.<sup>7</sup>

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<sup>7</sup> Quora defines

## SOME LANDMARK CASES

- In *Maqbool Husain v. State of Bombay*<sup>8</sup> the Court held that the sea custom authority are not court or judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgment of judicial character necessary to take the plea of the double jeopardy. Hence, the prosecution under the Foreign Exchange Regulation Act is not barred.
- In *A.A. Mulla v. State of Maharashtra*<sup>9</sup> the court held that the second trial was not barred as not only the ingredients of the offence of two trial were different but the factual situation of offences in the first and the second trial were also different.
- In *M.P. Sharma v. Satish Chandra*<sup>10</sup> the Supreme Court observed that this right embodies the following essentials:
  - 1) It is a right pertaining to a person who is “accused of an offence”.
  - 2) It is a protection against “compulsion to be a witness”.
  - 3) It is a protection against such compulsion relating to his giving evidence “against himself”.
- In *Venkataraman v. Union of India*<sup>11</sup> the court held that the second prosecution of the appellant was held not to attract the application of the double jeopardy protection guaranteed by Article 20(2).

## DOUBLE JEOPARDY AND RES JUDICATA/ ISSUE ESTOPPEL

In essence, the policy of protection against double jeopardy expounds that a matter, once put to an end, may not be reopened or re litigated. The finality principle found expression in the Roman-law doctrine of *res judicata*. The basic tenet of the doctrine is that a matter or question raised by one’s adversary who has already been the subject of adjudication in previous legal proceedings, cannot be raised once again. Roman texts on the principle of *res judicata* reveal

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<sup>8</sup> AIR 1953 SC 325

<sup>9</sup> AIR1997 SC 1441

<sup>10</sup> AIR 1954 SC 300

<sup>11</sup> AIR 1954 SC 375

a concern that a community ought to be protected against what may be regarded as oppressive multiplication of suits.

Our Supreme Court has held that the application of the above rule of *res judicata* in India is not excluded by the fact that the rule against double jeopardy has been codified in s. 300 of the Cr. P.C., and also guaranteed by Article 20(2) of the Constitution<sup>12</sup> because the scope of the two principles is not identical. For, the rule of *res judicata* rests on the principle where an issue of fact has been tried by a competent court on a former occasion and the finding of that court has been in favour of the accused, such finding would constitute an estoppel against the prosecution- not as a bar to the trial but as a precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence. Since the doctrine of *res judicata* rests on the identity of the issues at the two trials, it is also known as the doctrine of 'issue estoppel'.

The basic difference between the principle of double jeopardy and *res judicata* is that while the rule of double jeopardy is not applicable unless the offence involved in the subsequent proceeding is not the same as in the former proceeding, the rule of *res judicata* applies even though the offence for which the subsequent proceeding has been brought is a different one.

In India, the starting point of issue estoppel was the Privy Council decision in *Sambasivam v Public Prosecutor, Federation of Malaya*<sup>13</sup>. Lord MacDermott in this judgment said that:

*“The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all the subsequent proceedings between the parties to the adjudication. The maxim, ‘Res judicata pro veritate accipitur’ is no less applicable to criminal as to civil proceedings.”*

Hedge J. in *Assistant Collector, Customs v Malwani*<sup>14</sup> has also observed that the issue estoppel rule was but a facet of the doctrine of *autrefois acquit*. And that it was based on the principle of *res judicata*.

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<sup>12</sup> Manipur Administration v Thokchom Bira Singh, AIR 1965 SC 87(90)

<sup>13</sup> Sambasivam v Public Prosecutor, Federation of Malaya, (1950) A.C. 458

<sup>14</sup> Assistant Collector, Custom v Malwani, (1969) 2 SCR 438

## **DOUBLE JEOPARDY AT INTERNATIONAL LEVEL**

Globally the concept of Double Jeopardy is accepted by different countries. It is explained under:

There are number of international instruments and legal regimes which provide for restrictions on successive criminal proceedings, these are

### **CANADA**

In Canada the concept of double jeopardy is contained in section 11(h) of Canadian Charter of Rights and Freedoms. However, this prohibition applies only after an accused person has been “finally” convicted or acquitted. In contrast to the laws of United States, Canadian law allows the prosecution to appeal from an acquittal. If the acquittal is thrown out, the new trial is not considered to be double jeopardy because first trial and its judgment would have been annulled. In rare circumstances a court of appeal might also be substituted a conviction for an acquittal. This is not considered to be double jeopardy either.

### **GERMANY**

The basic law of Federal Republic of Germany does provide protection against double jeopardy. If a final verdict is pronounced. A verdict is final, if nobody appeals against it. Article 103(3)of the basic law provides:

“Nobody should be punished multiple times for the same crime on the base of general criminal law”

The German Code of Criminal Procedure permits a retrial if it is in favor of the defendant or if following events had happened:

- A. If a document produced as a genuine for his benefit at the main hearing was false or forged;
- B. If a witness or expert, when giving testimony or an opinion for the for the defendant’s benefit was guilty of the willful or negligent violation of his duty imposed by the oath, or of willfully making a false, unsworn statement;

- C. If a judge or lay judge participated in drafting the judgment who was guilty of criminal violation of his official duties in relation to the case;
- D. If the person acquitted makes a credible confession, in or outside the court, that he committed the criminal offence.

The code also provides provision in case of an order of summary punishment, which can be issued by the court without the trial for lesser misdemeanors, there is a further exception.

## **UNITED KINGDOM**

The doctrine of *autrefois acquit and autrefois convict* persisted as a part of the common law from the time of the Norman Conquest, they were regarded as essential elements of protection of the liberty of the subject and respect for due process of law in that there should be finality of proceedings.

The Parliament of the United Kingdom passed legislation in the Criminal Justice Act 2003 introduced by then Home Secretary David Blunkett to abolish the previously strict form of prohibition of Double Jeopardy in England. Retrials are now allowed if there is new and compelling evidence. All cases must be approved by the Director of Public Prosecution and the Court of Appeal must agree to quash the original acquittal.

## **AUSTRALIA**

Australian double jeopardy jurisprudence is very similar to other common law countries. While there is no constitutional protection against re-trials following acquittal, there has been few examples of statutory exceptions. In all states jurisdictions prosecutors can appeal against the sentence handed down by the trial judge and in South Australia and Tasmania the prosecution can appeal against an error of law made by the trial judge in certain situations. However the acquittal will still stand valid and the purpose of the appeal is merely to clarify the relevant laws.

In a contrast to other common law jurisdictions. Australian double jeopardy law has been held to extend to prevent prosecution for perjury following a previous acquittal where a finding of perjury would controvert the previous acquittal. This was confirmed in the case of the Queen v. Carroll's sworn alibi two decades after he had been acquitted of the murder of a

young girl and successfully prosecuted him for perjury, public outcry following the overturning of his conviction by the High Court has led to widespread calls for reform of the law along the lines of the UK legislation.

## **UNITED STATES**

The United States retains very strong prohibitions against double jeopardy, although given its system of federalism (where the federal and state government may have overlapping criminal laws), criminal defendants may be tried in both state and federal courts for the exact same criminal act. The idea, first expounded in *U.S. v. LANZA* (1922), is now known as the dual sovereignty doctrine. In addition, if a trial is begun, but it does not end in judgement (guilty, innocent or acquitted), the criminal defendant can often be retried. This often arises in cases where a jury cannot reach a decision (a hung jury), and a mistrial is declared.

## **ENGLAND AND WALES**

Under England law, the prohibition against double jeopardy may now be suspended in a limited number of cases. Born from the realization that modern scientific forensic methods can reveal evidence that was unavailable in years past, beginning in 2005, criminal defendants who had been previously acquitted of a serious charge may be retried if “new and compelling evidence” is brought to light.

Crimes that reach the seriousness threshold include murder, war crimes, rape and certain drug offenses. The compelling evidence that justifies a retrial cannot have been available at the time of the first trial. Notably, this undermining of double jeopardy protection applies retroactively meaning that people, who were previously tried when double jeopardy had its full effect, can now be retried. As a result, some criminal defendants who confessed (or bragged) after their first acquittal may now be tried again, based on that confession, such as Bunny Dunlop, who was convicted of the 1991 murder of Julie Hogg in a 2006 retrial.

Note that unlike America, in United Kingdom, ex post facto criminal laws are merely frowned upon, but not prohibited.



## NEW ZEALAND

New Zealand generally prohibits retroactive criminal laws, although its exceptions to double jeopardy, passed in 2011, apply to acquittals entered after June 2008. These two exceptions are: where the criminal defendant was acquitted through some criminal action, and where “new and compelling evidence,” is found in a serious case (defined as those with the maximum penalty of at least 14 years of prison). As with other jurisdiction, this new evidence could not have been available for the first trial.

## SCOTLAND

Passed on 2011, the Double Jeopardy Act also provides limited exception to the prohibition against the second trial, and applied in the cases of a trained acquittal or in light of “new and compelling” evidence. However, according to commentators, unlike other jurisdiction the Scots law was broadly written, such that it could apply to any offense and leaves the decision to allow a retrial largely to judicial discretion. As a result, some commentators have opined that the Scottish exception essentially elements the entire protection, or as lawyer like to say, created the “exception that swallowed the rule.”

## CONCLUSION

There are two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings. A sentence, whether absolute or condemnatory, is a complete bar, not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*, whether at the instance of the public or private property.<sup>15</sup> In every legal system there is provision for double jeopardy as no person should be punished twice for the same offence. Doctrine of double jeopardy is a right given to the accused to save him from being punished twice for the same offence and he/she can take plea of it. Different cases present different circumstances situations. Therefore, the

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<sup>15</sup> Archibald Alison, Practice of the Criminal Law of Scotland, (1833, reprinted 1989)p.652

rule of double jeopardy cannot be made a straitjacket rule and is hence interpreted differently for different cases. While interpreting the provision judges always keep a watch that innocent does not gets punished. The principle of double jeopardy has been a part of the legal system since man can remember and is an honest endeavor to protect the non-guilty ones. It can therefore be considered a positive and just doctrine based on equity, justice and good conscience.

