THE DOUBLE JEOPARDY RULE- IS IT OUTDATED AND IN NEED OF REFORM?

BY

ETHEL INONGE BANDA

UNZA JANUARY 2007
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THE DOUBLE JEOPARDY RULE: IS IT OUTDATED AND IN NEED OF REFORM?

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BY

ETHEL INONGE BANDA

AN OBLIGATORY ESSAY SUBMITTED TO THE FACULTY OF THE UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELAR OF LAWS (L.L.B)

FACULTY OF LAW
UNIVERSITY OF ZAMBIA
LUSAKA

JANUARY 2007
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DECLARATION

I ETHEL INONGE BANDA-COMPUTER NUMBER 25143344 do hereby declare that I am the author of this Directed Research Paper entitled: The Double Jeopardy Rule: Is it outdated and in need of reform? And confirm that it is my original work. I further declare that due acknowledgment has been given where scholar's works have been used. I verily believe that this research has not been previously presented in the school for academic purposes.

Student's Signature ...........................................

Date .......................................................

16th Jan 2007
DEDICATION

This work is first and foremost dedicated to the memory of my dear departed Mother Mrs. Elizabeth Mukuwe Banda, you were and forever will be an inspiration to me, and you encouraged and believed in me all the time and had trust in me that I would make it, its sad that you are not here to share in this moment.

To my father Mr Daniel F.Y Banda, Daddy you have raised the benchmark for success in this family so high and if I could attain even half of what you have I will be a happy person. Thank you for your understanding and your patience and for always being there for me.

To my siblings Anita, Melinda and Daniel Jnr, you guys “we stick together like glue”, I am very luck to have you not just because you are family but also because you are my friends and you understand me and put up with me especially when I was busy with my work but most importantly you have been there walking with me through this life journey and you understand what it has taken to get to this moment.

To my Step-Mother Mrs Wabei Lubasi Banda, thank you for all the help you have rendered these past few years, I may not show it but I am forever grateful.

To Carolyn Kahindi, Abraham Miti, James Ager, Faith Magessa, Yacintha Gervas-Scott and Kris Karaba, you guys have been the best friends a person could ever ask for. I am what I am today because I have had great people like you along this journey called life, you raised me up in times of sorrow and despair, you have been shoulders to cry on, you have been there for me through thick and thin, ups and downs and Carolyn whenever I fall there you are, you are my guardian angel and you make me realize that with God’s help nothing is impossible.

I also dedicate this to all those that helped me one way or the other during my short stay at UNZA, Ba Bronx a.k.a Joseph Mwaba Banda, Bridget V. Banda, Beauty M. Banda, Victor Kabwiku, Goodwell Mateyo, Mary Goma, Mutale Mukuka and last but not least my nephew Aaron, I hope that I have set a good example for you son.

Thanks

Ethel

“*The sky is no longer the limit*”
PREFACE

This research was inspired mainly because this topic is a hot debate subject at the moment in several commonwealth Countries and also partly due to the fact that this area of law had not been attempted by any previous UNZA students, at least not the angle hat I have taken with this research.

The author felt that since the protection was enshrined in the Constitution of our Country, it is taken for granted and at times abused by the defendants and the Criminal Law fraternity at large.

The research is divided in five chapters. Chapter one is an introduction of the double jeopardy (autrefois acquit and autrefois convict) principle. It covers the problem of having such a law and it serves as a justification for the whole research.

Chapter two: This will define the law as it stands presently in Zambia, common law, American law and other commonwealth Countries. It also looks at how the courts attach the principle in given cases, this basically looks at how the principle operates in reality and it gives details of the cases.
Chapter three - is a comparative look at the principle of double jeopardy, it takes a closer look at the principle in the United Kingdom - the proposed changes and reforms therein and it also looks at a commonwealth perspective in the form of New Zealand.

Chapter four - looks at the Human Rights aspects of double jeopardy - basically this looks at the reasons why such a law exists, the intention of the legislator in drafting such a law, the problems identified of changing or limiting the protection given by section 18 of the Constitution. It also looks at the concerns raised by those interviewed by the author.

Chapter five - the way forward, new evidence and the double jeopardy principle, how the availability of new compelling evidence can justify re-opening a case and sending it for re-trial notwithstanding the principle of double jeopardy - proposals regarding new evidence, conclusion and recommendations.
ACKNOWLEDGEMENT

"Having ideas in ones head which can never be applied is a great torture, a terrible torture"

N. Katkov

I would like to sincerely thank Mr. S.E Kulusika, my supervisor, for coming in, in the 11th hour to help in this dissertation. I sincerely do not know how I would have made it without your help; I only wish that all academicians could have the dedication that you do to your work. God Bless you.

I am also greatly indebted to the Former Coordinator, Mr. Mumba Malila who helped this idea take off the ground, Mr. Nicholas Kahn-Fogel the present Coordinator for helping me out when it mattered the most.

To all those who helped in this research I say hats off to you all.

To the Class of 2006/2007 I say we are the next generation of lawyers, lets raise this bar high.
TABLE OF CASES

- Beedie [1998] QB 356
- Connelly v DPP [1964] AC 1254
- Miller v Minister of Pensions [1947] 2 ALL ER 372
- Moore 17th September 1999, unreported, Moore 23rd November 1999, unreported
- Moses Sachigogo V The People (1971) ZR 139 (H.C)
- Mwape V The People (1972) ZR 288 H.C
- R v Miles [1890] 24 QBD 423
- Sambasivam v Public Prosecutor Federation of Malaysia [1950] A.C 458
- Shamabanse V The People (1972) ZR 151
- United States v Ball 163 US 662, 669, 16 S.ct 1192, 1194, 41 L.ed 30 [1896]
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1) American Constitution

2) Constitution of Zambia Cap 1 of the Laws of Zambia

3) Criminal Procedure Code Cap 88 of the Laws of Zambia

4) High Court Act Cap 27 of the Laws of Zambia

5) Penal Code Cap 87 of the Laws of Zambia

6) Supreme Court Act Cap 26 of the Laws of Zambia

7) Zambia Police Act Cap 107 of the Laws of Zambia
CHAPTER 1

1.0 INTRODUCTION

Art 18 of the Constitution of Zambia and s.138 of the Criminal Procedure Code both refer to a person not being tried twice for an offence and s.128 in particular talks of a person not being tried again on the same facts for the same offence.

Ultimately what the law stipulates is that when a man is indicted for an offence and acquitted, he cannot afterwards be indicted for the same, provided the first indictment were such that he could have been lawfully convicted on it and if he be thus indicted for the second time, he/she may plead autrefois acquit and this will be a bar to the indictment. The offence with which the defendant is now charged must be identical to the offence of which he was previously acquitted or convicted, thus in Connelly v DPP [1964] AC 1254, the rule was held not to protect the defendant from being tried for robbery after being acquitted for murder committed in the course of the robbery and the word “offence” embraces both the facts which constitute the crime and the legal characteristics which make it an offence and for the doctrine to apply it must be the same offence both in fact and in law.
STATEMENT OF THE PROBLEM

While the defendant has a right to appeal a criminal conviction the prosecution cannot appeal if the defendant is acquitted and due to the doctrine against double jeopardy, trial judgments that go against the prosecution cannot be attacked. The author feels that this rule tips the scales of justice in the defendants favour because it appears to offer him blanket protection and does not consider the cost of an acquittal to the victim or the victim’s families. For example in England there was the famous case of Ronnie Knight who was acquitted of murder in the 1980’s only to write a book a couple of years later admitting and boasting of having committed the murder, safe in the knowledge that he could not be prosecute again because of the rule and further there is the infamous O.J Simpson case where the defendant was acquitted of murder but found guilty in the civil courts and fined about $33 million but because of the acquittals in the criminal court he cannot be tried again for the same offence. Surely situations like these are a mockery to the court system and the criminal justice system as a whole.

I acknowledge that all governments involves a reconciliation of the competing demands of liberty and order, of individual freedom and public safety and that is the underlining reason why the rule against double jeopardy exists, to protect the individual from infringements of his personal freedom, however
the problem is that justice should be seen to be done for the good of all in society and not tilt so unevenly in favour of the defendant and his rights, what about the victim and his rights?

2 OBJECTIVES

This study will highlight the problems created by having such an outdated doctrine in this new age of technological advancement and discoveries and the important objective is to bring the doctrine up for debate, scrutinizing its merits and demerits in the 21st century.

RATIONALE

As already mentioned there have been instances where the defendant has been acquitted on a technicality or lack of sufficient evidence but some months or even years later some evidence crops up which makes it more “highly probable” that the defendant had actually committed the said crime. It is this situation that this study will try to address, what happens in such a situation? Should the criminal get away with it scotch free?
CHAPTER 2 – THE DOCTRINE IN DETAILS

The doctrine of autrefois acquit and autrefois convict (hereby called Double Jeopardy) state that no man may be put in peril twice for the same offence, this is grounded in the maxim of the common law which is “nemo debet bis puniri pro uno delicto” basically meaning that no man shall be placed in peril of legal penalties more than once upon the same accusation.

Art 18(5) of the Zambian Constitution provides that “a person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence which he could have been convicted at the trial for that offence”¹ and the Penal Code stipulates that ‘a person cannot be punished twice either under the provisions of this code or under the provisions of any other law for the same act or omission”².

The rule against double jeopardy has been applied in several Countries around the world, for instance in the United States of America the 5th Amendment of the Constitution states that “...no shall any person be subject to the same offence to be put twice in jeopardy of life or limb”. From the above

¹ Cap 1 of The Laws of Zambia
it is evident that the rule is well enshrined in the laws of any democratic society, it is a law that is regarded as fundamental for the protection of the individual. Perhaps the underlining reason for such a rule can be best understood by the words of Black J in the U.S Supreme Court when he said

"The underlying idea one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for alleged offences thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."³

1.3 Basically speaking where a person has previously been convicted or acquitted of an offence and is later charged on indictment with the same offence, a plea of autrefois will bar the prosecution. In layman’s language, where the defendant has a right to appeal an unsatisfactory criminal conviction the prosecution cannot appeal if the defendant is acquitted.

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² Cap 87 of The Laws of Zambia
WHEN DOES THE PLEA OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT ATTACH?

In raising the plea it is sufficient for the accused to state that he has been lawfully acquitted or convicted as the case may be of the offence charged. This was seen in the case of Shamabanse V The People, the first and second accuseds were originally jointly charged with theft of money but were found guilty of obtaining money by false pretences. The learned trial magistrate held at the close of the prosecution evidence that the first and second accused were not “guilty of theft” and held that they were acquitted of that charge. At the no case to answer stage they were pt to their defences on the alternative charge of obtaining money by false pretences they unsuccessfully pleaded autrefois acquit and they were subsequently convicted of the alternative offence. They appealed to the High Court on the ground that the pleas of autrefois acquit should have been upheld. In arriving at his judgment Scott J looked at s.20 (5) of the Constitution (now Art 18 (5)) and s. 128 (now 138) of the Criminal Procedure Code, it was held that “the plea of autrefois acquit is


5 (1972) ZR 151 (HC)

6 Caps 1 and 88 respectively of the Laws of Zambia, which both stipulate that a person should not be tried
not of valid application to the circumstances of this case because both on the authorities and under our law it is envisaged that there have been previous and earlier proceedings followed by later proceedings at which the plea has been or can be raised”

Therefore for the plea to apply or attach there must have been some clear first trial and a second trial on the same issues and the same facts not alternative offences as the case was in the case cited. The court further contended that “in the instant case there was only one set of proceedings, one trial, the accused were not being tried again but were purportedly being called upon for their defence to an offence to which they could be convicted though not charged therewith”\(^7\). The authorities that justice Scott was referring to are not plenty but they do well to outline the procedure in court when the plea of autrefois is pleaded. One such case is Mwape V The People\(^8\), the facts of the case are that the appellant was charged with the offence of theft he raised the plea of autrefois acquit, the trial magistrate refused to accept the plea and convicted him of the offence, he appealed against the same to the High Court. Bruce-Lyle J in giving judgment stated that “\textit{when a plea of autrefois acquit is raised the magistrate should hold a trial on the preliminary issue of the plea before deciding whether or not to take a plea on twice for the same offence on the same facts.}

\(^7\) P 153 Parà 19-30 of Shamabanse V The People (1972) ZR 151

\(^8\) (1972) ZR 288 H.C
the charge before" he further went on to cite Archibald⁹ which stated that
"when a plea of autrefois acquit or convict is raised the defendant is not
restricted to a comparison between the latter and some previous indictment
or to records of the court but he may prove by evidence all such questions
with regard to the identity of persons, dates and facts as are necessary to
establish that he is being charged with a crime which is the same or
substantially the same as the one in respect of which he has been acquitted
or convicted or could have been convicted".

6 Basically what the judge was saying or what the law stipulates is that
when a defendant pleads autrefois acquit, a judge or magistrate should hold a
trial to establish the validity of the plea itself to ascertain that indeed this
same person was acquitted on this SAME OFFENCE before going on to
establish whether the person is guilty or not of the offence being charged,
failure to follow this procedure will render the proceedings a null and void as
was the case in Mwape and if the court so wishes it can set aside the
conviction and sentence and order a retrial or an acquittal and a complete
discharge as was the case in the case cited. Therefore procedure is
fundamental as justice Chomba stated in Moses Sachigogo V The People
(1971) ZR 139 (H.C) "failure to observe the procedure renders the
proceedings a nullity" therefore it does not matter which court is conducting

⁹ Criminal Pleading Evidence and Practice, 37th Edition, Butterworths 2000 Para 437 (d) p 121
the trial, the same procedure that is followed in the High Court when a plea of autrefois is pleaded must also be followed in the lower courts.

**THE SAME OFFENCE LIMITATION**

7 Double jeopardy as evidenced in the cases cited applies or attaches to re-prosecutions, which are the same as the original or previous offence. There have been some attempts by the courts to define what is meant by "sameness", in the **USA case of Ball**\(^{10}\), the test was said to be that "offences are the same if the elements of one are sufficiently similar to elements of the other" thus if the elements required to prove a latter offence are the same as those that were used to prove a previous offence then that would be defined as SAME. S.138 of the Criminal Procedure Code speaks of a person not being liable to be tried twice again on the same facts for the same offence, this was applied in the **Shamabanse case** cited above, basically what this does is to bar the prosecution from bringing a case against an accused already acquitted in court by a competent jurisdiction. This test came in to protect against repeated proceedings and abuse of process because as Justice Story put it “the prohibition of the double jeopardy clause is not against being twice punished but against being twice put in jeopardy”\(^{11}\). It is this underlining

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\(^{10}\) United States v Ball 163 US 662, 669, 16 S.ct 1192, 1194, 41 L.ed 30 [1896]

\(^{11}\) Livingston Hall et al “Modern Criminal Procedure” West Publishing 1960
thought that has lead many countries adopting the clause in their constitutions, but it shall be argued in later chapters that it is this mentality that tips the scales of justice in the defendants favour because it appears to offer him/her blanket protection and does not consider the cost of an acquittal to the victim or their families. Countries like the United Kingdom, United States, Australia, have all considered reforming the rule against double jeopardy, all but the United Kingdom have retained the rule even after wide spread debate on the issue.

In the U.K the change in the law was welcomed as this would mean that re-prosecution of those who had boasted after acquittal of actually committing the offence acquitted of would be possible, an example is Ronald Knight who was acquitted of murder in the 1980's only to writ a book admitting that he had hired someone to shoot the victim, safe in the knowledge that he would never be prosecuted again due to the autrefois acquit rule. Surely situations like these though not heard of in Zambia are a mockery of the court system and the criminal justice system as a whole. Another example of how the same offence can bar re-prosecution is the infamous Stephen Lawrence case\textsuperscript{12}, Stephen was a black teenage boy who was murdered by a group of white youths in what appeared to be an incident of extreme racial violence, there was one witness but due to the nature of the
attack, that is to say it was very quick and also a group attack, the witness failed to make a positive identification. After the crown decided that it had insufficient evidence to warrant a prosecution, the victim's family brought a private prosecution against three suspects. They were acquitted because of lack of firm identification, it was subsequently found by the inquiry that the police Investigations had been "palpably flawed" but because of the private prosecutions the three suspects concerned became untouchable in relation to the murder charge whatever new evidence turned up. It is important to note however that this brought about public outrage and talks of reform emerged mostly from his case and its shortcomings. The government responded by conducting some research into the law and eventually passed the Justice for all Bill in July 2002\(^{13}\) and this was subsequently turned into the Criminal Justice Act 2002 which basically states that a re-trial should be available and justified if there is compelling fresh evidence giving a clear indication of guilt evidence giving a clear indication of guilt. s.65 (1) states "there must be new and compelling evidence that the acquitted person is guilty of the qualifying offence before a retrial can be applied for or ordered"\(^{14}\)

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\(^{13}\) Justice for All Bill: review of the Criminal Courts of England and Wales-presented to Parliament by the Secretary of State for Home Department, July 2002

\(^{14}\) This aspect of the Criminal Justice Act of the United kingdom will be considered much later on in the essay, it was merely included to show the current law and its history on the doctrine against autrefois.
In reality the same offence limitation was seen in R v Miles [1890] 24 QBD 423. Mr. Miles was arraigned on an indictment that charged him in the first count with unlawfully and malicious wounding, 2· unlawfully inflicting grievous bodily harm, assault· actual bodily harm, common assault on the same person and finally common assault on another. The defendant was ultimately convicted for the first four counts of the indictment and acquitted on the 5th count. A different court of summary jurisdiction had heard the case before and now the case was before the central criminal court, he raised autrefois convict on the 1st 4 counts saying that those issues were handled at the first trial. The question before the court was whether the proceedings before the first court were a bar at the proceedings against him at the second and present trial, the court held that "the one and same assault of which the defendant was convicted is the sole foundation upon which the conviction at this court is rested, although aggravations are added to it which at first sight might make the offence appear different" the conviction was thus quashed.

10. Despite what is outlined above there is a proviso to the double jeopardy rule in the penal code s.20 where it says that a person cannot be punished twice "except in the case where the act or omission is such that by means thereof he causes the death of another, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence
constituted by the act or omission” and also s.140 Criminal Procedure Code stipulates “a person convicted or acquitted of any act causing consequence which together with such act, constitute a different offence from that for which such person was convicted or acquitted, may afterwards be tried for such different offence, if the consequence had not happened, or were not known to court to have happened, at the time when he was acquitted or convicted”¹⁵. This can be exemplified better in Connelly v DPP [1964] A.C 1254. Lord Devlin explained that the word “offence” embraces both the facts which constitute the crime and the legal characteristics which make it an offence, for the doctrine to apply it must be the same offence both in law and in fact. Generally this means that a defendant will be protected by the double jeopardy clause if the facts are similar but the offence is different. In Connelly the appellant and three others were charged on two indictments with murder and robbery with aggravation during which an individual died. The facts were as follows, the four men had robbed a place and in the course of the robbery someone died, these men were charged with murder and were acquitted, later on the prosecution sought conviction on the offence of robbery and the defendants raised autrefois acquit and the court ruled that the rule could not protect the defendants because even though the facts were similar the offence was different. One could say that this is an important exception to the rule against double jeopardy because it gives the prosecution an

¹⁵ Cap 87 and 88 of the Laws of Zambia respectively
alternative in cases where it is obvious that the defendant did in fact commit
the offence but there is insufficient evidence or lack of mens rea to convict
them of the higher offence.

11 In Shamabanse it was said that under s.187 of the Criminal Procedure
Code an accused should be informed of the alternative upon which he may be
found guilty. The proviso is narrow however in its application in that a
person who has been acquitted for a lesser offence may not be tried for a
serious form even if the special circumstances of new evidence apply, this was
illustrated in Beedie [1998] QB 356. Beedie was a landlord of a woman who
died of carbon monoxide poisoning, he was prosecuted under the Health and
Safety at Wok Act and fined, when the woman later died he was
subsequently prosecuted for manslaughter based on the same facts. It was
held that the second prosecution should have been stayed as an abuse of
process. The short and narrow of this is that it bars subsequently proceedings
against the accused not only for offences on which verdicts have expressly
been returned in previous proceedings but also for alternative offences
implicitly covered by those verdicts, therefore if a defendant is charged with
manslaughter and acquitted or convicted as the case may be, the prosecution
can not later do decide that it shall bring proceedings against the accused of
murder on the same offence.
2. It should be noted however that difference should be noted in instances where a person who has convicted of an offence can be prosecuted for an aggravated form of the same offence if the facts constituting the aggravated offence were not in existence at the time of the conviction, this is an established principle of common law evidence and most important it has a statutory standing in Zambia under s.20 of the Penal Code and s. 140 of the Criminal Procedure Code. An example would be if a person knocks down a person while driving he can be prosecuted for careless or reckless driving and if later on the victim dies from his injuries the defendant can be brought back to court on a charge of manslaughter.

THE RULE AGAINST CHALLENGING A PREVIOUS ACQUITTAL

3. Another aspect of double jeopardy is the influence it has on the use of evidence in future trials that question a prior acquittal, this is known in English cases as the Sambasivam rule. The appellant had been charged with unlawfully possessing a firearm and unlawful possession of ammunition, he had signed a single written confession admitting the offences, however at trial he repudiated the confession and was acquitted on unlawful possession of ammunition, the court disagreed on unlawful possession of a firearm and a new trial was ordered and at the retrial the

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16 Sambasivam v Public Prosecutor Federation of Malaysia [1950] A.C 458
confession was given as evidence by the prosecutors even if the part of it referring to the ammunition contradicted the earlier acquittal, the appellant was convicted. On appeal the Privy Council held that the conviction should be set aside, in delivering judgment Lord MacDermont at p 479 state 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 on all subsequent proceedings between the parties to the adjudication, here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial”. Although prima facie this judgment seems correct based on the rules of confessional evidence I advance that its ratio decidendi should be confined more strictly, therefore if it appears that the accused did indeed commit this offence based on the fact that there is similarity between this offence and a previous offence although he was acquitted of it, the court should be open to look at that.

This chapter has centred on the law as it stands at the moment here in Zambia and abroad. The issues raised are what this paper will be proposing to change, for instance I will be suggesting that autrefois is an old law which
needs to be changed in this ever evolving world with new technologies like

Finger printing and other forensic aids that did not exist at the time that the
doctrine was included into law, therefore it is outdated and adds as a
miscarriage of justice in the sense that, if there is insufficient evidence or due
to a technicality the accused gets away with it, the victim has no recourse in
law, if the defendant can have a right to appeal why cant the prosecution?.
CHAPTER 3 · ARGUING FOR CHANGE- A COMPARATIVE STUDY-

United Kingdom

In chapter two, the case of Stephen Lawrence and the controversy that that case generated led to the argument for change of the autrefois principle notably after the inquiry\(^\text{17}\), recommendation 38 which was the most important in regards to double jeopardy, this basically stated that “consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented”\(^\text{18}\).

1.1 The government also asked the Law Commission\(^\text{19}\) to look into the double jeopardy principle and how if any it could be reformed. Their main recommendations were summarized as follows:

1.18· “our main recommendations on double jeopardy was that the Court of Appeal should have power to set aside an acquittal for murder only-thus permitting a retrial where there is compelling new evidence of guilt and the court is satisfied that it is in the interest of justice to quash the acquittal and

\(^{17}\) Supra note 12  
that power should apply equally to acquittals which have already taken place before the law is changed"\textsuperscript{20}.

In 2001 Lord Justice Auld undertook a general review\textsuperscript{21} of the operation of the criminal Justice System and also reviews the recommendations of the Law Commission cited above on the reform of the autrefois principle. He argued inter alia that "the doctrine of double jeopardy should not be considered absolute and must be applied in light of the general justifying aim of the administration of the criminal justice system, namely to control crime by detecting, convicting and duly sentencing of the guilty".\textsuperscript{22}

In July 2002 the government published a policy statement called "Justice for All" which was based on the Auld Report. The statement included a commitment to reform the existing double jeopardy principle in the United Kingdom, it acknowledged inter alia that the double jeopardy principle was "an important safeguard to acquitted defendants, but proposed to extend the exceptions (i.e. the exceptions contained in the Law Commission's recommendations which spoke of murder only) on the grounds that there are some other cases where a retrial would be justified if there were compelling

\textsuperscript{20} Note 19, page 6
\textsuperscript{21} The Right Honourable Lord Justice Auld, Review of the Criminal Courts of England and Wales, September 2001
\textsuperscript{22} Page 629, supra 21
fresh evidence giving a clear indication of guilt. These exceptions were to include, very serious offences such as rape or armed robbery as well as murder and these were summed up in Para 4.65 as follows:

Should fresh evidence emerge that could not reasonably have been available for the first trial and strongly suggests that a previously acquitted defendant was in fact guilty, the Director of Public Prosecutions (DPP) will need to give his personal consent for the defendant to be re-investigated. He may also indicate that another police force should conduct the re-investigation.

Before submitting an application to the Court of Appeal to quash an acquittal, the DPP will need to be satisfied that there is new and compelling evidence and that an application is in the public interest and a re-trial fully justified.

The Court of Appeal will have power to quash the acquittal where:

(i) There is compelling new evidence of guilt and

(ii) The court is satisfied that it is right in all the circumstances of the case for there to be a re-trial

There will be scope for only one re-trial under these procedures.

23 Justice for All: Review of the Criminal Courts of England and Wales, Presented to Parliament-July 2002 at 4.64
The government eventually added the recommendations to the Criminal Justice Bill of 2002, which was passed and become the Criminal Justice Act 2005, which basically gave the Court of Appeal power to quash an acquittal and order a re-trial when "new and compelling evidence is produced"\textsuperscript{24}. Therefore it can be seen that the United Kingdom effectively managed to reform a law, which existed for centuries of time and made a few statutory exceptions to the principle that most importantly still affords the defendant protection through the safeguard discussed in Para 3.3 above.

NEW ZEALAND

The principle of double jeopardy is contained in s.26 (2) of the New Zealand Bill of Rights Act 1990. This section stated, "no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again"\textsuperscript{25}. Like the United Kingdom, research and inquiries came after controversial cases, one of them being the Moore case (Moore 17th September 1999, unreported, Moore 23rd November 1999, unreported). The brief facts are that, Moore and another were tried for murder, a witness for the defence gave Moore an alibi and he was acquitted. Moore was subsequently convicted of conspiracy to pervert the course of justice in

\textsuperscript{24} Double Jeopardy Law ushered out- 3 April 2005- BBC News Online, News.bbc.co.uk  
\textsuperscript{25} Supra note 18 at page 5
relation to that evidence. He received seven years imprisonment, which was
the maximum penalty for that particular offence, but it was felt that he had
escaped the conviction for murder and a life sentence.\textsuperscript{26}

6.6 The New Zealand Law Commission carried out some research and identified
three main purposes behind the double jeopardy principle, which they listed
as follows:

a) The avoidance of inconsistency and securing finality of a verdict

b) The prevention of harassment of the accused by repeated
prosecution for the same matter

c) The promotion of efficient investigations\textsuperscript{27}.

The commission felt that it was first important to establish the reasons why
the principle existed before looking at its possible reforms, this was
important because consideration should be had to the purposes or reasons
when looking for the exceptions if any to the principle.

6.7 In the end the commission recommended to permit a limited departure from
the principle of double jeopardy in that cases should be allowed to be re-
opened where the accused has been convicted of an administration of justice

\textsuperscript{26} Supra note 18 at page 18
\textsuperscript{27} New Zealand Law Commission- Acquittal following perversion of the course of Justice (Report 70)
crime, secondly the crime of which the accused was originally acquitted must carry a penalty of 14 years imprisonment or more, thus confining the departure to only very serious offences and most importantly it gave jurisdiction only to the High Court to hear applications of this nature. However unlike the United Kingdom where the Law Commission's recommendations were eventually turned into Law, the New Zealand Law Commission's recommendations were not taken up.

3.8 The purposes as identified by the Law Commission of New Zealand form the basis of autrefois acquit and autrefois convict principle and as such shall be consider more elaborately in chapter three of this research when I look at the Human Right aspects of having such a principle. In Zambia there has not been a great number of cases to come up before the courts regarding the autrefois acquit and convict principle per se. As the cases cited Shamabanse, Mwape etc tend to illustrate, the courts have been more concerned with the procedural aspects of the principle, that is to say, when the plea can be raised or attached and whether or not the plea is relevant to the facts in issue as opposed to whether the basic rights guaranteed by the Constitution in Art 18 have been adhered to.
CHAPTER 4- HUMAN RIGHTS ASPECTS

4.0 This chapter shall focus on the human rights aspects of the autrefois acquit and autrefois convict principle, in short it shall look at the reasons of having such a principle in the first place and the implications if any of changing the law.

Many authors who have written on this subject tend to differ on opinion and interests regarding the double jeopardy principle, however they all seem to be in agreement in regards to the reasons of having such a law. For instance it has been said that the principle is there because of the following reasons:

a) To avoid harassing an individual with anxiety and expense of repeated prosecution

b) To achieve finality and to furnish essential respect and support for the courts and the law itself- for to try a man over and over again is to undermine the judicial process

c) To avoid the increasing likelihood that an innocent man will be convicted.  

The above reasons can be justified when one thinks of the checks and balances that the criminal and legal procedure must have. As Professor Carlson Anyangwe put it so eloquently:

"The law of criminal procedure strives to balance evenly the seemingly antagonistic interests of society and the individual. Societal interest demands that criminals be arrested, tried and punished. But societal interest demands that an accused be given every opportunity to defend himself and vindicate his innocence and that he not be deprived of his personal liberty until he has been found guilty by a court of competent jurisdiction" 29

Of the reasons given above for the principle of double jeopardy, perhaps only the second, the principle of finality appears to be more persuasive.

THE PRINCIPLE OF FINALITY

2.2 This is sometimes referred to as Res Judicata pro veritate accipitur (a thing adjudicated upon is received as the truth). This basically means that once a court has adjudicated a matter, the resulting judgment is decisive. As a brief summary, an acquittal or conviction is Res Judicata if it is final, in that all

the ordinary procedures have been exhausted. In Zambia this means that an acquittal in a trial is final as soon as the judge delivers the verdict and where provision is made for the prosecution right to appeal, an acquittal would only become Res Judicata when either the time affixed for appealing has elapsed or an appeal has been duly determined, the same principle will apply to convictions.

One author articulated the principle of finality as follows:

“*In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on; if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime.*”

From the above it is evident that the law tries to protect the defendant from repeated prosecutions thereby allowing the acquitted defendant to live in peace and not in fear of having to appear in court and go through the process again and again. It is felt that the principle protects the accused from having

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to go to trial again because of police incompetence for example or prosecution unpreparedness of the case. Ultimately there has been argument, even from the people interviewed that the prosecution and/or the police should not be allowed a second bite at the cherry, that is to say that, if a person has been duly acquitted because maybe of some technicalities in the investigative process or in the prosecution's handling of the case, the defendant should not have to pay for their incompetence at the first trial by being subjected to a second trial.

4.3 some lawyers interviewed argued that the present law should be retained, this is because having repeated trials would inevitably disadvantage the defendant by increasing the possibility of wrongful conviction, through things like adverse publicity especially if the case involves some controversial issues and also there is the issue of the tactical advantage gained by the prosecution by having listened to the defence at the first trial. These concerns can be summarized best by Hall and Kamisar who stated that there is an increasing likelihood that an innocent man may be convicted on repeated prosecutions because as they put it “it is said that on a fanciful hypothesis of an unlimited number of prosecutions the ultimate conviction of an innocent man approaches a mathematical certainty”
Although I do recognize the above concerns raised by learned counsels, I am of the view that reforms can be possible within the purposes that the principle of double jeopardy was created, in that most people seem to have a problem with putting the defendant in a state of continued fear and anxiety of never knowing when the prosecution might open up a case if the law were reformed or abolished altogether, this can be easily remedied by stating precise procedural safeguards and guidelines to be followed, for example stipulating a time frame on which the prosecution can re-open a case (this aspects will be discussed elaborately further in the next chapter).

4.4 The overall concern is that under our Criminal system the accused has a right of appeal albeit this is hedged by some restrictions, in such circumstances, if the accused succeeds there is almost always a retrial and some of these might end up being successful appeals from conviction- thus the argument posed by some learned counsels interviewed is that if the convicted accused can appeal his conviction, the symmetry argument may lead someone to presume that there might be an argument for giving the prosecution a right to appeal an acquittal on similar grounds.

The way the present law is drafted leads one to think that they are too absolute in favour of the defendant. The law seems to be concerned with the
violations of the defendant’s rights but what about the violations of the victim’s rights for example in murder cases or violent attacks including rape.

If we go back to Professor C. Anyangwe’s statement at Para 4.1 above where he said

"The law of criminal procedure strives to balance evenly the seemingly antagonistic interests of society and the individual". Evenly, was the word used there, society will inevitably be on the side of the victim, in that it will almost always have the victim’s interest at heart when addressing criminal issues, therefore by according an individual, lets say an acquitted or convicted individual so much rights as to deny justice to be done is a clear case of miscarriage of justice as the present law tips the scales of justice so unevenly in favour of the defendant.

Further when one is considering the implications of the Human Rights has on nay section of the law, it is important to add that Zambia is a signatory to several international laws, meaning that it is bound to apply those international instruments to its Laws at all times and as such it must ensure that its domestic practice is acquiescent31 with these obligations which it undertook to protect under those laws. For instance Zambia has to comply

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31 This basically means that the Laws of Zambia must be in line with the international instruments that it has signed to, for example with the ICCPR the Country must ensure that all its laws are compliant (agreeable) with those of the ICCPR and failure to do so would mean that a person in theory can bring an action citing non-compliance with International Law
with the International Covenant on Civil and Political Rights (ICCPR), in particular Article 14(7) that reads:

“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each Country”
CHAPTER 5- NEW EVIDENCE AND THE DOUBLE JEOPARDY

PRINCIPLE

In chapter four the human rights aspects of having the rule against double jeopardy was considered, in so far as explaining the underlying idea of the principle and argument for its retention. Notwithstanding the arguments put therein but having due regard to them, this chapter shall centre on the ideas for reform, and proposal therein. This chapter shall try to answer the following questions: “should there be an exception to the rule against double jeopardy? And if so “how can these rules be regulated and implemented?”

SHOULD THERE BE AN EXCEPTION TO THE RULE?

The key underlining aim of the Criminal Justice System is the conviction of the guilty and the principles underpinning the rule against double jeopardy as explained above are,

a) The interest in securing finality of some court decisions,
b) The prevention of wrongful conviction or acquittal,
c) The protection of citizens from harassment by the government of the day
Therefore if at all an exception has to be made a balance has to be struck between the public interest in convicting the guilty and the protection of the citizen from undue harassment from the government of the day. Therefore the pursuit of justice i.e. convicting the guilty must and should always outweigh the public interest in protecting citizens from harassment.

The advancement of forensic science, the development of DNA profiling which can analyse smaller and wider types of bodily fluids or materials, forensic fingerprinting is an important development in the Criminal law. Given Zambia is not so much technologically advanced as other countries are but it must be noted that there is a fingerprinting department at the police headquarters and that like other countries this system is computerised and therefore when there is a fingerprint taken at a crime scene this is imputed in the computer system and when there is a suspect, the suspects prints will be compared to the data on the computer and if there is a match the computer would indicate the match. An important aspect of the system is that all employees of government departments are required to have their fingerprints taken and therefore if there are fingerprints recovered at a crime scene, these prints are ran against the prints in the database and if there is no match that is when the suspect’s prints would be ran as they become available. It is therefore submitted that with such technological advancement it shall become a lot easier for the police investigators to gather information
that was not available at the time the crime was committed and it is proposed that such evidence as collected should be available even after acquittal.

The development of scientific test has produced in other countries like the United Kingdom and U.S.A a number of successful prosecutions where forensic techniques at the time of the crime could not have achieved the requisite level of proof. Example include the case of Anthony Diedrick: a Dr Joan Francisco was murdered in 1994, at first the victim’s colleague who had previously forged her signature and had been convicted of the same was the suspect, however the victim’s family felt that Anthony Diedrick was involved and brought civil proceedings successfully against him in 1998, this prompted the police to review their investigations which lead to the discovery of tiny blood spots on the t-shirt of the victim, spots that matched Anthony’s blood, this blood was not detected at the time of the crime in 1994.. Another case was that of John Taft: A Cynthia Bolshaw had been murdered in her bathtub and was famously known as the “beauty in the bath”. Mr Taft confessed to his ex-wife that he had visited the victim on the night of the murder in 1981, acting on that confession the police re-examined the clothing of the victim and matched a DNA sample from Taft with semen on a negligee of Cynthia Bolshaw. Both men in the cases were subsequently convicted, even though these cases don’t touch on double jeopardy, they were included herein to show
the effect of advancement in technology in solving unsolved crimes and also in amplifying the fact that in 1994 in Mr Anthony Diedrick's case there was no forensic analytical techniques which were effective enough to give a conclusive result or to even detect the small splatter of blood\textsuperscript{32}.

People spoken to had raised concerns with relying on DNA to mount a second trial of a suspect, they spoke of the timeframe and the likelihood of contamination of the sample taken from the suspect or the victim and there was fear that the law might end up convicting innocent people and thus go against what the Criminal Justice System aims to achieve. These concerns genuine as they are must not be the reasons to deny justice to be done by letting criminals get away without punishment because there might be fear among the Human rights fraternity of wrongful conviction.

Apart from DNA, there might be new evidence of great probity becoming available after an acquittal or conviction of a suspect, for example new witnesses who did not realise before the relevance of their testimony or who were intimidated previously into silence might later on give an account to the court. It is for the above reasons that it proposed that the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after the first trial.

New evidence has been defined as “evidence that was not available or known to an officer or prosecutor at or before the time of the acquittal”\textsuperscript{33}. Professor Ian Dennis put another aspect for allowing an exception where there is new evidence by saying “... we are used to the idea that new evidence of innocence, a previously unknown alibi witness for example, calls into question the legitimacy of a conviction. It suggests that a mistake has been made that calls for investigation and possible rectification. Similarly the emergence of significant new evidence of guilt calls into question the legitimacy of the acquittal. It suggests likewise that a mistake has been made, why should we not investigate and if necessary rectify the mistake, so as to lead to a re-trial? The Criminal Justice System exists to enforce the Criminal Law and the correct enforcement of the Criminal Law against those whom we have reason to believe may be guilty is a matter of state policy - the interests of justice seem therefore to call for a retrial in these circumstances....”\textsuperscript{34}

There is therefore a public interest policy in convicting the guilty and it therefore seems logical that when new compelling evidence\textsuperscript{35} becomes available a second trial should be allowed.

\textsuperscript{33} The Australian Government, The Attorney-General’s Department- Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals- November 2003 p19

\textsuperscript{34} Rethinking Double Jeopardy [2000] Crim LR 933, 945

\textsuperscript{35} Compelling evidence is evidence that is reliable, substantial and when considered in the context of outstanding issues, it is highly probable that the person is guilty of the offence
IN WHAT CASES WOULD THE EXCEPTION APPLY?

The proposals contained herein have in mind situations where the offence committed is so severe and since the double jeopardy rule is protected by the Constitution any abrogation is not allowed since Zambia is a Constitution Supremacy Country, meaning that the constitution of Zambia is the grudnorm\textsuperscript{36} and therefore all laws must comply with the constitution and failure to do so the said law or decision would be deemed unconstitutional and thus null and void ab initio. Therefore it would mean that the constitution would need to be amended so as to accommodate the exception incorporating the new evidence.

An acquittal which is sufficiently illegitimate damages the reputation of the Criminal Justice System, this is because there is usually a spectre of public disquiet, even revulsion when someone is acquitted of the most serious of crimes, such cases may undermine public confidence in the Criminal Justice System- a case in point is the O.J Simpson case in America which greatly divided the Country, there were a great number who believed that O.J Simpson was guilty of the murder of his wife and her lover in that he was seem on National Television running away from Police leaving the scene of the crime and he also did not have an alibi, on the other hand there were

\textsuperscript{36} From Kelsen’s Pure Theory of Law- this is the basic norm, it is a norm that gives all other acts their validity, cited in Doherty M. “Jurisprudence- The Philosophy of Law” 3\textsuperscript{rd} edition, Old Bailey Press p100
those that believed that he was being implicated as a black man in racist America for a crime he did not commit. O.J Simpson was acquitted due mainly to having one of the best defence lawyers in America Johnny Cochran defending him and also because the legal burden on the prosecution was not discharged- i.e. the case must be proved beyond reasonable doubt and Denning J made an attempt to define reasonable doubt when he stated in Miller v Minister of Pensions [1947] 2 ALL ER 372 as follows “it need not reach certainty but it must carry on a high degree of probability- proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible but not in the least probable”- the case is proved beyond reasonable doubt”. Therefore in O.J Simpson’s case the prosecution failed to discharge the doubt that the defence attorney had lodged and thus he was subsequently acquitted.

Despite the acquittal the victim’s families brought a civil suit against him, this suit was successful as the Court felt there was enough evidence to show to a balance of probability, which is the civil law standard of proof. This basically means that the standard of proof required is lower than that required in criminal cases and in such circumstances the Court must be
satisfied on a preponderance of probability that the respondent was guilty
or responsible for the offence in question.

Lord Denning gave a good example in Miller\textsuperscript{37} of what would satisfy the
legal burden in a civil case when he said "it must (evidence) carry a
reasonable degree of probability, but not so high as is required to
discharged a burden in a criminal case- if the evidence is such that the
Court can say "we think it more probable than not"- the burden is
discharged....". Therefore on the evidence the court in the O.J Simpson case
felt that he was involved in the murders and he was fined thirty-three
millions dollars ($ 33m) payable to the victim’s families. Despite the
outcome and the evidence adduced in the civil suit, due to the double
jeopardy rule O.J Simpson can never be tried again in a Criminal Court for
the murders\textsuperscript{38}. Although O.J has never publicly admitted the part he played
in the murders, he has continued reaping profits from the publicity
generated from the murders, for instance he is about to release a book
entitled "if I had done it, this is how I would have done it". Situations like
these should not be allowed to foster in any society as this undermines the
Criminal Justice System.

\textsuperscript{37}[1947] 2 ALL ER 372

\textsuperscript{38}Unless of course America changes the law and it applies retrospectively, but it is submitted
herein that given America’s deep rooted human rights system and a strong and tested
Constitution this is unlikely to happen.
INTERESTS OF JUSTICE

It was stated earlier that the Criminal Law Procedure strives to balance evenly the interests of the public and that of the individual and it is believed public interest demands that criminals be arrested, tried and punished but justice also demands that an accused person is given every opportunity to defend himself/herself and vindicate his/her innocence. Therefore even if new compelling evidence is available that in itself should not justify quashing an acquittal or a conviction and allowing a retrial, regard must be had to the interests of justice, that is to say the courts must consider and be satisfied that in all the circumstances of the case it is in the interests of justice to quash an acquittal or a conviction. A great number of respondents interviewed felt that if an exception of new compelling evidence were to be recognised some type of procedural safeguards need to be implemented and in short the statements made all come down to the following suggestions. Regard must be had to:

i) Whether it is likely that the new evidence could have been available at the first trial had the police investigated with due diligence

ii) Whether a fair trial is likely to be possible

iii) The time that has lapsed since the crime was committed
Learned colleagues were of the consensus that if these procedural safeguards were observed then an exception might be acceptable in limited circumstances and that if an application for example were made after such an introduction to the rule against double jeopardy and it did not address the concerns above then that application must and should be thrown out of court for abuse of court process, I concur with that view and shall in turn consider the safeguards individually to justify or support the court using its discretion in allowing the use of new evidence.

DUE DILIGENCE BY THE POLICE IN FIRST TRIAL INVESTIGATIONS

5.5 The Police in their investigations must carry these out with due diligence (Zambia Police Act Cap 107) so that all the evidence that is reasonably available can be processed, that way the Police would not be using a retrial as an excuse for sloppy investigative work. Those interviewed felt that even with such a requirement is imposed on the police of diligent work, it can not be guaranteed that the police will be disciplined in their investigations some even said that a person shall not be made to suffer a second trial because of police incompetence at the first trial. Jeremy Roberts put it eloquently when he said

"How realistic is it to suppose that the new existence of a due diligence restriction on the power to receive new evidence would make any significant

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39 Professor C. Anyangwe p51
difference to the efficiency and thoroughness with which the original investigation was carried out"\textsuperscript{40}

It is felt that the police would produce shoddy investigative work hoping that they would get a second chance if they did not succeed the first time round. However the majority of policepersons interviewed did not see this as a true reflection of their work. The Zambia Police is constrained due to a number of things inter alia due to poor resources both material and monetary and any inconsistence in their work is not due to lack of trying or commitment on their part that the evidence required, might not be found as it is required and moreover when asked how they would feel if they were given a second try at finding evidence for a new and second trial, though most recognised the human implications of subjecting a suspect to a second trial, others felt that if new and compelling evidence which could not be reasonably found at the first trial is made available or is found however method is used, that evidence should be used especially if it implicates the suspect in a significant manner, this is because the interest of justice requires that the guilty be prosecuted and held liable for their crimes to society.

\textsuperscript{40} "Double Jeopardy First Principles and the Criminal Justice Deal: a commentary on the Law Commission's Proposal", (2001) 64 MLR
Further police officers are required by law to conduct their investigations with diligence anyway. The relevant section in the *Zambia Police Act Cap 107, Vol. 8 of the Laws of Zambia*, stipulates by virtue of s.30 (1) that:

“A police officer below the rank of Assistant Superintend-ent commits an offence against discipline if he is guilty of...”

(c) *Neglect of duty that is to say, if he...*

(i) Neglects or without good and sufficient cause omits promptly and diligently to attend to or carry out anything which it is his/her duty as a police officer to attend to or carry

(viii) Fails to report anything which he knows concerning a criminal charge or fails to disclose any evidence which he or any person within his knowledge, can give for or against any prisoner or defendant to a criminal charge

(ix)

(x) Without reasonable cause omits to make any necessary entry in any official document, book or paper.

Therefore even if the exception were introduced and some police officers conducted their investigations at the first trial incompetently hoping to get another chance at the second trial these officers would be cited for
disciplinary action in that they were discharging their duties incompetently which would be contrary to the law, s. 30(2) which provides that “an offence against discipline under this section may be inquired of, tried and determined and the offender shall be liable to suffer punishment, according to the degree and nature of the offence, in accordance with the provisions of this Act”.

There has been concerns by interviewees that the principle of finality would be undermined if the acquitted person lived in fear of re-prosecution and this would greatly impact on his enjoyment of definition of the good life and also that it would defeat the principle further if after lets say 10 years of acquittal the person was subjected to a re-trial, this concern shall be addressed in the recommendation herein under.

**CONCLUSION**

This research has centred on the autrefois acquit and convict principle also known as the double jeopardy rule- it has been suggested that the principle is out-dated and should be reformed to conform to the 21st century society especially in light of all the forensic advancements that is currently available that was not available or even foreseeable at the time the principle was thought of centuries ago.

From this research it is possible to draw some conclusions from several interviews conducted and from the literature consulted, it can be for instance said with some conviction that the Law of Double Jeopardy (Autefois Acquit
and Autrefois Convict) is intricate and complex in detail and in the Zambian scenario difficult to find information relating to the same. Unlike other countries where there are many cases and considerable debate on double jeopardy, Zambia does not have many cases that deal with the issue and those that do, do not dwell so much on the debate of whether the plea should be available in these modern times or the implications of having such a principle but rather on whether the plea is appropriate in the circumstances at hand\textsuperscript{41} - such a scenario posed a stumbling block for the author in this research, however I relented because the underlining purpose of this research was to bring the subject out in the open and generally open for debate since no other students have attempted to look at this principle. Further a short survey of the law students indicated that half did not remember the principle from their Criminal Law Module and those that did, took it at face value and did not give much thought at the flipside, being that, though it be recommendable not to put a defendant in peril twice for the same offence, it is equally, if not more of a miscarriage of justice not to give the victims or their families justice - justice here is taken to mean, equal treatment for all the citizens. It is submitted that this old doctrine does not give equal treatment because at close scrutiny it is apparent that the defendant for some reason is accorded more rights than the victims - without sounding like a "rebel for no cause", I would like to advance that the author is from a new school of thought that regards the rights of the victims as a dominant right as

\textsuperscript{41} Refer to appendix 1
compared to that of the defendant, this is because it can be argued that by committing a crime, the defendant has waived his rights, I do acknowledge that under both the Common Law and our Constitution the presumption of innocence is an important right, it is not suggested that an abrogation from this principle should be allowed, to the contrary and further a balancing of interests is what is desirable, so that the scales of justice do not tip so unevenly in favour of the defendant as is the case presently.

The danger of lack of awareness on this subject is that most people do not realise the consequences of having such an all embracing principle and unlike other Countries like the United Kingdom and the Stephen Lawrence case and the USA and the O.J Simpson case, Zambia has not seen any controversial cases which have raised the plea or brought the plea out in the public for debate, probably this would explain the lack of knowledge by most people law students alike. The inherent danger with the present non-interest is that there might be a great number of un-represented defendants who might be convicted without raising the plea because they did not realise that such a plea was available to them. I do acknowledge that a great amount of time has been spent in this research discussing the double jeopardy rule in regards to acquittals and possible re-prosecutions but I am alive to the fact that it just as great a miscarriage of justice\textsuperscript{42} to deny a convicted accuse a chance to

\textsuperscript{42} Miscarriage of justice is taken to mean a failure of justice, meaning that justice fails if "the conviction by the trial court is wrong or if an error or omission in the court may reasonably be considered to have brought about the conviction or if there was material irregularity in the course of the trial or if the judgment of the trial is wrong on a point of law"
question his conviction. What this means is that a convicted person might be protesting his innocence i.e he might have new evidence to vindicate himself but his conviction might be final after exhausting all judicial appeals available under the law - the Supreme Court has jurisdiction to dismiss an appeal by the convicted accused where it considers that no miscarriage of justice has occurred (s 15 (1) of the Supreme Court Act) therefore once there has been a dismissal, the Supreme Court being the highest court in the Country there can not be another appeal for the convicted accused, thus the fact that the defendant can not have “another” trial is equally a miscarriage of justice as not re-prosecuting an acquitted person where new reliable evidence is available.

RECOMMENDATIONS

It has been thus recommended that,

1) Where there is new and compelling evidence that was not reasonably available at the first trial, then an exception should be made available so that a second trial can be open that way justice can be done - it is hereby recommended that there should be an exception to the double jeopardy rule where there is new reliable, substantial evidence which appears to resolve the disputed issues at the first trial and supports
the assertion or the conclusion that the acquitted accused is guilty of
the offence in question.

2) It is further recommended that the exception should only apply in
very limited and serious qualifying offence. Serious offences would be
taken to mean murder, manslaughter, sexual offences like rape,
defilement, incest and violent dishonesty offences such as aggravated
robbery etc. These qualifying offences obviously have been proposed in
that they are serious and that there is a legitimate public interest
policy in overriding the rule against double jeopardy in these cases.

3) That the DPP should be the only one with the power to instigate
investigations when he/she is satisfied that the new evidence is
compelling and it implicates the accused in a substantial manner. To
ensure a fair trial, it is proposed that the Director of Public
Prosecutions (DPP) would be the only one with the powers to instigate
investigations and re-trials to be permitted or allowed only after he has
consented to the same. It is proposed that this would be in line with his
powers under the Constitution by virtue of Art 56.

For instance Art 56 (3) provides that “the DPP shall have power in any
case which he considers it desirable so to do (a) to institute and
undertake criminal proceedings against any person before any Court,
other than a Court-Martial, in respect of any offence alleged to have been committed by that person”

It is therefore suggested that since the DPP is an independent organ this would ensure that only those cases which are in the public interest are pursued and it would also serve as a procedural safeguard—therefore it is proposed that the DPP alone be vested with the power to decide whether the new evidence is compelling and makes it highly probable that the defendant is guilty, strictly speaking no investigations would be undertaken unless the DPP allows and further he/she must consent only if sufficient new evidence is available to warrant the investigation. It is submitted that these safeguards would ensure that re-trials are fair and not vexatious and that the police do not use the allowed exception as outlined herein to make up for their incompetence as the DPP would be an overall overseer that the process was only allowed in the interest of the public.

It is further argued that since by Art 56 © the DPP has powers to enter a nolle prosequi i.e “to discontinue, at any stage before judgment is delivered, any criminal proceedings, instituted or undertaken by himself or any other person or authority” arguedo he should equally have the power in very limited circumstances of course to take up criminal proceedings after judgment is delivered and that these powers should vest in him exclusively. The author acknowledges that this
seems to give the DPP an all embracing power and this might lead to abuse and other potential problems, however it is submitted that the DPP must take reasonable care in his discharge of his duties and any derogations or abuse of power and/or office would mean that he would be dealt with by the relevant code of conduct and Law, thus the concern though genuine is without merit.

4) That the prosecution would only have one more chance to prosecute the accused, that way some form of finality can be achieved and so that the person acquitted can live a peaceful life without interference from the state. Also it is recommended that a time limit can be imposed on the exception to the double jeopardy principle, for instance a limitation of five years after acquittal could be permitted.

5) It is further recommended that the Court empowered to quash acquittals or convictions should be the Supreme Court, and thus since the Supreme Court is the Highest Ranking Court in Zambia there can never be another appeal.

6) Finally it is recommended that the Constitution, the Criminal Procedure Code and the Penal Code have to be amended to
accommodate the new changes, which the author feels are absolutely necessary in a modern society.
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SHAMABANSE v THE PEOPLE (1972) Z.R. 151 (H.C.)

HIGH COURT
SCOTT, J.
6TH APRIL, 1972
(CRIMINAL APPEAL NO. 90 OF 1971)

Flynote

Criminal Procedure - Plea of autrefois acquit - When Plea can be a pleaded.

Headnote

The first and second accused were originally jointly charged with theft of money but were found guilty of obtaining money by false pretences. The learned trial magistrate held at the close of the prosecution evidence that the first and the second accused were 'not guilty of theft' and accordingly held that 'both [were] acquitted of the charge', i.e. theft.

The third accused was found guilty of being an accessory after the fact. All three appealed on the following two grounds: (1) that the plea of autrefois acquit made before the accused were called upon for their defence to the substituted offence of obtaining money by false pretences should have been upheld; (2) that the evidence did not justify the subsequent convictions.

Held:

(i) The plea of autrefois acquit could not be successfully raised because s. 20 (5) of the Constitution referred to person being tried again for an offence and s. 128 of the Criminal Procedure Code also provided that a person cannot be tried again; in the present case there were only one set of proceedings and only one trial ... The accused were not being tried again.

(ii) Subordinate court magistrates are creatures of statute and they must exercise their jurisdiction so far as regards criminal procedure, in the manner provided by the Criminal Procedure Code whenever it contains a relevant provision.

(iii) The magistrate was neither required nor permitted to acquit the first and second accused of the charge of theft, but since the learned trial magistrate had expressly acquitted them he was to be deemed to have done so under s. 189 of the Criminal Procedure Code.

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(iv) Having acquitted the first and second accused on the charge of theft he had no case left before him on which to substitute an offence under s. 192 of the Criminal Procedure Code.

(v) All that the magistrate had to do was to inform the two accused persons that there were facts before the Court which warranted an invisible alternative verdict. The Court could then have simply convicted the first and second accused of the alternative offence although they were not charged with it without acquitting them of the original charge.

(vi) The convictions and sentences on the first and the second accused had therefore to be set aside and their acquittals maintained. It followed that the conviction and sentence on the third accused had also to be set aside and an acquittal entered.

(vii) In a case such as this the prosecution of the accessory should await the outcome of the charge against the principal offenders, lest there be a finding on an invisible alternative.

Cases cited:

Legislation referred to:
Constitution of Zambia, s. 20 (5).
Subordinate Court Ordinance, Cap. 4., s. 13.
Criminal Procedure Code, ss.3 (1), 128, 158 (3), 174 (2), 187, 190, 192.
Penal Code, ss. 243, 278.

For the first appellant: E.J. Shamwana, of Shamwarm and Co.
For the second and third appellants: P.Banda of Lisulo and Co.
For the respondent: G. Ghigaga, Director of Public Prosecutions.

Judgment

SCOTT, J.: This is an appeal from the Subordinate Court of the First Class for the Lusaka District. The first and second accused were originally and jointly charged with the theft of K24,000, the property of the Southern Province African Farming Improvement Fund, but were found guilty of obtaining this money by falsely pretending that Michael Minyoi Kalaluka had applied for a loan in that sum when in fact he had not.

The third accused was found guilty of being an accessory after the fact in that he knew that the second accused had obtained this money by false pretences and assisted him in
order to enable him to escape punishment by stating that he, the third accused, had
applied for and obtained a loan of K24,000, when in fact he had not applied for and
obtained this sum.

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At the close of the prosecution case the learned senior resident magistrate said 'I find that
both Shamabanse and Sipalo are not guilty of theft contrary to s. 243 of the Penal Code
but I find that there is sufficient evidence to place them on their defence on another
charge. Accordingly both are acquitted of the charge as it stands but in terms of s.174 (2)
of the Criminal Procedure Code I am putting them on their defence on the charge of
obtaining money by false pretences contrary to s. 278 of the Penal Code.'

He then substituted the offence of obtaining by false pretences in place of the original
offence of theft on count 1, and made consequential amendments to count 2.

There are two grounds of appeal -

(1) that the plea of autrefois acquit made before the accused were called upon for
their defence should have been upheld;
(2) that the evidence did not justify the subsequent connections.

I am obliged to learned counsel for the appellants and to the learned Director of Public
Prosecutions for their respective arguments which I have carefully considered.

I shall say at once that the plea of autrefois acquit is not of valid application to the
circumstances of this case, because both on the authorities and under our law it is
envisaged that there have been previous and earlier proceedings followed by later
proceedings at which the plea has been or can be raised. Section (5) of the Constitution
refers to a person again being tried for an offence and s.128 of the Criminal Procedure
Code also speaks of a person not being liable to be tried again on the same facts for the
same offence. In the instant case there was only one set of proceedings, one trial: the
accused were not being tried again, but were purportedly being called upon for their
defence, in the case of the first and second accused, to an offence of which they could be
convicted though not charged therewith.

However, what the learned magistrate did raises another and fundamental issue.
Subordinate court magistrates are creatures of statute and their jurisdiction must be
exercised, so far as regards criminal procedure, in the manner provided by the Criminal
Procedure Code, whenever that Code has made provision appropriate to the
circumstances. (Subordinate Courts Ordinance, Cap. 4, s.13) and all offences under the
Penal Code shall be inquired into, tried and otherwise dealt with according to the
provisions in the Criminal Procedure Code (C.P.C., s. 3 (1)). Now, under s.158 (3) of the
Criminal Procedure Code, in the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty. A judgment can be at the end of the prosecution evidence, without calling on the defence, and under s.189 there must be not only an acquittal but a dismissal of the case. If the charge against an accused person consists of only one count and at the end of the prosecution he is acquitted on that count then the whole case is dismissed and there is nothing left. The magistrate has ceased to

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be seized of the matter. If there were more than one count he could of course continue on the other courts but Somerhough, Acting Chief Justice, in R v Mungala and Musaka [1] disapproved of alternative counts in such a case as this because it was unnecessary, and could be embarrassing to an appeal court as an acquittal would have had to have been entered on one of the alternative counts and the appellate court could not substitute an alternative verdict. He pointed out that a full compliance with s. 187 of the Criminal Procedure Code should inform an accused of the alternatives upon which he may be found guilty. I prefer this approach to cases where there are invisible alternatives rather than that suggested in R v Secundo Mancinell [2], for the simple reason that the Criminal Procedure Code does not require any dismissal of the case, or discharge or acquittal of the accused in cases falling within s. 174 of the Criminal Procedure Code. All the magistrate should do, when requiring an accused to make his defence under s.190 of the Criminal Procedure Code and explaining again to him the substance of the charge, is to inform him, if the facts seem to warrant it, that there is an invisible possible alternative verdict.

The whole purpose of the provisions of s.174, and other sections providing for alternative verdicts, is to obviate any need for alternative counts or the substitution of different counts in the cases or circumstances stipulated. The Director of Public Prosecution said 'even if the Court had proceeded to judgment on the offence of theft it was still bound to acquit the accused of theft and convict him of obtaining by false pretences'. This is not so. The section does not say so. The court simply convicts him of the alternative offence, although he was not charged with it. The Director of Public Prosecution argues that the magistrate did not stop at the acquittal on the original charge nor did he terminate the proceedings, but merely drew the attention of the appellants to the existence of an alternative charge. I cannot accede to this argument. The magistrate was bound by the Procedure Code and as he did acquit the first and second accused on the charge of theft he had no case left before him o which to make any amendment or substitution under s.192 of the Criminal Procedure Code, or indeed do anything else. The law did not either require or permit an acquittal in the circumstances but as this course was taken the power to acquit at that stage could only have been under s.189 despite the magistrate's reservations. The fact that an acquittal was announced cannot simply be
ignored. It did terminate the proceedings on the only count on which the first and second accused had been charged, although this was not the intention of the magistrate.

On the merits of the case itself I am constrained to point out that the magistrate did not say in his judgment what the false pretences were, which he said he was satisfied were made, and in particular did not direct his mind to the vital question whether such false pretence, assuming it to have been as contained in the substituted count 1, so operated on the minds of Lundwe and Quinton as to cause them to part with the cheque. These persons were civil servants with responsibilities to the Board. No pretence was practised on the Board before the cheque was issued, and from their records they must have known whether or not Kalaluka had applied

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for a loan. It seems to me that these two just did as they were told by the Minister of State - they acted on his instructions - and they did not concern themselves with whether there had been an application. I feel this was particularly so because loans were issued in the name of Clark 13 enkele who knew nothing about it, to Lundwe, and even to Quinton (seemingly) for K24,000. These were not deserving; farmers in Southern Province. As Quinton said 'We typed out loan agreements in duplicate for every name on the list' (page 58 of the record). The magistrate, had he considered these various points and their implication, might have concluded it was a case of theft after all, a conversion of money belonging to the Fund.

For those reasons I allow the appeals - the convictions and sentences on the first and second accused must be set aside, and their acquittals maintained. It follows that the conviction and sentence on the third accused must also be set aside and an acquittal entered. In a case such as this the prosecution of the accessory should await the outcome of the charge against the principal offenders, lest there be a finding on an invisible alternative.

Appeal allowed