HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

THE QUEEN APPLICANT

AND

RAYMOND JOHN CARROLL RESPONDENT

The Queen v Carroll
[2002] HCA 55
5 December 2002
B82/2001

ORDER

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and dismissed.

On appeal from the Supreme Court of Queensland

Representation:

M J Byrne QC for the applicant (instructed by the Director of Public Prosecutions (Queensland))

M J Griffin SC with P J Davis for the respondent (instructed by Legal Aid Office (Queensland))

CATCHWORDS

The Queen v Carroll

Criminal law – Perjury – Accused at murder trial denies in evidence that he killed the deceased – Accused acquitted of murder and subsequently indicted for perjury in relation to sworn statement – Whether perjury charge undermined accused's acquittal of earlier charge of murder – Whether perjury charge infringed common law rule against "double jeopardy".

Criminal law – Double jeopardy – Res judicata – Issue estoppel – Autrefois acquit – Preclusion.

Practice and procedure – Power of court to stay indictments for abuse of process – Whether perjury indictment should have been stayed as an abuse of process.

Criminal Code (Q), ss 17, 123, 584, 592A, 598, 602, 631.
Evidence Act 1977 (Q), s 8.

Words and phrases – "Double jeopardy".

1 GLEESON CJ AND HAYNE J. In 1985, the respondent gave evidence on oath, at his trial for the murder of Deidre Maree Kennedy, denying that he had killed her. Despite his denial, the jury returned a verdict of guilty. On appeal, the Court of Criminal Appeal of Queensland concluded that, on the evidence led at trial, it was not open to a properly instructed jury to conclude beyond reasonable doubt that the respondent was guilty. Accordingly, the Court ordered that the conviction be quashed and directed that a verdict of acquittal be entered[1].

2 More than 14 years after the respondent's trial for murder, he was indicted for perjury[2]. He was charged that "in a judicial proceeding [namely, his trial for murder, he] knowingly gave false testimony to the effect that he … did not kill … Deidre Kennedy, and the false testimony touched a matter which was material to a question then depending in [his trial for murder]". On his trial for perjury, the jury returned a verdict of guilty. On appeal to the Court of Appeal of Queensland, that Court concluded that the trial should have been stayed as an abuse of process and that, in any event, the verdict returned by the jury was unsafe and unsatisfactory[3]. The Court ordered that the respondent's conviction for perjury be quashed and a verdict of acquittal be entered.

3 The prosecution seeks special leave to appeal from those orders, seeking to contend that, contrary to the conclusion of the Court of Appeal, the trial for perjury should not have been stayed as an abuse of process and the verdict returned by the jury was not unsafe or unsatisfactory. Argument of the application for special leave was confined, in the first instance, to argument of the issue whether the respondent could or should have been prosecuted or tried for perjury.

4 After the indictment for perjury had been presented against the respondent, but before he was arraigned, he made application under s 592A of the *Criminal Code* (Q) ("the Code") seeking, among other things, a direction or ruling in relation to the quashing or staying of the indictment[4]. The primary judge (Muir J) recorded[5] the respondent's submission in this respect as being that

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1 *Carroll* (1985) 19 A Crim R 410.

2 *Criminal Code* (Q), s 123.

3 *R v Carroll* [2001] QCA 394 at [72].

4 Section 592A provides for applications for a direction or ruling to be made "[i]f the Crown has presented an indictment" and thus, for applications before a plea is made. One of the subject matters of an application is "the quashing or staying of the indictment".

5 *Carroll* (2000) 115 A Crim R 164 at 166 [10].

"where an accused person was acquitted of a criminal charge, the principles of res judicata or autrefois acquit prevented that person from being tried again in respect of the facts which constituted the offence [and that] [t]he offence of perjury … did not provide an exception to this rule, except where the accused person's evidence secured or may have secured the acquittal." The primary judge concluded that[6] the doctrines of autrefois acquit and res judicata did not prevent the bringing of the perjury charge laid against the respondent and that[7] the trial should not be stayed.

5 The respondent pleaded not guilty, stood his trial, and the jury returned a verdict of guilty of perjury. The respondent was not arraigned, and therefore was not called on to plead, until after the primary judge had ruled that the doctrines of autrefois acquit and res judicata did not prevent the bringing of the perjury charge against the respondent. The only plea the respondent made was, therefore, a plea of not guilty; he did not enter a plea in bar and did not demur to the indictment.

6 Under the Code the respondent had no available plea in bar to the indictment for perjury and, as we have said, he made no plea other than a plea of not guilty. Rather, the question was treated in the Court of Appeal, and in the application to this Court, as being whether there were grounds for the exercise of a discretion to stay his trial on the charge of perjury, as an abuse of process. This was said to depend upon a principle that the acquittal for murder was incontrovertible. The similarity of the evidence to be called and the factual inquiry to be made on the trial of the indictment for perjury to the evidence called and factual inquiry made on his trial for murder was said to reveal that the trial of the charge of perjury would controvert the acquittal for murder.

Autrefois acquit

7 It is, nonetheless, desirable to begin consideration of the present issue by considering the provisions of the Code relevant to a plea of autrefois acquit. Sections 17, 584, 598, 602 and 631 must all be considered in identifying the scope that the Code gives to autrefois acquit as a plea in bar. It is important to identify the field of operation of those provisions because autrefois acquit is a defence to a charge[8], is a matter which must be determined before trial of the

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6 (2000) 115 A Crim R 164 at 169-170 [26].

7 (2000) 115 A Crim R 164 at 170 [27].

8 s 17.

issues that are joined on a plea of not guilty to an indictment[9], and tenders an issue for decision which does not call for any exercise of discretion. Either the plea in bar is made out, in which case the person indicted has a complete defence to the charge, or the plea in bar is not made out, in which case the person indicted may either contest the matter by entering a plea of not guilty or may formally admit it by entering a plea of guilty. It is only at this stage that any question of exercising a discretion to stay the proceedings would arise.

8 Section 17 of the Code provides:

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

This section, which appears in Ch III of the Code, entitled "Application of Criminal Law", must be read in light of the provisions of s 16 that:

> "A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission."

These two provisions, taken together, can be understood as giving effect to at least some aspects of the rules commonly encompassed by the expression "double jeopardy".

9 The expression "double jeopardy" can give rise to difficulty if the sense in which it is being used is not made clear. As was pointed out in *Pearce v The Queen*[10]:

> "The expression 'double jeopardy' is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of autrefois

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9 ss 602, 631.

10 (1998) 194 CLR 610 at 614 [9].

> acquit and autrefois convict; sometimes it is used to encompass what is said to be a wider principle that no one should be 'punished again for the same matter'[11]. Further, 'double jeopardy' is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment."

As was also pointed out in *Pearce*[12], because double jeopardy is an expression used in connection with several different stages of the process of criminal justice and because there are other (sometimes competing) forces at work in the area, the treatment of double jeopardy has not always been clearly based on identified principles. As the criminal law has become more complex, it has become even more important to examine those principles upon which the disparate principles encompassed by the expression double jeopardy are based if it is said that one or more of those principles is engaged in a particular case.

10 Sections 16 and 17 of the Code are drawn in terms more apt to deal with less complicated cases of possible intersection between offences than sometimes are now encountered. The complexity of criminal legislation, and the problems of double jeopardy to which it can give rise, are sufficiently exemplified by reference to various forms of statutory drug offences in which, for example, there may be separate offences of possessing prohibited drugs and supplying prohibited drugs, but the offence of supplying prohibited drugs can be constituted by having goods in possession for the purpose of supply[13]. The provisions of s 17 of the Code do not readily lend themselves to circumstances in which, for example, a person is acquitted of the offence of supplying drugs (where the allegation was that the offender had drugs in possession with intent to supply) and is then charged with possession of the drugs.

11 Section 17, in terms, deals with two kinds of case. First, where an accused has been tried on an indictment on which the accused might have been convicted of the offence later charged, the accused will have a defence to that later charge. Chapter 61 of the Code (ss 575-589) identifies the alternative offences of which an accused may be convicted upon an indictment. The second kind of case with which s 17 deals may be seen as the converse of the first: where the *second* indictment preferred against an accused is such that, on *that* indictment, the accused might be convicted of an offence of which he or she has already been acquitted or convicted.

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11 *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381 per Blackburn J.

12 (1998) 194 CLR 610 at 615 [14].

13 *Dodd & Dodd* (1991) 56 A Crim R 451; cf *EPA v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502.

12 Neither limb of s 17 had application in the present case. On the respondent's trial for murder, perjury was not a verdict open to the jury. On his trial for perjury, murder was not a verdict open to the jury.

13 Section 598 of the Code prescribes what is to be done if the accused person does not apply to quash the indictment or move for a separate trial of one or more counts on it. The accused "must either plead to [the indictment], or demur to it on the ground that it does not disclose any offence cognisable by the court"[14]. Seven forms of plea are specified. The section provides that two or more pleas may be pleaded together except that the plea of guilty may not be pleaded with any other plea to the same charge[15]. Of the seven forms of plea for which s 598(2) provides, only those provided in pars (d) and (e), to the extent that each is premised upon an earlier acquittal, need be considered.

14 For the same reason that s 17 had no application in this matter, s 598(2)(d) of the Code could not have been engaged. It provides that one of the pleas available to an accused is that: "the person has already been acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment of an offence of which the person might be convicted upon the indictment". As has already been pointed out, on the respondent's trial for murder, perjury was not an available verdict and murder was not a verdict available on his trial for perjury.

15 Section 598(2)(e) provides that one of the pleas available to an accused person is: "that the person has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person cannot under the provisions of this Code be tried for the offence charged in the indictment". The juxtaposition of this provision with s 598(2)(d) reveals that s 17 of the Code is not to be understood as describing exhaustively the circumstances in which a plea in bar is available. Such a plea may also be made if the accused, having already been tried and convicted or acquitted of one offence, "committed or alleged to be committed *under such circumstances* that the person cannot *under the provisions of this Code* be tried" for the offence charged in the later indictment.

16 It may be that s 598(2)(e) has operation only in cases where s 16 of the Code applies. That is, it may be that (unless the exception for cases where death is caused by the act or omission in question applies) s 598(2)(e) is engaged only

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14 s 598(1).

15 s 598(3).

where the accused would be twice punished for the same act or omission. That is not this case and the contrary was not suggested. No doubt this was because the acts which founded the charge of murder differed markedly from the act of allegedly false swearing which founded the charge of perjury.

17 Whether or not s 598(2)(e) is to be read as confined in its operation to cases to which s 16 applies, not only is it plain that s 16 was not engaged in this case, no other provision of the Code was suggested to provide that the murder with which the respondent had been charged was committed, or was alleged to be committed, under such circumstances that he could not under the provisions of the Code later be tried for perjury.

18 That being so, neither par (d) nor (e) of s 598(2) applied and the respondent had no plea in bar available under the Code.

19 As has been pointed out earlier, although the respondent's submissions to the primary judge were cast in terms apt to invoke a plea in bar ("principles of res judicata or autrefois acquit") the argument in the Court of Appeal, and in this Court, proceeded as if there had been an application for the exercise of a discretion to stay the proceeding as an abuse of process. The conclusion that there was no available plea in bar focuses attention upon why, that being so, the trial of the perjury charges should be stayed. What is it that constitutes the alleged abuse of process?

20 The answer proffered by the respondent to these questions is that having been acquitted of murder he should not now face a charge that he lied on oath when he denied killing Deidre Kennedy. The effect of trying him for the alleged perjury is, so it was submitted, to try again the issue which was central to his trial for murder and to controvert the verdict of acquittal entered after the trial and appeal. To understand the basis for the respondent's contention that the Court of Appeal is not shown to have erred in concluding that the trial for perjury should be stayed, it is necessary to refer to some fundamental considerations.

Some fundamental underpinnings of the criminal law

21 A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept "that it is better that ten guilty

persons escape, than that one innocent suffer"[16] may find its roots in these considerations.

22 Many aspects of the rules which are lumped together under the title "double jeopardy" find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double jeopardy in the case of acquittals procured by perjury or perversion of the course of justice[17], the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important. The Commission quoted what was said by Lord Wilberforce in *The Ampthill Peerage*[18]:

> "Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality."

23 It is, nonetheless, important to recall that the four considerations which we have mentioned (the imbalance of power between prosecution and accused, seriousness for an accused of conviction, prosecution as an instrument of tyranny and the importance of finality) are not the only considerations which find reflection in the criminal law system. At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.

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16 Blackstone, *Commentaries*, (1769) (1966 reprint), bk 4, c 27 at 352.

17 Law Commission, *Acquittal Following Perversion of the Course of Justice*, Rep 70, March 2001.

18 [1977] AC 547 at 569.

24 Reference to the general propositions we have mentioned is important not because the answer to the issues now being considered can be found by deductive reasoning which takes any or all of them as a premise but because they are values to which the criminal law can be seen to give effect. They are values that may pull in different directions. There are, therefore, cases in which a balance must be struck between them. To take only one obvious example, it is accepted that in order to acquit the innocent, some who are guilty will go unpunished. But conversely, to punish the guilty, some who are innocent will suffer the very real detriments of being charged and tried for an offence they did not commit. It follows that to argue from any one of the considerations we have identified to some rule of universal application is to invite error.

25 Until very recently it has been accepted as a basal tenet of the law that no person who has been acquitted of an offence should be required to stand trial again for the *same* offence[19]. That is not what was done in the present case. The respondent, having been acquitted of the charge of murder, was not indicted again on that charge. Nonetheless, some, but not all, of the facts which it would be necessary to prove to establish the charge of perjury brought against the respondent were facts which, together with other facts, constituted the elements of the offence of murder of which he had been acquitted. Common to both charges was the prosecution's allegation that the respondent had killed Deidre Kennedy. To establish the charge of murder other facts (particularly the intention with which the killing occurred) had to be established and those other facts were not at issue at the perjury trial. On the perjury trial the prosecution had to demonstrate that the respondent had given sworn evidence that he did not kill Deidre Kennedy and, of course, that formed no part of the proofs the prosecution had to make on the murder trial. What the prosecution had to prove at each trial was, therefore, not identical.

26 Nonetheless, the factual inquiries made at the two trials, in the end, came to focus upon the same issue – did the respondent kill Deidre Kennedy? At his trial for murder, the issue which was fought was whether it was the respondent who had killed her. The trial was conducted on the footing that there had been a murder. On his trial for perjury there appears to have been no controversy about the fact that the respondent had sworn that he had not killed Deidre Kennedy; again, the focus of factual inquiry was, did he kill her? In the course of argument in the Court of Appeal the prosecutor expressly acknowledged that the perjury case was conducted, in practical effect, as a re-trial for murder.

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19 Legislative inroads on that principle have been proposed in the United Kingdom. See United Kingdom, Law Commission, *Double Jeopardy and Prosecution Appeals*, (2001) Cm 5048.

27 The trend of authority in other common law jurisdictions may appear to favour the conclusion that a prosecution for perjury may proceed where the perjury alleged is that in a previous criminal trial the accused swore that he or she was not guilty of the offence then charged against him or her[20]. Certainly there are statements to be found in those cases which would support that view.

28 What principle or principles are engaged in such cases? It is necessary to begin consideration of them by recognising that they consider two fundamentally different issues. In many cases[21] the question has been whether evidence of what are alleged to be the accused's earlier crimes (for which the accused has stood trial and of which he or she has been acquitted) may be led as similar fact evidence in a later trial for a different offence. There the issue is not whether there can be a trial of the charge preferred in the later indictment but what evidence may be led in proof of that charge. Of the cases we have mentioned, it is only in *H M Advocate v Cairns*[22], *R v Humphrys*[23], *R v Moore*[24] and *Grdic v The Queen*[25] that the issues presented by a subsequent charge of perjury or perverting the course of justice have been considered directly.

Issue estoppel and preclusion

29 Discussion of the issues which arise has often proceeded by reference to principles of preclusion. Indeed, in *Grdic* the issue was framed in those terms. It was said[26] that the issue was "the availability of the defence of issue estoppel *per rem judicatam* on a charge of perjury". Framing the issue in terms of preclusion

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20 *H M Advocate v Cairns* 1967 SLT 165; *Grdic v The Queen* [1985] 1 SCR 810; *R v Humphrys* [1977] AC 1. See also *R v Z* [2000] 2 AC 483; *R v Arp* [1998] 3 SCR 339; *R v Moore* [1999] 3 NZLR 385; *R v Degnan* [2001] 1 NZLR 280; *Dowling v United States* 493 US 342 (1989).

21 *R v Z* [2000] 2 AC 483; *R v Degnan* [2001] 1 NZLR 280; *Dowling v United States* 493 US 342 (1989).

22 1967 SLT 165.

23 [1977] AC 1.

24 [1999] 3 NZLR 385.

25 [1985] 1 SCR 810.

26 [1985] 1 SCR 810 at 822 per Lamer J, delivering the judgment of Estey, McIntyre, Lamer, Le Dain and La Forest JJ.

has led to consideration of the applicability of exceptions to rules of preclusion in cases where judgment has been obtained by fraud[27]: "an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice"[28].

30 Analysing the issues in this way presents no little difficulty. As Gummow J pointed out in *Pearce*[29], a starting point for a doctrinal consideration of the pleas of autrefois acquit and autrefois convict is recognition of the distinction between those pleas referred to by Spencer Bower, Turner and Handley in *The Doctrine of Res Judicata*[30]. Autrefois acquit is a species of estoppel by which the prosecution is precluded from reasserting the guilt of an accused when that question has previously been determined against it, whereas autrefois convict is the application to criminal proceedings of the maxim *transit in rem judicatam* and is akin to merger.

31 Although often seen as different sides of the same coin, as Deane and Gaudron JJ pointed out in *Rogers v The Queen*[31], autrefois acquit and autrefois convict reflect quite different considerations. Indeed, that must be so when it is recalled that a jury's finding of guilt depends upon the jury being satisfied beyond reasonable doubt that all elements of the charged offence have been proved, whereas the jury that entertains a reasonable doubt about any one of the elements of the offence is bound to acquit. Seldom, if ever, therefore, can a verdict of acquittal be understood as some positive finding by the jury in favour of the accused about any of the issues that may have been contested at trial. Moreover, to invoke the application of principles developed in the civil law where a judgment is procured by fraud must confront the difficulty that a jury's verdict of acquittal provides no clue to why the jury was not satisfied beyond reasonable doubt of the accused's guilt. For all that is known, the verdict of acquittal may be entirely unrelated to any evidence that the accused gave, or procured to be given, at trial and if that is so, it is not easy to say that the judgment has been obtained by fraud.

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27 *Grdic* [1985] 1 SCR 810 at 826 per Lamer J.

28 *The Duchess of Kingston's Case* (1776) 1 Leach 146 [168 ER 175]; (1814) 20 St Tr 537 at 544 per De Grey CJ (full report).

29 (1998) 194 CLR 610 at 626 [59].

30 3rd ed (1996) at par 309.

31 (1994) 181 CLR 251 at 276-277.

32 What is precluded? In *Grdic*, the majority of the Supreme Court of Canada, having identified the question as one of preclusion, formulated[32] a principle which directed attention to the evidence that had been called on the trial of the first offence and the evidence which it was intended to lead on the trial for perjury. The majority held that, if the same evidence were to be tendered, the prosecution would be estopped from pursuing the charge of perjury. Similarly, the prosecution would be estopped if it were to seek to call only evidence that was available to be called at the first trial[33]. Thus, to put the matter positively, the majority held that the prosecution would be estopped from pursuing the perjury charge unless it sought to tender, in addition to or in lieu of the evidence previously adduced, evidence that was not at the time of the first trial available by the exercise of reasonable diligence[34].

33 The formulation of such a rule reveals the difficulties that inhere in analysing the matter by reference to principles of issue estoppel or obtaining a judgment by fraud. The test formulated does not depend upon identification of issues of fact or law; the test depends upon the nature of the evidence to be adduced at the second trial. A test of this latter kind will, in the end, call for an assessment by the judge in the second trial, the trial for perjury, of the strength of the case which is to be made against the accused. That is, it will become a test which asks, in effect, how clear is it that the accused gave perjured evidence at the first trial? Yet that is a matter which should be for the jury. And more importantly than that, if the underlying principle is that the first conviction should not be controverted, it is a test that directs attention away from whether the prosecution for perjury does seek to controvert the decision in the earlier case; it directs attention to whether the second case is a new and good case.

Abuse of process

34 In *Humphrys*, the House of Lords was dealing with a case that was factually very similar to the later Canadian case of *Grdic*. In both cases, a person acquitted of a driving offence was later charged with perjury with respect to testimony given at the first hearing. Whereas, in *Grdic*, the Supreme Court of Canada dealt with the matter under the rubric of issue estoppel, the House of Lords did not accept that issue estoppel applied in criminal law. However, a number of their Lordships considered that, in an appropriate case, when a prosecution for perjury is merely a second attempt to secure a conviction on a

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32 [1985] 1 SCR 810 at 827 per Lamer J.

33 [1985] 1 SCR 810 at 827-828.

34 [1985] 1 SCR 810 at 829.

criminal charge, the court has a discretion to stay the proceedings in the exercise of its inherent jurisdiction to prevent an abuse of its process. It was such a jurisdiction that was invoked in the present case.

Incontrovertibility of an acquittal

35 Analysis by reference to rules of preclusion does not lead to the conclusion that the respondent cannot be prosecuted for perjury. Indeed, the premise for invoking the court's *discretion* to stay the prosecution for perjury appears to be an acceptance by the respondent that the prosecution was not precluded. Rather, the application for stay is to be understood as being based on what was said in *Rogers*[35] to be "the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct". It is this, rather than now rejected notions of the applicability in criminal cases of the principles of issue estoppel[36], which was said to warrant staying the prosecution of the respondent for perjury. Attention must first be directed to the ambit and effect of the proposition that the verdict of acquittal at the first trial is to be treated as incontrovertibly correct. Only then will it emerge whether it is necessary to consider the nature or quality of the evidence that it is sought to adduce on the second trial, in this case, for perjury.

36 On its face the principle stated in *Rogers* appears closely related to principles of preclusion. The reference to incontrovertibility makes that plain. On examination, however, the principle may be thought to find its origins in rather broader and less precise notions than those which have been developed in the rules of preclusion. First, the principle is said to apply *because* issue estoppel has no place in the criminal law[37]. Secondly, it takes the form it does because autrefois acquit, although analogous to and founded in the same principles as issue estoppel, has a different and further operation than issue estoppel would have[38].

37 The principle is stated in various ways. In *Garrett v The Queen*, Barwick CJ, with whose reasons Stephen, Mason and Jacobs JJ agreed, described[39] it as being that "the acquittal may not be questioned *or called in*

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35 (1994) 181 CLR 251 at 273 per Deane and Gaudron JJ.

36 *Rogers v The Queen* (1994) 181 CLR 251; cf *R v Wilkes* (1948) 77 CLR 511; *Mraz v The Queen [No 2]* (1956) 96 CLR 62; *R v Storey* (1978) 140 CLR 364.

37 (1994) 181 CLR 251 at 254 per Mason CJ, 278 per Deane and Gaudron JJ.

38 (1994) 181 CLR 251 at 278 per Deane and Gaudron JJ.

39 (1977) 139 CLR 437 at 445.

question by any evidence which, if accepted, would overturn or *tend to overturn* the verdict" (emphasis added). Reference to calling in question and tending to overturn give the principle great width: wider than may be thought to have been stated by the Privy Council in *Sambasivam v Public Prosecutor, Federation of Malaya*[40], a case often referred to in this connection.

38 In *Connelly v Director of Public Prosecutions*[41] Lord Pearce said:

> "A man ought not to be tried for a second offence which is manifestly inconsistent *on the facts* with either a previous conviction or a previous acquittal. And it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas." (emphasis in original)

39 His Lordship was speaking in a context in which the reference to a discretion was related to the inherent jurisdiction of a court to prevent oppression and abuse of process. By hypothesis, in a case of the kind his Lordship had in contemplation, the laying of a charge would constitute oppression and abuse of process, when viewed in the light of the considerations of double jeopardy which underlie a plea of autrefois acquit, even though such a plea is not available.

40 There are cases where a charge of an offence would be manifestly inconsistent on the facts with a previous acquittal, even though no plea of autrefois acquit is available. Since, in most cases of trial by jury, it will not be known why the accused was acquitted, and in many cases the reason may simply be that the jury had a doubt about whether the prosecution had established some element of the offence, the inconsistency, if it exists, will appear from a comparison of the elements of the new charge with the verdict of not guilty of the previous charge, understood in the light of the issues at the first trial.

41 The present case provides an example. The only element of the offence of murder that was in issue at the original trial of the respondent was whether he killed Deidre Kennedy. The perjury alleged at the second trial consisted of the respondent's falsely denying, on oath, that he killed Deidre Kennedy. The falsity of the testimony was claimed to be that he said he did not kill Deidre Kennedy whereas in truth he killed her. It was accepted in argument in this Court that,

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40 [1950] AC 458 at 479 per Lord MacDermott.

41 [1964] AC 1254 at 1364.

although it was not expressly averred, it was necessarily implied in the perjury indictment that the respondent had killed the child.

42 In the present case, there was manifest inconsistency between the charge of perjury and the acquittal of murder. That inconsistency arose because the prosecution based the perjury charge solely upon the respondent's sworn denial of guilt. The alleged false testimony consisted of a negative answer to a question, asked by his counsel, whether the respondent killed the child. The fact that the question asked was whether the respondent killed Deidre Kennedy rather than whether he murdered her, or whether he was guilty, is immaterial. Discretionary decisions do not turn upon such differences. Once such manifest inconsistency appeared, then the case for a stay of proceedings was irresistible.

43 The prosecuting authorities considered that they had available to them further evidence which became available only after the first trial, and which, so it was argued, strengthened the case that the respondent had murdered Deidre Kennedy. Much of the reasoning of the Court of Appeal was addressed to an examination of the strength and cogency of the new evidence. In this respect the Court was strongly influenced by the reasoning in *Humphrys* where the evidence at a later perjury trial was substantially identical with the evidence given at the first trial, and a case where new and cogent evidence of guilt had emerged.

44 The Court of Appeal concluded that the further evidence adduced at the perjury trial was deficient and unsatisfactory, and that it added little to the original evidence, but it considered that examining the strength and cogency of the new evidence was crucial to the exercise of the discretion to stay the proceeding. In that respect, the reasoning of the Court of Appeal was unduly favourable to the prosecution. The inconsistency between the charge of perjury and the acquittal of murder was direct and plain. The laying of the charge of perjury, solely on the basis of the respondent's sworn denial of guilt, for the evident purpose of establishing his guilt of murder, was an abuse of process regardless of the cogency and weight of the further evidence that was said to be available.

45 The need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct is a principle which requires that it is the verdict of acquittal which should be incontrovertible. It is not necessary in this case to attempt to decide what may be the limits of the principle about incontrovertibility and, in any event, it would be unwise to attempt to do so. It is a proposition which has not been held to preclude persons other than the prosecution asserting in later proceedings that the person committed the crime of

which he or she was acquitted at trial. (Hence the decisions about what standard of proof is to be applied in civil cases in which a crime is alleged[42].)

46 In *Rogers*, a majority of the Court held that for the prosecution to tender in evidence at a later trial records of interview which had been held inadmissible in an earlier prosecution for other offences would constitute a direct challenge to the earlier determination of admissibility – a determination which, if not final when made on the voir dire, became final once verdicts of acquittal were returned[43]. That being so, the majority held that the tender would be an abuse of process. In *Rogers*, there had been a finding by the trial judge in the first trial that the records of interview were not made voluntarily. There was, therefore, a positive finding to which it could be said that effect should be given. The abuse of process identified by the majority could, therefore, be said to lie in the prosecution seeking to relitigate that finding and have the trial judge at the second trial conclude that the record of interview was not shown to have been made involuntarily.

47 Whether *Rogers* or *Garrett* should be understood as standing for some wider proposition need not be decided, although it may be accepted that there may be cases where a second prosecution is argued to be oppressive and an abuse of process, even though there is no direct inconsistency between the new charge and the earlier verdict. The circumstances that may constitute oppression or an abuse of process are various[44]. The discretionary considerations that may be relevant in dealing with them cannot be rigidly confined. Nevertheless, where it is said that the abuse lies in seeking to controvert an earlier verdict of acquittal, there appears much to be said for the view that it is necessary to direct attention to the elements of the offence of which the person was acquitted and the elements of the offence with which the person is later charged. Seldom, if ever, will considering whether the later charge controverts an earlier acquittal require attention to whether evidence which would be led at a second trial is new or persuasive.

48 To approach the question by directing attention to the elements of the two offences would recognise that the principle that an acquittal is incontrovertible is

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42 For example, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449.

43 *Rogers* (1994) 181 CLR 251 at 255 per Mason CJ, 269 per Brennan J, 279-280 per Deane and Gaudron JJ.

44 See, for example, *Walton v Gardiner* (1993) 177 CLR 378.

a principle founded in the finality of judicial proceedings[45] and that it is what is decided in litigation that is final. Directing attention to evidence given at an earlier trial may serve to detract attention from what it is that was decided.

49 To pursue what is thought to be the objectively correct outcome of criminal proceedings is inconsistent with finality. As the Law Commission of England and Wales recognised in its report on *Double Jeopardy and Prosecution Appeals*[46], finality is a value which finds its roots in personal autonomy, and which serves to delineate the proper ambit of the power of the State by the State acknowledging[47] "that it respects the principle of limited government and the liberty of the subject".

50 Finality of a verdict of acquittal does not necessarily prevent the institution of proceedings, or the tender of evidence, which might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision. There may be cases where, at a later trial of other allegedly similar conduct of an accused, evidence of conduct may be adduced even though the accused had earlier been charged with, tried for, and acquitted of an offence said to be constituted by that conduct. *R v Z*[48], *R v Arp*[49] and *R v Degnan*[50] are cases of that kind. In such cases, the earlier acquittal would not be controverted by a guilty verdict at the second trial.

Conclusion

51 Proceedings on the indictment for perjury should have been stayed, as the Court of Appeal concluded. The prosecution inevitably sought to controvert the earlier acquittal on the charge of murder.

52 The Court of Appeal also concluded, after an examination of the evidence at the perjury trial, that the evidence was so lacking in weight and cogency that the jury should have acquitted the respondent. The Court has not heard argument

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45 United Kingdom, Law Commission, *Double Jeopardy and Prosecution Appeals*, (2001), Cm 5048 at par 4.2.

46 (2001), Cm 5048 at par 4.13.

47 (2001), Cm 5048 at par 4.17.

48 [2000] 2 AC 483.

49 [1998] 3 SCR 339.

50 [2001] 1 NZLR 280.

on that aspect of the matter. In view of the conclusion expressed above the question does not arise for decision.

53 Special leave to appeal should be granted but the appeal should be dismissed.

54 GAUDRON AND GUMMOW JJ. In the course of his judgment in *Weaver v Law Society of New South Wales*[51], Mason J observed that:

> "in criminal proceedings an earlier acquittal cannot be re-litigated (*R v Storey*[52]), though a prosecution for perjury may be maintained in respect of the giving of false evidence which secured that acquittal".

55 The primary question on this application by the Crown for special leave to appeal from the Queensland Court of Appeal requires consideration of that broad proposition. The particular issue concerns the competency of a later charge of perjury in respect of a statement given under oath by the accused at his trial for murder that he did not kill the deceased, in circumstances where the only element of the offence in question was whether the accused had killed the deceased. Although the jury convicted the accused of murder, that conviction was later quashed and a verdict of acquittal entered. This invites attention to the significance of the changes to the common law which rendered the accused a competent (but not compellable) witness, and the interaction between the statutory offence of perjury and common law principles often gathered under the rubric "double jeopardy".

56 Full argument was heard on this question, in respect of which the Court reserved its decision. If the Court were to reach the view that the charge of perjury was properly laid, it would be necessary to hear further argument on the other grounds upon which the applicant seeks special leave to appeal.

57 The respondent was convicted of perjury on 2 November 2000 following a jury trial before Muir J in the Supreme Court of Queensland. He successfully appealed against that conviction to the Court of Appeal (McMurdo P, Williams JA and Holmes J), which set aside the conviction and entered a verdict of acquittal[53]. The Court of Appeal concluded that Muir J had erred in failing to hold that the perjury indictment should have been stayed as an abuse of process and that, in any event, the verdict returned by the jury was unsafe and unsatisfactory[54]. The Crown seeks special leave to appeal against that decision.

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51 (1979) 142 CLR 201 at 206-207.

52 (1978) 140 CLR 364.

53 *R v Carroll* [2001] QCA 394.

54 [2001] QCA 394 at [1], [72], [75].

The murder trial and appeal

58 On 14 March 1985, at a trial in the Supreme Court of Queensland the respondent was found guilty of the murder of a baby, Deidre Kennedy. The body of Deidre Kennedy had been found on the roof of a toilet block in a park in Ipswich on 14 April 1973. A post-mortem examination established strangulation as the cause of death. It will be necessary later in these reasons to refer in more detail to the elements of the offence of murder as stipulated in the *Criminal Code* (Q) ("the Criminal Code"). However, the only issue at the respondent's trial was the identity of the killer. The prosecution relied upon three categories of evidence: (i) evidence that the respondent was not, as he claimed, at the Royal Australian Air Force recruits' course in South Australia at the time of the killing; (ii) forensic odontology evidence that the bruise marks on the deceased child's thigh were caused by the respondent; and (iii) similar fact evidence. The respondent gave evidence at trial, in the course of which in answer to the question "Did you kill Deidre Kennedy?", he replied "I did not".

59 The respondent's appeal against his conviction for murder was unanimously allowed by the Court of Criminal Appeal on 27 November 1985[55]. The Court of Criminal Appeal (Campbell CJ, Kneipp and Shepherdson JJ) ordered that the conviction be quashed and that a verdict of acquittal be entered. The Court concluded that a properly instructed jury, properly considering the matter, could not be satisfied beyond reasonable doubt on the prosecution evidence that the accused was guilty[56].

The perjury prosecution

60 Many years later, on 12 February 1999, the respondent was charged with perjury in contravention of s 123(1) of the Criminal Code. The alleged perjury was his sworn evidence at the murder trial that he did not kill Deidre Kennedy. The indictment against the respondent, presented in the Supreme Court of Queensland on 27 October 1999, stated:

> "That on the eighth day of March, 1985 at Brisbane in the State of Queensland, RAYMOND JOHN CARROLL *in a judicial proceeding*, namely the trial of RAYMOND JOHN CARROLL for the murder of one DEIDRE MAREE KENNEDY *knowingly gave false testimony* to the effect that he, RAYMOND JOHN CARROLL did not kill the said

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55 *Carroll* (1985) 19 A Crim R 410.

56 (1985) 19 A Crim R 410 at 410, 417, 435.

> DEIDRE KENNEDY, and *the false testimony touched a matter which was material to a question then depending in the proceeding*."

The phrases emphasised followed the terms of s 123(1)[57].

61 Section 598(1) of the Criminal Code provides that, in place of a plea to the indictment, an accused person may "demur to it on the ground that it does not disclose any offence cognisable by the court"; if the demurrer be overruled, the accused person is to be called upon to plead (s 605(2)). No demurrer was entered by the respondent, a matter to which it will be necessary to return.

62 Rather, on 28 August 2000, the respondent sought a permanent stay on the basis that the prosecution constituted an abuse of process[58]. This application apparently was brought pursuant to s 592A of the Criminal Code. It appears that the respondent sought a pre-trial direction or ruling staying the indictment (par (a) of s 592A(2)) or, in the alternative, the exclusion of certain evidence (par (e) of s 592A(2)). Section 592A relevantly provides:

> "(1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial.
>
> (2) Without limiting subsection (1) a direction or ruling may be given in relation to –
>
> (a) the quashing or staying of the indictment; or
>
> …
>
> (e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted".

63 One circumstance alleged to enliven the discretion to stay the indictment as an abuse of process was that "the prosecution [was] ill-founded as it contravene[d] the doctrines of res judicata or autrefois acquit"[59]. On 6 September

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57 The form of the indictment followed form 78 contained in Sched 3 to the Criminal Practice Rules 1999 (Q); the use of that form was required by r 13(1) thereof.

58 *Carroll* (2000) 115 A Crim R 164 at 165.

59 (2000) 115 A Crim R 164 at 165.

2000, Muir J dismissed the application for a stay and declined to exclude any of the challenged evidence. His Honour rejected the contention that the doctrines of autrefois acquit or res judicata prevented the laying of the charge of perjury and decided that the evidence the Crown proposed to adduce was sufficiently different to and stronger than that presented at the murder trial, and therefore that there was no abuse of process[60].

64 The matter proceeded to trial and, on 3 November 2000, the jury returned a verdict of guilty in respect of the perjury charge. The respondent appealed against that conviction to the Court of Appeal under s 668D of the Criminal Code on the ground that the trial judge should have stayed the prosecution as an abuse of process on all or any of several bases. The respondent's Notice of Appeal identified the alleged abuse of process by reference to various circumstances including his earlier acquittal for murder, the trial judge's failure to exclude certain evidence and what was said to be the unsafe and unsatisfactory verdict returned by the jury. The respondent's appeal to the Court of Appeal thus put in issue both the pre-trial rulings of Muir J and the verdict of the jury. The former were susceptible to challenge on appeal by force of s 592A(4) of the Criminal Code, which provides that a direction or ruling under s 592A "must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence". That provision reflects the proposition that, in general, an interlocutory order which affects the final result can be challenged in an appeal against the final judgment[61].

65 The judgment of the Court of Appeal was delivered by Williams JA, with whom McMurdo P and Holmes J agreed. Williams JA analysed the evidence tendered at the perjury trial and concluded that the trial should have been stayed as an abuse of process, because the "principle of double jeopardy" had been "substantially breached"[62]. His Honour also expressed the view that, when the evidence was considered as a whole, the verdict returned by the jury was "unsafe and unsatisfactory", and that, on either ground, the verdict should be set aside and an acquittal entered[63].

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60 (2000) 115 A Crim R 164 at 169-170.

61 *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 829 [6]; 188 ALR 353 at 355.

62 [2001] QCA 394 at [64], [72].

63 [2001] QCA 394 at [72].

Pleas under the Criminal Code

66 At no stage did the respondent enter, or seek to enter, a plea under pars (c), (d) or (e) of s 598(2) of the Criminal Code; indeed it would have been futile to do so. Paragraphs (c) and (d) permit an accused person to plead that he or she has already been convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been convicted or acquitted upon indictment of an offence of which the person might be convicted upon the indictment. Paragraph (e) of s 598(2) permits an accused person to plead that he or she has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person cannot under the provisions of the Criminal Code be tried for the offence charged in the indictment.

67 Reference then is necessary to s 17 of the Criminal Code. This provides:

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

68 None of the pleas described in pars (c), (d) or (e) of s 598(2) was open to the respondent. Clearly the original indictment for murder could not have supported a conviction for perjury alleged to have occurred during the course of the murder trial; similarly, the respondent could not, upon the indictment for perjury, be convicted of the murder of Deidre Kennedy. It follows that, whatever development may have occurred at common law respecting the plea of autrefois acquit, the respondent was not entitled to enter the pleas provided for in the Criminal Code. In *R v Viers*[64], Thomas J observed that while Sir Samuel Griffith thought that s 17 somewhat extended the common law, in some respects s 17 narrowed it.

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64 [1983] 2 Qd R 1 at 4.

69 Williams JA in the Court of Appeal was correct, and in accordance with prior authorities in Queensland[65], when he indicated that s 17 of the Criminal Code had no application here[66]. We therefore turn to consider the question of abuse of process.

Abuse of process

70 As indicated earlier in these reasons, s 592A of the Criminal Code empowers the Supreme Court of Queensland, where the Crown has presented an indictment before it, to give pre-trial directions and rulings, including "in relation to … the … staying of the indictment". There is no express power to stay an indictment to prevent an abuse of process. However, s 7 of the *Supreme Court of Queensland Act* 1991 (Q) continued in existence that Court as formerly established as "the superior court of record in Queensland" and s 8(1) conferred "all jurisdiction that is necessary for the administration of justice in Queensland"[67]. These are words of wide reach[68]. They bring with them, in aid of the effective exercise of that jurisdiction, the power of a superior court to prevent abuse of its procedure[69] and, in that regard, to stay indictments[70].

71 This power is drawn by implication from the constitutive statutory authority of the Supreme Court. It perhaps qualifies, or more likely complements, the statement by Windeyer J in *Timbu Kolian v The Queen*[71] that the provisions of the Criminal Code provide "the exclusive source of the law in all indictable offences, with only the exceptions which the [Criminal Code] specifies".

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65 *R v Gordon, ex parte Attorney-General* [1975] Qd R 301 at 322; *R v Viers* [1983] 2 Qd R 1 at 4.

66 [2001] QCA 394 at [14].

67 Sections 7 and 8 have since been repealed by s 94 of the Constitution of Queensland 2001 (Q); similar provision now is made by s 58 thereof.

68 cf *Mobil Oil Australia Pty Ltd v Victoria* (2002) 76 ALJR 926; 189 ALR 161.

69 *Williams v Spautz* (1992) 174 CLR 509 at 518-519, 531; *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [24]-[26].

70 *R v Viers* [1983] 2 Qd R 1 at 6.

71 (1968) 119 CLR 47 at 58.

72 The applicant correctly eschews any argument that the Criminal Code is the exclusive source of the grounds upon which an indictment may be stayed. Notwithstanding that the statutory pleas in s 598(2) are more narrowly drawn than what at any rate are now understood to be the common law doctrines, the stay application was correctly approached on the footing that it was to those doctrines, supplemented by other relevant statutory provisions, that regard was to be had.

73 The power to stay is said to be discretionary. In this context, the word "discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not. However, as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration. If so, the appellate court may reach its own decision in substitution for that of the primary judge, where there are before it the materials for so doing[72].

74 The immediate question whether special leave should be granted thus turns on whether sufficient doubt attends the decision of the Court of Appeal that, in declining to stay the perjury indictment for abuse of process, Muir J acted upon a wrong principle.

The Court of Appeal

75 It is necessary to identify the ground upon which the Court of Appeal decided that the indictment for perjury should have been stayed as an abuse of process. Williams JA stated, as a proposition he deduced from the authorities on perjury and "double jeopardy" to which he referred, that[73]:

> "if the evidence at the perjury trial was substantially identical with that at the earlier trial, the rule against double jeopardy would be infringed and the prosecution would amount to an abuse of process".

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72 *House v The King* (1936) 55 CLR 499 at 505.

73 [2001] QCA 394 at [24].

Williams JA analysed the evidence adduced during the perjury trial and concluded that it did not constitute "substantial" or "significant" new evidence that the respondent had killed Deidre Kennedy[74]. His Honour said[75]:

> "The prosecution case on the perjury trial was essentially a re-trial for murder based on odontological evidence from a fresh set of witnesses, asking the jury to disregard contrary opinion from the odontological experts called at the first trial where the basic data on which each opinion was based was the same."

It was said to follow that the "principle of double jeopardy" had been "substantially breached"[76]. Williams JA said[77]:

> "In essence, the prosecution set out to prove that the appellant murdered the child by calling different witnesses but without there being any new substantive acceptable evidence to that led at the original trial."

On this basis, the Court of Appeal held that the trial should have been stayed as an abuse of process[78].

Perjury and the testimonial competence of the accused

76 Section 3 of the *Criminal Law Amendment Act* 1892 (Q) ("the 1892 Act") rendered every person accused of an indictable offence (and the spouse of such a person[79]) a competent but not compellable witness, liable to cross-examination but not compellable to answer any question tending to criminate himself or herself with respect to any matter other than the offence for which he or she was being tried. Prior to the enactment of this provision, a prisoner on trial in Queensland could be neither examined nor cross-examined; a prisoner was not competent to give evidence for or against himself or herself. Section 7 of the

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74 [2001] QCA 394 at [37], [46]-[47], [50], [62]-[63].

75 [2001] QCA 394 at [62].

76 [2001] QCA 394 at [64].

77 [2001] QCA 394 at [64].

78 [2001] QCA 394 at [1], [72], [75].

79 See *Riddle v The King* (1911) 12 CLR 622.

Evidence and Discovery Act 1867 (Q) so provided, thereby confirming the position which obtains at common law[80].

77 The common law position reflected in part the principles respecting disqualification by reason of interest, and in part a desire to avoid erosion of the privilege against self-incrimination and of the presumption of innocence; the competing policy, urged by Bentham and his disciples, had been that no evidence tending to produce conviction in a rational mind should be excluded[81]. The 1892 Act, which ante-dated the English *Criminal Evidence Act* 1898 (UK)[82], represented a compromise.

78 Before the 1892 Act, a person accused of an indictable offence had, as Townley J later put it in *R v McKenna*[83]:

> "[T]he common law right or privilege to make an unsworn statement, which had grown from the practice of judges of allowing a prisoner to do so because he could not give evidence on oath and, except in certain cases, was not allowed to be defended by counsel. Then, when permitted to be represented by counsel a conflict arose as to his right to make a statement when defended but this conflict seems to have been eventually resolved in favour of his right to do so."

The 1892 Act contained no express provision preserving the privilege, but thereafter it was exercised[84] until recent times[85]. However, at common law, only statements made by a competent witness under a duly administered oath could be

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80 The relevant part of s 7 was repealed by s 2 of the 1892 Act.

81 The whole subject is elaborately treated by Brennan J in *Ferguson v Georgia* 365 US 570 at 573-582 (1961). See also *Nicholas v The Queen* (1998) 193 CLR 173 at 232 [143]; *Pearce v The Queen* (1998) 194 CLR 610 at 626 [58].

82 61 & 62 Vict c 36.

83 [1951] St R Qd 299 at 305.

84 *R v McKenna* [1951] St R Qd 299 at 305.

85 *Carter's Criminal Law of Queensland*, 12th ed (2001) at 828.

subject of a perjury charge[86]. The better view was that the unsworn statement was not to be regarded as evidence[87].

79 The provisions of s 3 of the 1892 Act are now represented by s 8(1) of the *Evidence Act* 1977 (Q) ("the Evidence Act"). This states:

> "In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so."

80 Ordinarily, a provision which defines the offence of perjury as the giving knowingly of "false testimony" is not construed as including material in an unsworn statement[88]. However, in detailing the crime of perjury, s 123(6) of the Criminal Code states:

> "It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not."

It appears never to have been decided whether s 123 contains sufficiently clear words to alter the nature of the benefit which the availability of an unsworn statement historically conferred upon an accused person[89].

The issue of statutory construction

81 With the statutory history in mind, the question which immediately arises is whether in altering the pre-existing law which (i) denied competency to testify to an accused in the position of the present respondent and (ii) therefore precluded the charge of perjury in respect of statements made by an incompetent witness, the Queensland legislature brought about the result for which the Crown now contends. Against the Crown submission is the well-settled proposition that legislation is not to be construed as abrogating important common law rights, privileges or immunities unless that abrogation is mandated by clear words or by

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86 See *R v Clegg* (1868) 19 LT 47; *R v Kilkenny* (1890) 16 VLR 139 at 142-143.

87 "A Note on Unsworn Statements from the Dock", (1952) 26 *Australian Law Journal* 166.

88 *Edwards v Director of Public Prosecutions (Cth)* (1987) 163 CLR 558.

89 cf *Edwards v Director of Public Prosecutions (Cth)* (1987) 163 CLR 558 at 560.

necessary implication[90]. Is s 123 of the Criminal Code to be construed (and, if so, how) so as not to effect what Williams JA in the present case identified as a "substantial breach" of "the principle of double jeopardy"[91]?

82 If the section does not have such an operation with respect to the charge against the respondent, then it would follow that the respondent might, under s 598(1) of the Criminal Code, have demurred on the ground that the count of perjury did not disclose any offence cognisable by the court. That was not done. The question then would become whether nevertheless it was open to the respondent to, in substance, ventilate the point upon the application for stay.

83 Before turning to these matters, it is appropriate first to consider the extent to which principles of "double jeopardy" are applicable.

"Double jeopardy" and perjury

84 In Australia, "double jeopardy" is not an independent doctrine of avoidance, which, for example, would found a demurrer to a count or a stay application[92]. The law's aversion to placing an individual twice in jeopardy of criminal punishment for the one incident or series of events reflects a broader precept or value. This finds diverse application through doctrines of estoppel and merger[93], in the pleas of autrefois acquit and autrefois convict[94], and in principles

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90 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561.

91 [2001] QCA 394 at [64].

92 *Pearce v The Queen* (1998) 194 CLR 610 at 629 [66].

93 *Blair v Curran* (1939) 62 CLR 464 at 531-533.

94 *Pearce v The Queen* (1998) 194 CLR 610 at 616-620 [17]-[28], 626-628 [58]-[61], 640-645 [99]-[107].

respecting abuse of process[95], the admissibility of evidence[96], and sentencing[97]. In some instances, as here, the precept finds expression in principles of statutory construction. An illustration is the settled rule that a general statutory provision should not ordinarily be construed as conferring or extending a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language[98].

85 If it be accepted that on occasion, and despite directions as to the onus of proof, juries return guilty verdicts which are ill founded, that possibility must increase with successive trials. Particular considerations arise where the "double jeopardy" is said to lie in a subsequent prosecution for perjury in respect of statements made by the accused in evidence in earlier criminal proceedings.

86 The interests at stake in a case such as the present were discussed in *Rogers v The Queen*[99] and in *Pearce v The Queen*[100]. They touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive[101]. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct[102]. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute[103]. Thirdly, there is the interest of the

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95 *Rogers v The Queen* (1994) 181 CLR 251.

96 *R v Z* [2000] 2 AC 483; *R v Moore* [1999] 3 NZLR 385; *R v Degnan* [2001] 1 NZLR 280.

97 *Pearce v The Queen* (1998) 194 CLR 610 at 621-624 [34]-[49], 629-630 [69], 649-650 [119]-[121].

98 *Everett v The Queen* (1994) 181 CLR 295 at 299; *Byrnes v The Queen* (1999) 199 CLR 1 at 25-26 [50].

99 (1994) 181 CLR 251 at 273-274.

100 (1998) 194 CLR 610 at 614-615 [9]-[15], 625-626 [53]-[56], 636-637 [89]-[91].

101 Expressed in the maxim *interest reipublicae ut sit finis litium*.

102 Expressed in the maxim *res judicata pro veritate accipitur*.

103 cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

individual in not being twice vexed for one and the same cause[104]. Finally, there is the principle that a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature[105].

87 There is competition between (i) securing truthful testimony, and hence protecting the integrity of the judicial process and public perceptions thereof and (ii) preventing successive criminal prosecutions in respect of what in substance may be the same elements of an offence for which an individual earlier has been acquitted. That competition is capable of legislative resolution in different ways and with various exceptions and qualifications detailed by statute[106]. So much is illustrated by the recent and divergent recommendations of the Law Commission of England and Wales[107] and the Law Commission of New Zealand[108].

88 This case concerns the interrelation between the common law and s 123 of the Criminal Code. The preferred resolution of any conflict or clash between them should acknowledge the capacity of the legal system to protect by means other than perjury prosecutions public perceptions of the integrity of the judicial process. For example, proceedings for contempt may lie against a defendant who publicly boasts of success in securing an earlier acquittal by perjured testimony[109].

89 In Canada, issue estoppel may constitute a defence to a charge of perjury in respect of evidence given at an earlier trial, unless there is additional evidence which was not available to the Crown using reasonable diligence at the time of the first trial[110]. Similarly, the authorities in the United States dealing with the

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104 Expressed in the maxim *nemo debet bis vexari pro una et eadem causa*.

105 Expressed in the maxim *transit in rem judicatam*.

106 See Friedland, *Double Jeopardy*, (1969) at 159-160; Note, "Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel", (1961) 74 *Harvard Law Review* 752 at 754-755.

107 Law Commission, *Double Jeopardy and Prosecution Appeals*, (2001), Cm 5048. See Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary", (2002) 65 *Modern Law Review* 393.

108 Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report No 70, (2001).

109 cf *H M Advocate v Cairns* 1967 SLT 165 at 169.

110 *Grdic v The Queen* [1985] 1 SCR 810. See also *Gushue v The Queen* [1980] 1 SCR 798.

circumstances in which a prior acquittal bars a subsequent conviction for perjury which would contradict or undermine the prior verdict have turned on the application of "collateral estoppel" or "issue preclusion"[111]. Those doctrines may operate to preclude prosecutions which fall beyond the ambit of the Fifth Amendment prohibition on subjecting any person "for the same offence" to be twice put in jeopardy of life or limb[112].

90 *Rogers v The Queen*[113] decided that in Australia the doctrine of issue estoppel as it has developed in civil proceedings is not applicable to criminal proceedings. That holding, which no party to the present application sought to challenge, reflects the state of the law in the United Kingdom since the decision of the House of Lords in *R v Humphrys*[114], and that in New Zealand since the decision of the Court of Appeal in *R v Davis*[115].

91 Notwithstanding the inapplicability of the civil doctrine of issue estoppel in Australian criminal law, the common law of this country has sought to protect defendants acquitted of an offence from retrial for a subsequent offence where (i) the elements of the two offences are identical or (ii) the elements of one offence are wholly included in the other. *Pearce v The Queen*[116] determined that that degree of coincidence between the elements of the two offences will ground a plea of autrefois acquit at common law. Again, this Court held in *Rogers*[117] that the tender of evidence of admissions which had been found in a prior trial not to have been made voluntarily would challenge directly that prior judicial determination, which had become final once verdicts were returned, and, on that

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111 See, for example, *Boyles v Alaska* 647 P 2d 1113 (1982). See generally Note, "Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel", (1961) 74 *Harvard Law Review* 752 at 757-764.

112 The principles for the determination whether two charges constitute "the same offence" were considered in *United States v Dixon* 509 US 688 (1993); cf the principle of "double criminality" in extradition law: *Riley v The Commonwealth* (1985) 159 CLR 1 at 15-20.

113 (1994) 181 CLR 251 at 254-255, 278. See also *R v Storey* (1978) 140 CLR 364 at 372, 388, 400-401.

114 [1977] AC 1 at 19-21, 40, 48, 58.

115 [1982] 1 NZLR 584.

116 (1998) 194 CLR 610 at 618 [24], 620 [28], 628 [63].

117 (1994) 181 CLR 251 at 255, 280.

basis, would constitute an abuse of process. Similarly, in *Garrett v The Queen*[118], evidence of a previous charge of rape of the prosecutrix, for which the accused had been acquitted, was held by this Court to have been inadmissible in a later trial of the accused in which he was convicted of rape and abduction in respect of different allegations involving the same complainant. The evidence was said by this Court to be inadmissible because it "inevitably challenged the verdict of acquittal"[119]. The Court allowed an appeal against the later convictions and ordered a new trial.

92 However, in *R v Storey*[120], Stephen, Mason, Jacobs and Aickin JJ held that relevant evidence tending to show that the accused was guilty of an offence of which the accused had been acquitted may be admitted, but only if the jury can be and is directed not to interpret it in such a way as to deny the acquittal. In *Storey*, the two accused had been acquitted on a charge of forcible abduction; at their subsequent trial for rape, evidence was admitted which tended to show the forcible abduction of the victim, but without it being made clear to the jury that the evidence must not be taken as proving guilt on the previous charge. This Court dismissed the Crown appeal against the quashing of the conviction.

93 We agree with the remarks of the Chief Justice and Hayne J in the present case respecting the decisions in *Rogers* and *Garrett*. Those authorities support the proposition that a prior acquittal itself cannot subsequently be controverted; it is unnecessary here to decide whether they support any wider proposition.

94 So-called "similar fact" evidence gives rise to difficulties which it is unnecessary here to consider. However, it may be noted that the House of Lords and the New Zealand Court of Appeal respectively have held that similar fact evidence is not rendered inadmissible (i) merely because it shows or tends to show that the defendant was guilty of an offence of which that person has been acquitted[121], or (ii) "by reason of the fact that a previous trial based on that evidence has resulted in an acquittal or a stay of proceedings"[122].

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118 (1977) 139 CLR 437.

119 (1977) 139 CLR 437 at 445.

120 (1978) 140 CLR 364 at 391, 397-398, 408-409, 424-425.

121 *R v Z* [2000] 2 AC 483.

122 *R v Degnan* [2001] 1 NZLR 280 at 292.

The efficacy of the indictment

95 The Queensland legislature removed a disability of accused persons under the common law by rendering them competent but not compellable witnesses in their own case. This had the consequence of expanding the class of persons to whom, when enacted thereafter, the perjury provisions in s 123 of the Criminal Code otherwise would apply. Section 123, which has not been amended since it was enacted in 1899, is an elaborate provision which goes to some pains to remove doubts as to its scope. It states:

> "(1) Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'.
>
> (2) It is immaterial whether the testimony is given on oath or under any other sanction authorised by law.
>
> (3) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if the person assents to the forms and ceremonies actually used.
>
> (4) It is immaterial whether the false testimony is given orally or in writing.
>
> (5) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place, or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.
>
> (6) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.
>
> (7) The offender cannot be arrested without warrant."

96 The immediate problem of construction which arises in this appeal arose in the United States shortly after Congress in 1878 rendered defendants competent witnesses in prosecutions for crimes under federal law[123]. In *United*

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123 See *Ferguson v Georgia* 365 US 570 at 577 (1960), where reference is made to 18 USC §3481.

States v Butler[124], the accused had sworn that he had not sold certain liquors without payment of a federal tax, was acquitted, and then was put on trial for perjury in so swearing; the District Court held that the government could not by such a proceeding show that the prior oath was false. It was held that[125]:

> "[t]his never could have been the contemplation of congress in allowing a defendant to be sworn in his own behalf."

97 The general provisions of the Queensland legislation should not be construed as exposing defendants who are acquitted after exercising their statutory right to testify in their behalf to a subsequent prosecution for perjury in respect of their denial on oath of guilt on the first charge. A construction of s 123 of the Criminal Code which allowed that prosecution would abrogate the freedom of the individual from subsequent criminal prosecution respecting his or her ultimate culpability for an offence of which that person has been acquitted. Legislation having that result would require expression in unambiguous language or be compelled by necessary implication.

98 The reference above to denial of guilt requires further attention. The offence in respect of which there was an acquittal may comprise various elements presenting the ultimate issue for the jury's determination. More or less evidence (and inference invited from primary evidence) may have been tendered on one or more of those elements or the ultimate issue. Only some of those issues may remain alive and in contest when cases are closed. It is in respect of those live elements and the ultimate issue that what is said above applies. In the present case the only element that was alive in the murder trial was whether the respondent had killed the deceased.

99 In those circumstances, the subsequent perjury charge seeks to impeach the earlier acquittal. Any subsequent perjury charge may be said to some degree to vex twice the accused. But, as the United States cases dealing with the constitutional protection illustrate, the basic notion of "the same offence" suggests some close relationship between the charge the subject of the acquittal and that of perjury.

100 The present case provides one example. The constituent elements of the crime of murder under the Criminal Code may compendiously be stated as the "unlawful killing" of another under any of the circumstances detailed in s 302(1).

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124 38 F 498 (1889).

125 38 F 498 at 500 (1889).

That telescopes a number of elements identified by the process of statutory analysis recently undertaken in *Murray v The Queen*[126].

101 The text of the present indictment itself discloses that what was here sought to be impugned or controverted was the prior acquittal for murder. The indictment pleaded the falsity of the respondent's "testimony to the effect that he, RAYMOND JOHN CARROLL did not kill the said DEIDRE KENNEDY". That testimony necessarily was central to the earlier trial. The only issue in contest was the identity of the killer. For example, there was no issue in the murder trial respecting the mens rea of the killer; the respondent maintained simply that he did not kill Deidre Kennedy. His statement on oath to that effect was therefore but an assertion of his defence, upon the acceptance or rejection of which the verdict of the jury necessarily depended. For this reason, the testimony sought to be impugned by the subsequent indictment for perjury went to the ultimate and live issue in the murder trial. It was a re-affirmation on oath by the respondent of his plea of not guilty to murder. Proof of the falsity of that re-affirmation was a necessary ingredient of the perjury charge.

102 That is apparent from the terms of the direction to the jury by Muir J at the conclusion of the perjury trial, which included the following:

> "The only real issue is whether he told a lie when in that trial he said he did not kill Deidre Kennedy. If he did kill Deidre Kennedy, you may think it plain that that was something well-known to him. If you conclude that it is not established beyond reasonable doubt that he did kill Deidre Kennedy, it follows that it has not been proved beyond reasonable doubt that the accused gave false testimony and the verdict must be not guilty."

103 This indictment is to be contrasted with a charge of perjury that relates not to an ultimate issue in contest in a previous trial, but to evidence given at such a trial by the defendant which, if subsequently proved to be false, would not directly impeach the prior acquittal. An indictment which charged, for instance, that the present respondent had committed perjury by testifying that he had been at the Royal Australian Air Force recruits' course at the time of the murder would answer that description. It might support an inference that he was wrongly acquitted, but would not necessarily negative the acquittal.

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126 (2002) 76 ALJR 899 at 904-905 [28]-[30]; 189 ALR 40 at 46-47.

Other authorities

104 The point is illustrated by *R v McDermott*[127]. At his earlier trial for housebreaking and stealing at Carrum, the accused had given evidence that he was not at or near Carrum on the day of the alleged offences. He was acquitted. The Full Court of the Supreme Court of Victoria, on a special case stated by a'Beckett J, affirmed his conviction at a subsequent trial before a'Beckett J and a jury for perjury, this being his evidence in respect of his alibi at the earlier trial. In upholding the conviction for perjury, notwithstanding the prior acquittal, the Full Court emphasised that the ground of the jury's verdict in the earlier trial was not necessarily that the alibi evidence was true. Similar reasoning respecting alibi evidence and subsequent perjury charges has been adopted in later United States decisions[128].

105 In England, the decision in *R v Humphrys*[129] may be nearer the line. In that case, the alleged perjury was the evidence by the accused at an earlier trial on a charge of driving a motor vehicle on 18 July 1972, while disqualified, that he had not driven any motor vehicle during 1972. Proof of the falsity of that general denial did not directly controvert the earlier acquittal on the specific charge of driving while disqualified on a particular day in that year. The House of Lords held that the trial judge had correctly admitted police evidence that the accused was driving a vehicle on 18 July 1972. This was so, even though that evidence, if accepted, would lead to the inference that the accused was guilty of the offence of which he had been acquitted.

106 In *Chitwood v United States*[130], the Court of Appeals for the Eighth Circuit (i) emphasised that "[a] person acquitted of a crime cannot be again tried for it under the guise of a charge of perjury"[131]; (ii) said that this was so "if the particular testimony alleged to be false is as general and broad as the charge of the crime – in other words, a denial of guilt"[132], but (iii) added[133]:

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127 (1899) 24 VLR 636.

128 *Adams v United States* 287 F 2d 701 at 705 (1961); *United States v Haines* 485 F 2d 564 at 565-566 (1973).

129 [1977] AC 1.

130 178 F 442 (1910).

131 178 F 442 at 443 (1910).

132 178 F 442 at 443 (1910).

133 178 F 442 at 443-444 (1910).

> "If, however, the false swearing, like in the case at bar, is as to a subordinate evidential matter, and not a mere general denial of the entire charge, an indictment for perjury may be upheld, notwithstanding the prior acquittal."

In *Chitwood*, a post office clerk had been acquitted of stealing certain letters; he had testified that he had not read or understood a purported signed confession. The Court held that the acquittal and perjury in testifying about the confession were not necessarily inconsistent.

107 The question whether a jury verdict of acquittal was *necessarily* predicated on acceptance of the allegedly perjured testimony has been a significant consideration in the later United States authorities respecting the circumstances in which a subsequent perjury prosecution is barred by the doctrine of "collateral estoppel". In *United States v Fayer*[134], the Court of Appeals for the Second Circuit said, with reference to authority respecting perjury trials:

> "It is only when an issue of ultimate fact or an element essential to conviction has once been determined by a final judgment in a criminal case that the same issue cannot be relitigated."

108 That was this case. Section 123 of the Criminal Code, on its proper construction, did not support the indictment for perjury which was brought in the present case.

"Fraud" and "fresh evidence"

109 In submissions to this Court, the applicant fixed upon observations in some authorities[135] which may suggest that it is permissible to litigate afresh matters determined in earlier criminal proceedings where those proceedings were affected by "fraud" or where there is "fresh evidence". It was submitted that perjury constitutes a species of fraud upon the court and that, if there be "significant" or "substantial" fresh evidence, principles of "double jeopardy" do not deny the competency of an indictment for perjury committed in earlier criminal proceedings which resulted in an acquittal.

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134 573 F 2d 741 at 745 (1978). See also *Ehrlich v United States* 145 F 2d 693 (1944); *United States v Haines* 485 F 2d 564 at 565 (1973); *Boyles v Alaska* 647 P 2d 1113 at 1116-1117 (1982).

135 *Rogers v The Queen* (1994) 181 CLR 251 at 256-257; *R v Storey* (1978) 140 CLR 364 at 409.

110 The reasoning in *R v El-Zarw*[136] may be consistent with these propositions. The accused was charged with perjury in that at his trial for the murder of his wife he falsely swore to the effect that he had not killed her. The resemblance to the perjury count in the present case will be apparent. A demurrer to the indictment, pursuant to ss 598 and 605 of the Criminal Code, on the ground that it disclosed no offence cognisable by the court, had been overruled by the trial judge[137].

111 The accused was convicted of perjury. His appeal succeeded but not on the ground that the demurrer should have been allowed or that there had been some other wrong decision of any question of law, as provided by s 668E(1) of the Criminal Code. Rather, the conviction was set aside as "unsafe and unsatisfactory"[138]. This expression is not used in s 668E[139] but indicates that, within the meaning of s 668E, there is a "miscarriage of justice" if a verdict is unreasonable or not supportable on the evidence or is attended by a real doubt as to whether it is "safe or just"[140].

112 The outcome in *El-Zarw* involved the recasting of a substantive legal deficiency, to which the procedures in ss 598 and 605 are directed, into an exercise of determining whether the proceedings were an abuse of process. The actual outcome may be supported on the ground that the demurrer should have been allowed. However, the reasoning adopted by the Court of Criminal Appeal appears to have been[141] that the verdict was "unsafe and unsatisfactory" because there was insufficient additional evidence to that at the first trial and so no addition of "a new dimension" to the Crown case[142]. Rather, it was said, the Crown case on perjury involved "simply going behind the verdict of acquittal", something "not permissible under the double jeopardy rule"[143].

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136 [1994] 2 Qd R 67.

137 [1994] 2 Qd R 67 at 79.

138 [1994] 2 Qd R 67 at 77, 85.

139 *Jones v The Queen* (1997) 191 CLR 439 at 450.

140 *Jones v The Queen* (1997) 191 CLR 439 at 450.

141 [1994] 2 Qd R 67 at 76-77, 79-80, 84-85.

142 [1994] 2 Qd R 67 at 79.

143 [1994] 2 Qd R 67 at 77.

113 It is unnecessary for this application to rule upon the availability in law of the proposed "exceptions" urged by the applicant. However, it may be said that, cast in terms of weighing and balancing the fairness of a trial, they lack cogency. Further, either separately or in combination, they would operate to deprive principles of "double jeopardy" of much of their content. The recognition of perjury as a general exception for "fraud" would enable the State, by the expedient of laying such a charge, to controvert an earlier acquittal in any case in which the accused had given evidence affirming a plea of not guilty. Similarly, an exception for "fresh evidence", whether "substantial" or otherwise, removes an encouragement to thorough investigation in the first instance. Any weakening of the "double jeopardy" principles in the fashion proposed should be by legislative action.

Conclusions

114 The respondent would have had a good demurrer under ss 598 and 605 of the Criminal Code for failure of the indictments to disclose an offence known to the law[144]. That course was not followed. But, given the course of the procedure which instead was adopted before Muir J, the respondent should not be prejudiced in this Court against seeking to uphold the favourable outcome he obtained in the Court of Appeal. Further, because the perjury indictment in the present instance could not be supported by s 123 of the Criminal Code, and consistently with authority in this Court, the laying of that indictment was vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance, there was an attempt to re-litigate the earlier prosecution[145].

115 Doubt does not attend the decision of the Court of Appeal that Muir J erred in declining to stay the prosecution. The outcome in the Court of Appeal was correct as a matter of law. Therefore, no occasion arises to consider the further matters which the applicant would seek to agitate in this Court.

116 Full argument on the question of law having been heard, special leave to appeal should be granted, but the appeal should be dismissed.

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144 cf, for example, *Director of Public Prosecutions v Bhagwan* [1972] AC 60 at 73.

145 *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Rogers v The Queen* (1994) 181 CLR 251.

117 McHUGH J. The question in this special leave application is whether the Crown should be granted special leave to appeal against an order of the Court of Criminal Appeal of Queensland quashing a conviction for perjury and entering a verdict of acquittal. In my opinion, special leave should be granted but the appeal should be dismissed on the ground that the charge against the respondent for perjury was an abuse of process because it had a tendency to undermine the respondent's acquittal of an earlier charge of murder.

118 It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge. A perjury charge that has that effect is an abuse of process even if the evidence supporting the charge is different from the evidence that supported the prosecution case in respect of the charge on which the accused was acquitted. The long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal. That is so even though the evidence proving perjury is unanswerable.

Statement of the case

119 In 1985, the Crown charged Raymond John Carroll with the murder of Deidre Maree Kennedy. At his trial, Carroll denied on oath that he had killed her. But the jury disbelieved him and convicted him of her murder. On appeal, however, the Court of Criminal Appeal of Queensland held that no jury, properly instructed, could be satisfied beyond reasonable doubt that Carroll had murdered Deidre Kennedy[146]. It allowed his appeal and ordered that the conviction be set aside and that a verdict of acquittal of the charge be entered.

120 Over 14 years later, the Crown indicted Carroll for perjury. The indictment charged that "RAYMOND JOHN CARROLL in a judicial proceeding, namely the trial of RAYMOND JOHN CARROLL for the murder of one DEIDRE MAREE KENNEDY knowingly gave false testimony to the effect that he ... did not kill the said DEIDRE KENNEDY". The indictment against Carroll was presented in terms of s 123(1) of the *Criminal Code of Queensland* ("the Criminal Code" or "the Code") to which reference will later be made.

121 The charge of perjury was tried by a jury before Muir J in the Supreme Court of Queensland. Before the trial commenced, Carroll applied under s 592A of the Code for an order that the proceedings be stayed on the basis that they

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146 *Carroll* (1985) 19 A Crim R 410 at 417.

were an abuse of process. Muir J dismissed the application[147]. His Honour held that:

- To prove a charge of perjury, the Crown does not have to prove that the false evidence must or may have caused the tribunal to acquit the accused. What must be proved to establish the offence is that false evidence was given knowingly and was material to a question at issue[148].

- The doctrines of autrefois acquit and res judicata do not apply to prevent the prosecution for perjury[149].

- The evidence that the Crown would call was significantly different from and stronger than the evidence at the trial and was not an abuse of process[150].

122 Section 592A provides that a ruling given on such an application may not be the subject of an interlocutory appeal, but the ruling may be raised as a ground of appeal against conviction.

123 The jury convicted the accused. He appealed to the Court of Appeal (McMurdo P, Williams JA and Holmes J). The Court of Appeal held that Muir J had erred in failing to hold that the perjury indictment was an abuse of process. The Court also held that the jury's verdict was unsafe and unsatisfactory. It set aside the conviction for perjury and directed that the accused be acquitted of the charge.

124 The Crown now seeks special leave to appeal against the orders of the Court of Appeal.

The material facts

125 At the trial for murder, the only issue was whether Carroll was the person who had killed Deidre Kennedy. No other issue such as intention, accident, provocation, self-defence, insanity or manslaughter was involved. In the course of giving evidence in support of his plea of Not Guilty, Carroll was asked, "Did you kill Deidre Kennedy?" He answered "I did not." The jury disbelieved him and convicted him of murder, that is to say, convicted him of unlawfully killing

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147 *Carroll* (2000) 115 A Crim R 164.

148 *Carroll* (2000) 115 A Crim R 164 at 169.

149 *Carroll* (2000) 115 A Crim R 164 at 170.

150 *Carroll* (2000) 115 A Crim R 164 at 170.

Deidre Kennedy. But the Court of Criminal Appeal of the Supreme Court of Queensland directed that a verdict of acquittal be substituted for the conviction of murder. Thus, the effect of the judgment of the Court of Criminal Appeal is that Carroll was not guilty of murdering Deidre Kennedy.

126 At the trial for perjury, the central issue once again was whether the accused had killed Deidre Kennedy. That is because the Crown case on the perjury charge was that Carroll had killed her and his sworn denial at the murder trial necessarily meant that he had lied on oath at that trial and was guilty of perjury. Muir J instructed the jury:

> "The only real issue is whether he told a lie when in that trial he said he did not kill Deidre Kennedy. If he did kill Deidre Kennedy, you may think it plain that that was something well-known to him. If you conclude that it is not established beyond reasonable doubt that he did kill Deidre Kennedy, it follows that it has not been proved beyond reasonable doubt that the accused gave false testimony and the verdict must be not guilty."

127 Thus, the evidence supporting the charge of perjury put in issue the very fact that was in issue on the charge of murder, a charge of which Carroll was acquitted. By finding that he was guilty of perjury, the jury's verdict necessarily proved that he had murdered Deidre Kennedy. It contradicted the acquittal of Carroll in respect of the charge of murdering her. So the issue is whether it was open to the Crown to charge Carroll with perjury when the resultant verdict on the perjury charge necessarily contradicted − or at all events had a tendency to undermine − the acquittal of the accused on the charge of murder. I do not think that there is any doubt that this was a course that the common law does not tolerate. Nor is that position affected by reason of the enactment of the Criminal Code defining the crime of perjury and declaring the circumstances in which a plea of double jeopardy may be pleaded.

Double jeopardy

128 It is a fundamental rule of the criminal law "that no man is to be brought into jeopardy of his life, more than once, for the same offence"[151]. If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict) or acquitted (autrefois acquit) of the same matter. The rule is an aspect or application of the principle of double jeopardy whose "main rationale ... is that it prevents the unwarranted harassment of the accused by multiple prosecutions"[152]. Policy considerations that go to the heart of the

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151 Blackstone, *Commentaries*, (1769) (1966 reprint), bk 4, c 26 at 329.

152 Friedland, *Double Jeopardy* (1969) at 3-4. cf *Rogers v The Queen* (1994) 181 CLR 251 at 273.

administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive[153] if the determinations of courts are to retain public confidence[154]. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct[155]. As Lord Halsbury LC said in *Reichel v Magrath*[156], "it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." In addition, the double jeopardy principle "conserves judicial resources and court facilities"[157].

129 Until comparatively recent times − perhaps not until 1964[158] − the double jeopardy principle gave limited protection to a person who had been convicted or acquitted of an offence. Thus, in *R v Winsor*[159], Erle CJ confidently declared that "[t]he only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the *same offence*" (emphasis added). As late as 1946 Dixon J, in *Broome v Chenoweth*[160], said:

> "The rule against double jeopardy requires for its application not only an earlier proceeding in which the defendant was exposed to the risk of a valid conviction *for the same offence* as that alleged against him in the later proceedings but that the earlier proceeding should have resulted in his discharge or acquittal." (emphasis added)

130 Yet if the prosecution can bring further and different charges arising out of facts all or many of which were before the court in an earlier prosecution, the accused is as effectively harassed as if he was being tried again on the same charge. Similarly, if other proceedings could be brought that had the tendency to contradict or undermine the effect of an acquittal, an acquitted person might

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153 *Rogers v The Queen* (1994) 181 CLR 251 at 273.

154 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1353.

155 *Rogers v The Queen* (1994) 181 CLR 251 at 273.

156 (1889) 14 App Cas 665 at 668.

157 Friedland, *Double Jeopardy* (1969) at 4.

158 *Connelly v Director of Public Prosecutions* [1964] AC 1254.

159 (1866) 10 Cox CC 327 at 329.

160 (1946) 73 CLR 583 at 599.

effectively lose the benefit of the acquittal and the full protection of the double jeopardy principle. Plainly, the formal pleas of autrefois convict or autrefois acquit were inadequate to give effect to the full rationale of the double jeopardy rule and the policy behind it in some cases where the prosecution brought successive proceedings against an accused person. The pleas of autrefois convict and autrefois acquit were confined to successive charges based on the same or substantially the same facts. They do not protect the accused against prosecutorial harassment in many cases that, in substance but not in form, offend the double jeopardy principle.

131 To remedy these and other defects in the application of the double jeopardy principle, the common law courts have applied other weapons in the judicial armoury to make the double jeopardy principle more effective. In particular, they now intervene to protect the accused by staying proceedings that they consider are an abuse of their processes. The common law courts have done so by utilising their inherent jurisdiction to protect their processes. In *Connelly v Director of Public Prosecutions*[161], the House of Lords rejected the Crown's argument that it could be trusted not to abuse its position by bringing further proceedings *related to* the same facts on which an accused person had been convicted or acquitted. Lord Devlin famously said[162]:

> "The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

132 In *Connelly*, the House of Lords held[163] that courts possess inherent jurisdiction to stay a prosecution for a charge that should have been included in the indictment at an earlier trial. Nevertheless, the House upheld the appellant's conviction for robbery even though the Court of Criminal Appeal had quashed his conviction for a murder that had occurred in the course of the robbery. The House held that there had been no abuse of process because the practice was not to try other charges with a charge of murder.

133 In *Garrett v The Queen*[164], this Court gave full effect to the double jeopardy principle when it ordered a new trial for rape after the trial judge had directed the jury that the acquittal of the accused for rape of the complainant at an earlier trial was a neutral fact. The judge had also directed the jury that no

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161 [1964] AC 1254.

162 [1964] AC 1254 at 1354.

163 [1964] AC 1254 at 1296, 1347, 1365-1368.

164 (1977) 139 CLR 437.

inference should be drawn from the acquittal for or against the accused or the complainant. Barwick CJ said that to say "the acquittal was neutral was to deny the applicant the full benefit of the acquittal and not to lay that emphasis upon it for which the circumstances called"[165].

134 The Chief Justice said[166]:

> "The relevant principle is that the acquittal may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict."

135 His Honour went on to say[167]:

> "That the applicant was not guilty of the former charge because acquitted of it is a matter which passed into judgment: it is res judicata. It is upon that principle and not upon any issue estoppel that the applicant succeeds. Here, if the Crown had sought to establish by the evidence of the prosecutrix an indictment that the applicant had raped her on the occasion in November 1975, he could have pleaded autrefois acquit and thus precluded the reception of any such evidence. Here, of course, he was not indicted in respect of the intercourse in November 1975: and the purpose of the Crown in proffering the evidence was not to secure a finding that the intercourse had been without consent. But the direct tendency of the evidence of the prosecutrix was to establish rape on the former occasion. It inevitably challenged the verdict of acquittal. It was therefore, on basic principle, without resort to any issue estoppel which might be suggested, inadmissible."

136 This Court applied the rationale of the double jeopardy principle and took it a step further in *Rogers v The Queen*[168] when it held that the principle applied to interlocutory rulings in criminal proceedings that resulted in the conviction or acquittal of the accused. In *Rogers*, the accused had stood trial in 1989 on an indictment containing four counts. The prosecution sought to rely on admissions in three of four records of interview made by the accused. The first and second records of interview contained admissions concerning two charges on which the accused was subsequently acquitted. The fourth record of interview contained admissions concerning the third and fourth charges on which the accused was

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165 *Garrett v The Queen* (1977) 139 CLR 437 at 445.

166 *Garrett v The Queen* (1977) 139 CLR 437 at 445.

167 *Garrett v The Queen* (1977) 139 CLR 437 at 445.

168 (1994) 181 CLR 251.

convicted. The trial judge rejected the tender of the records of interview on the ground that they had not been made voluntarily. Some years later, the accused was indicted on a further eight counts of armed robbery. At this trial, the prosecution sought to rely on the fourth record of interview to support its case on six of the counts. It sought to rely on the third record of interview − which had not been tendered at the trial − to support another count. This Court held that the tender of the records of interview amounted to a direct challenge to the decision of the judge in the 1989 trial and constituted an abuse of process. Mason CJ said[169]:

> "The tendering of the confessions by the prosecution was vexatious, oppressive and unfair to the appellant in that it exposed him to re-litigation of the issue of the voluntariness of the confessional statements in the records of interview. This issue had already been conclusively decided in the appellant's favour because the confessions sought to be tendered − although relating to different crimes − were made at the same time and in exactly the same circumstances as the confessions that were the subject of the voir dire. Re-litigation in subsequent criminal proceedings of an issue already finally decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence), but is also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue."

Deane and Gaudron JJ said[170] that the challenge to the judge's 1989 ruling invited "the scandal of conflicting decisions"[171] and that it jeopardised public confidence in the administration of justice.

137 In some cases, evidence concerning a charge on which the accused has been acquitted may be admissible because it may be impossible to separate it from the evidence relevant to a charge in a subsequent case[172]. But even though the evidence concerning the acquittal is admissible, the jury must be directed that the previous acquittal cannot be challenged and that the evidence must not be taken as proving guilt on the earlier charge[173]. Barwick CJ dissented in that case

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169 (1994) 181 CLR 251 at 256-257.

170 (1994) 181 CLR 251 at 280.

171 Spencer Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969) at 411.

172 *R v Storey* (1978) 140 CLR 364 at 397, 424.

173 *R v Storey* (1978) 140 CLR 364.

but his statement of relevant principle in such a case was correct. The Chief Justice said[174]:

> "But the citizen must not be twice put in jeopardy, that is to say, as relevant to the present discussion, must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of in any sense being treated as guilty. It is the use of the evidence given on the prior occasion to canvass the acquittal which, if allowed, would offend the rule against double jeopardy, giving that rule a generous application."

138 If this case had to be decided in a common law jurisdiction according to common law principles, the prosecution of Carroll for perjury would be seen as an abuse of process. It contravened the rule that the acquittal of an accused person "may not be questioned or called in question by any evidence which, if accepted, would overturn or *tend to overturn the verdict*"[175] (emphasis added). For the purposes of the criminal law, the entry of an acquittal on the charge of murdering Deidre Maree Kennedy was a final judicial determination that Carroll did not kill her. Under the common law, that determination could not be directly challenged or undermined in or by any subsequent criminal proceeding. *Helton v Allen*[176] establishes that the acquittal would not prevent a court in a civil action determining that Carroll had killed Deidre Kennedy. But for the purposes of the criminal law, the judgment of acquittal entered by the Court of Criminal Appeal was a final and conclusive determination that Carroll did not kill her. The conviction of Carroll for perjury where the perjury consisted of denying that he killed her is in direct conflict with the conclusive determination of the Court of Criminal Appeal that he did not kill her. On common law principles, Muir J should have stayed the indictment for perjury.

139 But is the acquittal entered by the Court of Criminal Appeal final and conclusive given the terms of the Criminal Code? Section 8(1) of the *Evidence Act* 1977 (Q) reverses the common law rule that an accused person could not give evidence on oath in defence of a criminal charge. It declares that the accused is "competent to give evidence on behalf of the defence ... but is not compellable to do so." What then is the effect of s 123(1) of the Criminal Code on the evidence of the accused when it enacts:

> "Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in

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174 *R v Storey* (1978) 140 CLR 364 at 372.

175 *Garrett v The Queen* (1977) 139 CLR 437 at 445.

176 (1940) 63 CLR 691.

> that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'.
>
> ... "?

140 Do the general terms of s 123(1) indicate that in Queensland a person acquitted of an offence in a criminal proceeding may be indicted for perjury if he or she has knowingly given false evidence "touching any matter which is material to any question then depending in that proceeding"? The language of s 123(1) is general enough to authorise a prosecution against a person who has given false testimony in defence of a criminal charge notwithstanding his or her acquittal of that charge. And it is general enough to authorise a prosecution such as the present prosecution even where the false testimony of the accused concerns a denial of an essential element of the charge on which the accused was acquitted.

141 The terms of ss 16 and 17 of the Criminal Code must also be considered. Section 16 provides that, with a specified exception, a person cannot be twice punished for the same act or omission. Section 17 enacts:

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

142 Section 598(2)(e) of the Code provides that a person may plead "that the person has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person cannot under the provisions of this Code be tried for the offence charged in the indictment".

143 Hence, the Code expressly deals with the principle of double jeopardy. Do these provisions of the Code indicate that the common law principles of double jeopardy have no operation in Queensland?

144 In *R v Viers*[177], Thomas J said that Sir Samuel Griffith, who drafted the Criminal Code, thought that s 17 extended the common law. However, given the modern developments concerning the common law of double jeopardy, Thomas J was correct in saying that "in some respects [s 17] narrows it." Nevertheless in

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177 [1983] 2 Qd R 1 at 4. See also *R v Gordon; Ex parte Attorney-General* [1975] Qd R 301 at 322.

R v Viers[178], Thomas J held that he had jurisdiction to stay an indictment which offended common law double jeopardy principles. In *R v Viers*, the prosecution sought to charge a person on indictment with possession of cannabis after he had pleaded guilty to possession of the same drug in summary proceedings. Although s 17 did not apply to the case before him, Thomas J thought[179] "it would be oppressive to allow the present proceedings to run their course" and stayed the indictment.

145 In the Court of Appeal in this case, Williams JA held, correctly in my opinion, that s 17 had no application to the present case[180]. Although s 17 exhaustively defines the circumstances in which a person can plead a defence of double jeopardy[181] and does not protect Carroll's acquittal on the murder charge, s 17 does not exclude the inherent jurisdiction of the Supreme Court to stay proceedings on the ground of abuse of process. By s 58 of the Constitution of Queensland 2001, which echoes the former ss 7 and 8 of the *Supreme Court Act* 1991 (Q), the Supreme Court is the superior court of record in Queensland. Section 58(1) invests it with "all jurisdiction that is necessary for the administration of justice in Queensland". Quite apart from the jurisdiction inherent in the Supreme Court to protect its process, those words are wide enough to authorise the stay of any curial proceedings in Queensland[182]. They are wide enough to stay proceedings on the ground that they infringe the double jeopardy principle and constitute an abuse of process. In *Rogers*[183], this Court held that, if subsequent proceedings put at risk the finality of a previous decision involved in an acquittal or conviction, those proceedings are an abuse of process. If they are an abuse of process, an accused person can apply for a stay of proceedings, for every court of justice has inherent power to prevent its procedures being abused[184]. It would be contrary to orthodox principles of statutory construction to find that a section, such as s 17, had impliedly repealed or confined the jurisdiction of the Supreme Court. Statutes are not interpreted as

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178 [1983] 2 Qd R 1 at 4.

179 [1983] 2 Qd R 1 at 7.

180 [2001] QCA 394 at [14].

181 *R v Gordon; Ex parte Attorney-General* [1975] Qd R 301; *R v Viers* [1983] 2 Qd R 1.

182 *Herron v McGregor* (1986) 6 NSWLR 246 at 252.

183 (1994) 181 CLR 251.

184 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536; see also *Rogers v The Queen* (1994) 181 CLR 251 at 255-256.

depriving superior courts of their jurisdiction unless the intention to do so appears expressly or by necessary implication, and that is a proposition that extends beyond applying the so-called ouster clauses[185].

146 Further, the general words of s 123(1) are not to be read as altering the fundamental rule of the common law that an acquittal of a criminal charge "may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict"[186]. General enactments do not abolish fundamental rights. In *Coco v The Queen*[187], four Justices of this Court said:

> "The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

147 Thus the general words of s 123(1) cannot be read as authorising a prosecution for perjury if a conviction for that offence would overturn or tend to overturn or undermine any acquittal of the accused in respect of a criminal charge. The Queensland legislature is not to be taken as abolishing this fundamental rule by an enactment expressed in general terms.

148 Accordingly, nothing in the Criminal Code precludes the Supreme Court of Queensland from staying a charge under s 123(1) when that Court concludes that a charge is in conflict with the double jeopardy principle of the common law and is an abuse of the process of the Court.

Order

149 Special leave to appeal should be granted, but the appeal should be dismissed.

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185 *Webster v Bread Carters' Union of NSW* (1930) 30 SR (NSW) 267; *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271; *Johnson v Director-General of Social Welfare (Vic)* (1976) 50 ALJR 562; 9 ALR 343.

186 *Garrett v The Queen* (1977) 139 CLR 437 at 445.

187 (1994) 179 CLR 427 at 437.