HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DOUGLAS WALLACE PEARCE APPELLANT

AND

THE QUEEN RESPONDENT

Pearce v The Queen (S87-1997) [1998] HCA 57
10 September 1998

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal dismissing the appellant's application for leave to appeal against sentence.*

3. *Remit the matter to the Court of Criminal Appeal to be dealt with consistently with the reasons for judgment of this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

M A Green QC with G P Craddock for the appellant (instructed by T A Murphy, Legal Aid Commission of New South Wales)

G S Hosking SC and A M Blackmore for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Pearce v The Queen

Criminal law – Double jeopardy – Appellant charged with and convicted of two offences arising out of same facts – Whether plea in bar available – Whether an abuse of process – Whether double punishment.

Crimes Act 1900 (NSW), ss 33, 110.

1 McHUGH, HAYNE AND CALLINAN JJ. The appellant was indicted in the Supreme Court of New South Wales. The indictment charged him (among other things) with maliciously inflicting grievous bodily harm with intent to do the victim grievous bodily harm and with breaking and entering the dwelling-house of the same victim and, while therein, inflicting grievous bodily harm on him. These charges were counts 9 and 10 on the indictment and alleged offences against ss 33 and 110 of the *Crimes Act* 1900 (NSW) ("the *Crimes Act*").

2 These two charges arose out of a single episode. The appellant broke into the victim's home and beat him.

3 The appellant applied to the primary judge for an order that "these proceedings" (presumably all proceedings on the indictment) be stayed on the basis that the indictment was oppressive or an abuse of process (or both). It was submitted that the appellant was placed in double jeopardy by the preferring of the two counts we have mentioned.

4 As argument developed before the primary judge, the application was reformulated: to seek an order staying proceedings on one or other of the two counts. The primary judge refused the application and the appellant then pleaded guilty to 8 of the 10 counts on the indictment (including the two disputed counts 9 and 10). He pleaded not guilty to one other count and no plea was taken on the remaining count. The prosecution accepted these pleas of guilty in full discharge of the indictment. He was sentenced to substantial periods of imprisonment on each count. On each of counts 9 and 10 he was sentenced to 12 years penal servitude (less 6 months and 6 days to make allowance for time already served) comprised of a minimum term of 8 years (less 6 months and 6 days) and an additional term of 4 years. The primary judge ordered that the sentences imposed on counts 9 and 10 should be served concurrently with each other but cumulatively upon a sentence imposed for another offence, the subject of a separate indictment.

5 The appellant's appeal to the Court of Criminal Appeal was dismissed[1], the Court holding that there was neither double jeopardy nor double punishment[2]. The appellant now appeals to this Court by special leave.

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1 *R v Pearce*, unreported, 1 November 1996.

2 Unreported, 1 November 1996 at 10-11 per Newman J, 19-20 per Hunt CJ at CL, Bell AJ concurring.

The offences

6 Section 33 of the *Crimes Act* provides that:

> "Whosoever:
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> maliciously by any means wounds or inflicts grievous bodily harm upon any person, or
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> maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person,
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> with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or any other person,
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> shall be liable to penal servitude for 25 years."

Section 110 provides:

> "Whosoever breaks and enters any dwelling-house, or any building appurtenant thereto, and while therein or on premises occupied therewith assaults with intent to murder any person, or inflicts grievous bodily harm upon any person, shall be liable to penal servitude for 25 years."

7 The elements of the offences charged against the appellant overlap but they are not identical. The offence under s 33 requires a specific intent to do grievous bodily harm; the offence under s 110 does not. The latter section requires only an intention to do the acts that caused the harm[3]. The offence under s 110 requires a breaking and entering; the offence under s 33 does not. Did charging both offences subject the appellant to double jeopardy?

8 There is no New South Wales legislation that deals directly with this question. Section 57 of the *Interpretation Act* 1987 (NSW) provides:

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3 *Ryan v The Queen* (1967) 121 CLR 205 at 223-224 per Barwick CJ, 230 per Taylor and Owen JJ, 243 per Windeyer J; *Bowden* (1981) 7 A Crim R 378 at 382-383.

"If an act or omission constitutes an offence under both:

(a) an Act or statutory rule, and

(b) a law of the Commonwealth or a law of some other State or Territory,

and a penalty has been imposed on the offender in respect of the offence under a law referred to in paragraph (b), the offender is not liable to any penalty in respect of the offence under the Act or statutory rule referred to in paragraph (a)."

Section 57 deals only with the situation of overlapping state, territory or federal legislation, and does not deal with the situation, as here, where the two offences are created by New South Wales legislation. It is necessary, then, to consider the position at common law.

The nature of "double jeopardy"

9 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 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"[4]. Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

10 If there is a single rationale for the rule or rules that are described as the rule against double jeopardy, it is that described by Black J in *Green v United States*[5]:

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

That underlying idea can be seen behind the pleas in bar of autrefois acquit and autrefois convict as well as behind the other forms or manifestations of the rule

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

5 355 US 184 at 187-188 (1957).

against double jeopardy. It also finds reflection in constitutional guarantees such as the 5th Amendment to the United States Constitution, which states in part:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

It may be seen as a value which underpins and affects much of the criminal law. But pervasive as it is, this value is not the only force at work in the development of these parts of the common law. Three further forces can be identified.

11 First, as the range of crimes and punishments for crime has expanded, it has become apparent that a single series of events can give rise to several different criminal offences to which different penalties attach.

12 Secondly, it has been recognised that an offender should be punished only for the offence with which he or she was charged, and not for some offence or version of the offence not charged.

13 Thirdly, and as a corollary to the second matter we have mentioned, prosecuting authorities have sought to frame charges against an accused that will reflect all of that accused's criminal conduct and thus enable the imposition of punishment that will truly reflect the criminality of that conduct.

14 The fact that double jeopardy is spoken of at several different stages of the process of criminal justice and the presence of other (sometimes competing) forces means that the treatment of double jeopardy has not always been clearly based on identified principles. It is not necessary, however, to resolve all the apparent inconsistencies that can be identified in the application of the rule or rules against double jeopardy in deciding the present appeal, and we do not attempt to do so.

15 In this case it is helpful to consider the stages in the criminal justice process separately, and to deal with issues of double prosecution separately from issues of double punishment. At the stage of prosecution, it is necessary to consider first whether the appellant was entitled to enter a plea in bar to one or more counts on the indictment, and secondly whether he was entitled to a stay of proceedings on one or more counts. At the stage of punishment, it is necessary to consider whether he was entitled to be sentenced in some way differently from the sentences imposed upon him.

Double prosecution

16 It is clear in this case that each of the offences concerned contains an element that the other does not - a specific intent to do grievous bodily harm in s 33 which is absent from s 110 and a breaking and entering in s 110 which is absent from s 33. Neither offence, therefore, is wholly included in the other[6]. So much was conceded by the appellant. It was argued, however, that at common law a person cannot be convicted of different offences "in respect of the same or substantially the same set of facts". That is of central importance in this case, because, as stated above, the two offences arose out of a single episode. The question then is whether the appellant had a plea in bar or was entitled to a stay of proceedings.

Plea in bar

17 Because the appellant's application to the primary judge was made before any plea was entered to the disputed counts, no plea in bar was formally entered. Yet much of the argument at first instance proceeded on the basis that such a plea would be available. Nothing was now said to turn on the fact that no plea in bar was entered and we leave to one side any procedural difficulty that might be said to follow from the course adopted below.

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6 The position can be contrasted with the position that would have obtained if, in New South Wales, there were a simple offence of housebreaking (which there is not). In that event, all of the elements of what might be called the simple offence of housebreaking would be included in the elements of the offence created by s 110. If convicted or acquitted of one, the accused would have a plea in bar to the other. But that is not this case. Sections 105A to 115A of the *Crimes Act* deal with a group of offences under the heading "Sacrilege and Housebreaking". The offences dealt with include various forms of housebreaking - breaking and entering "with intent to commit felony therein" (ss 111(1), 113(1)) or breaking and entering and committing "any felony therein" (s 112(1)). Special provision is made if these offences are committed in "circumstances of aggravation" (which includes maliciously inflicting actual bodily harm) or in "circumstances of special aggravation" (which includes maliciously inflicting grievous bodily harm) whether occurring before, at the time of or immediately after any of the elements of the offence concerned. See ss 105A, 111(2) and (3), 112(2) and (3), 113(2) and (3).

18 It is clear that the plea in bar goes to offences the elements of which are the same as[7], or are included in[8], the elements of the offence for which an accused has been tried to conviction or acquittal. There are, however, decisions that a person may not be prosecuted for one offence when that person has previously been prosecuted for "substantially the same"[9] offence, or for an offence the "gist" or "gravamen"[10] of which is the same as the subject of the earlier prosecution or, as was said in *Wemyss v Hopkins*[11], for the "same matter"[12]. It may be suggested that these cases indicate that a plea in bar is also available if a person is charged with different offences arising out of substantially the same set of facts.

19 Much of the difficulty in determining whether a plea in bar is available when a person is charged with different offences arising out of substantially the same facts can be seen to stem from two sources: first, the uncertainties inherent in the proposition that it is enough that the offences are "substantially" the same; and secondly, the attempt to identify the "sameness" of two offences by reference to the evidence that would be adduced at trial. But these difficulties may be more apparent than real.

20 In each of *Chia Gee v Martin*[13] and *Li Wan Quai v Christie*[14], Griffith CJ identified the test for whether a plea in bar would lie as being "whether the evidence necessary to support the second [charge or prosecution] would have been sufficient to procure a legal conviction upon the first"[15]. At first sight this might

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7 *R v Emden* (1808) 9 East 437 [103 ER 640]; *R v Clark* (1820) 1 Brod & B 473 [129 ER 804].

8 *R v Elrington* (1861) 1 B & S 688 [121 ER 870].

9 *Li Wan Quai v Christie* (1906) 3 CLR 1125 at 1131 per Griffith CJ; *R v O'Loughlin* (1971) 1 SASR 219 at 253-254 per Wells J; cf *R v Barron* [1914] 2 KB 570 at 575 per Lord Reading CJ - "practically the same" offence.

10 *O'Loughlin* (1971) 1 SASR 219 at 258 per Wells J.

11 (1875) LR 10 QB 378.

12 (1875) LR 10 QB 378 at 381 per Blackburn J.

13 (1905) 3 CLR 649.

14 (1906) 3 CLR 1125.

15 *Chia Gee v Martin* (1905) 3 CLR 649 at 653; *Li Wan Quai* (1906) 3 CLR 1125 at 1131. See also *Ex parte Spencer* (1905) 2 CLR 250 at 251 per Griffith CJ; *Paley's*

(Footnote continues on next page)

suggest that it is appropriate to consider what witnesses would be called and what each of those witnesses *could* say about the events which gave rise to the charges. Closer examination reveals that the enquiry suggested is different; it is an enquiry about what evidence would be *sufficient* to procure a legal conviction. That invites attention to what must be proved to establish commission of each of the offences. That is, it invites attention to identifying the elements of the offences, not to identifying which witnesses might be called or what they could say. It is only if attention is directed to what evidence might be given, as opposed to what evidence was necessary, that the enquiry begins to slide away from its proper focus upon identity of offence to focus upon whether the charges arise out of the same transaction or course of events.

21 Further, when it is said that it is enough if the offences are "substantially" the same, this should not be understood as inviting departure from an analysis of, and comparison between, the elements of the two offences under consideration.

22 In this respect *Wemyss* is capable of being misunderstood. Wemyss had been convicted at petty sessions of an offence that being the driver of a carriage he had "by negligence or wilful misbehaviour, to wit, by striking a certain horse ridden"[16] by the respondent caused hurt and damage to her. He was then charged (again at petty sessions) with unlawful assault. The court held that, the offences being summary offences, a plea of autrefois convict was not available but that a defence "in the nature of a plea of autrefois convict"[17] was. The judgments of the members of the court (which were given ex tempore) use various expressions which have later been seized on as sufficiently expressing the test of the availability of a plea in bar.

23 Thus Blackburn J speaks of "proceedings for the same offence" and punishment "for the same matter"[18]; Lush J speaks of prosecution "twice for the same offence" and conviction "again for the same act"[19]; Field J speaks of twice being "punished for the same cause"[20]. (Examination of other reports of the same

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Law and Practice of Summary Convictions, 5th ed (1866) at 145; Broom, *A Selection of Legal Maxims*, 4th ed (1864) at 341.

16 (1875) LR 10 QB 378 at 379.

17 (1875) LR 10 QB 378 at 381 per Blackburn J.

18 (1875) LR 10 QB 378 at 381.

19 (1875) LR 10 QB 378 at 382.

20 (1875) LR 10 QB 378 at 382.

case reveal even greater differences in expression[21].) But, all of these expressions must be understood in their context. Their differences should not obscure the fact that the elements of each offence alleged against Wemyss were identical. The enquiry made in *Wemyss* was an enquiry about the offences that had been alleged, not about what other offences the relevant statutes might create. Thus the case against Wemyss on the first prosecution appears to have been[22] not a case of negligent conduct but one of "wilful misbehaviour" constituted by his intentionally striking the victim's horse. That being so, the court was satisfied that the case propounded on the second prosecution was identical with the case propounded on the first.

24 On closer analysis, therefore, it may be that *Wemyss* and other cases that are said to support the proposition that a plea in bar is available when a person is charged with different offences arising out of the same set of facts do not do so. Moreover, there are sound reasons to confine the availability of a plea in bar to cases in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly included in the other.

25 Shifting attention to whether the offences arise out of the same conduct, or out of a single event or connected series of events, would be to substitute for a rule prohibiting prosecution twice for a single offence a rule that would require prosecuting authorities to bring at one time all the charges that it is sought to lay as a result of a single episode of offending. That would raise still further questions. How would a single episode of offending be defined? Would its limits be temporal or would they be founded in the intentions of the actor?

26 Those are not questions that admit of certain answers and, whatever criteria are adopted, are not questions that could readily be answered at the time an accused enters a plea. In any event, such a test would, as we have said, shift attention away from the principal focus of the rule underlying the pleas in bar which is a rule against repeated prosecution for a single offence. It would be a test which would deny operation to some or all of the three other forces at work in this area: that several different offences may be committed in the course of a single series of events, that an offender can be punished only for the offence charged, not some other offence, and that charges will usually be framed in a way that reflects all of the criminal conduct of the accused.

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21 See the differing reports in 44 LJ (MC) 101, 23 WR 691 and 33 LT(NS) 9 discussed by Zelling J in *Maple v Kerrison* (1978) 18 SASR 513 at 522-523.

22 Contrary to the analysis made by Wells J in *O'Loughlin* (1971) 1 SASR 219 at 260-261.

27 Reference to the recent course of decisions of the Supreme Court of the United States on the Fifth Amendment lends force to these conclusions. In *Blockburger v United States* the Court held that[23]:

> "... where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

This test was adopted until, in *Grady v Corbin*[24], the Court held that the double jeopardy clause of the Fifth Amendment bars a subsequent prosecution where, to establish an essential element of the second offence charged, the prosecution will "prove conduct that constitutes an offense for which the defendant has already been prosecuted"[25]. This was said not to be an "actual evidence" or "same evidence" test but an enquiry into what conduct the prosecution would prove[26] and was said to be a test additional to the *Blockburger* test[27]. Three years later, in *United States v Dixon*[28], the Supreme Court overruled *Grady v Corbin*. The Court held that the *Blockburger* test alone should be applied in determining whether there was a violation of the double jeopardy clause. The opinion of the Court, delivered by Scalia J, gave several reasons for overruling *Grady* but among these was that it provided a rule that was "unstable in application"[29] as he had predicted in his dissenting opinion in *Grady*. The kind of difficulty to which Scalia J was referring can be identified from one of the several examples he gave in that dissenting opinion. *Grady* arose out of a prosecution for motor manslaughter, the accused having previously been convicted of offences of failing to keep to the correct side

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23 284 US 299 at 304 (1932).

24 495 US 508 (1990).

25 495 US 508 at 521 per Brennan J (1990).

26 495 US 508 at 521 per Brennan J (1990).

27 495 US 508 at 521 per Brennan J (1990).

28 509 US 688 (1993).

29 509 US 688 at 709 (1993).

of the median strip and driving while intoxicated (both these offences relating to the accused's driving at or immediately before the fatal collision)[30]. He said[31]:

> "Suppose that, in the trial upon remand, the prosecution's evidence shows, among other things, that when the vehicles came to rest after the collision they were located on what was, for the defendant's vehicle, the wrong side of the road. The prosecution also produces a witness who testifies that prior to the collision the defendant's vehicle was 'weaving back and forth' - *without* saying, however, that it was weaving back and forth over the center line. Is this enough to meet today's requirement of 'proving' the offense of operating a vehicle on the wrong side of the road? If not, suppose in addition that defense counsel asks the witness on cross-examination, 'When you said the defendant's vehicle was "weaving back and forth," did you mean weaving back and forth across the center line?' - to which the witness replies 'yes.' Will this self-inflicted wound count for purposes of determining what the prosecution has 'proved'? If so, can the prosecution then seek to impeach its own witness by showing that his recollection of the vehicle's crossing the center line was inaccurate? Or can it at least introduce another witness to establish that fact? There are many questions here, and the answers to all of them are ridiculous. Whatever line is selected as the criterion of 'proving' the prior offense - enough evidence to go to the jury, more likely than not, or beyond a reasonable doubt - the prosecutor in the second trial will presumably seek to introduce as much evidence as he can without crossing that line; and the defense attorney will presumably seek to provoke the prosecutor into (or assist him in) proving the defendant guilty of the earlier crime. This delicious role reversal, discovered to have been mandated by the Double Jeopardy Clause lo these 200 years, makes for high comedy but inferior justice."

28 Inevitably, any test of the availability of the pleas in bar which considers the evidence to be given on the trial of the second prosecution except in aid of an enquiry about identity of elements of the offences charged would bring with it uncertainties of the kind identified by Scalia J. The stream of authorities in this country runs against adopting such a test[32] and there is no reason to depart from the use of the test which looks to the elements of the offences concerned. Each of

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30 *Grady v Corbin* 495 US 508 at 511-513 (1990).

31 495 US 508 at 541-542 (1990).

32 See also *R v Brightwell* [1995] 2 NZLR 435.

the offences with which the appellant was charged required proof of a fact which the other did not. It follows that no plea in bar could be upheld.

Stay of proceedings

29 Confining the availability of the plea in bar in this way does not deny the existence of the inherent powers of a court to prevent abuse of its process. That there *may* be cases in which the repeated prosecution of an offender in circumstances where that offender has no plea in bar available would be an abuse of process is illustrated by *Rogers v The Queen*[33].

30 The decision about what charges should be laid and prosecuted is for the prosecution[34]. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time. Nothing we say should be understood as detracting from that practice or from the equally important proposition that prosecuting authorities should not multiply charges unnecessarily.

31 There was, however, no abuse of process in charging this appellant with both counts 9 and 10. The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose[35]. To hold otherwise would be to preclude the laying of charges that, together, reflect the whole criminality of the accused and, consonant with what was held in *R v De Simoni*[36], would require the accused to be sentenced only for the offence or offences charged, excluding consideration of any part of the accused's conduct that could have been charged separately.

32 It follows that the primary judge was right to conclude that the proceedings on the indictment (or counts 9 and 10 in particular) should not be stayed.

33 More difficult questions arise in deciding whether the appellant could be or was doubly punished.

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33 (1994) 181 CLR 251.

34 *Maxwell v The Queen* (1996) 184 CLR 501 at 512 per Dawson and McHugh JJ, 534 per Gaudron and Gummow JJ.

35 cf *Williams v Spautz* (1992) 174 CLR 509.

36 (1981) 147 CLR 383.

Double punishment

34 In this area, too, there are apparently conflicting statements. In *R v Hoar*[37], Gibbs CJ, Mason, Aickin and Brennan JJ stated that there is "a practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act"[38]. By contrast, Humphreys J of the English Court of Criminal Appeal stated "[i]t is not the law that a person shall not be liable to be punished twice for the same *act*; it has never been so stated in any case, and the Interpretation Act [1889 (UK)] itself does not say so. What s 33 says is: 'No person shall be liable to be punished twice for the same *offence*.'"[39]

35 Again, it is as well to begin from some general considerations.

36 First, in creating offences, legislatures must necessarily proscribe conduct by reference to particular elements. A complex act by an accused may contain all the elements of more than one offence[40].

37 Secondly, it follows that to punish the whole of the accused's criminal conduct, there will be cases where more than one offence must be charged and punishment exacted for each.

38 Thirdly, since the enactment of s 33 of the *Interpretation Act* 1889 (UK) and its Australian equivalents[41], legislatures have sought to address some of the questions that then arise. At first, the focus was upon punishment twice for the

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37 (1981) 148 CLR 32.

38 (1981) 148 CLR 32 at 38, citing *Connolly v Meagher* (1906) 3 CLR 682.

39 *R v Thomas* [1950] 1 KB 26 at 31 (emphasis added). Section 33 provided "[w]here an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, ... the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence." Although Humphreys J spoke of s 33, he stated that this provision "certainly adds nothing to, and it detracts nothing from, the common law": [1950] 1 KB 26 at 31.

40 Locke, "On Leo Katz, Double Jeopardy, and the Blockburger Test", (1990) 9 *Law and Philosophy* 295 at 299.

41 *Acts Interpretation Act* 1901 (Cth), s 30 (now repealed); *Acts Interpretation Act* 1890 (Vic), s 30; *Acts Interpretation Act* 1954 (Q), s 45 (as originally enacted); *Acts Interpretation Act* 1915 (SA), s 50; *Interpretation Act* 1898 (WA), s 13; *Interpretation Act* 1900 (Tas), s 13.

same *offence*[42]. More recently, however, some legislation in Australia has sought to deal with whether an offender can be punished twice for the same *act or omission*[43]. And, of course, in Australia, some legislation has sought to deal with the consequences of overlapping state, territory, or federal legislation[44].

39 Fourthly, and very importantly, it is highly undesirable that the process of sentencing should become any more technical than it is already. Nearly 30 years ago, Sir John Barry, in his lecture on "The Courts and Criminal Punishments" said[45]:

> "Dr Leon Radzinowicz has rightly observed that the criminal law is fundamentally 'but a social instrument wielded under the authority of the State to secure collective and individual protection against crime'[46]. It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime."

That remains true. "[E]xcessive subtleties and refinements" must be avoided.

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42 See, eg, *Interpretation Act* 1889 (UK), s 33, and the Australian equivalents referred to above.

43 See, eg, *Crimes Act* 1914 (Cth), s 4C; *Interpretation of Legislation Act* 1984 (Vic), s 51; *Interpretation Act* 1967 (ACT), s 33F; cf *Sentencing Act* 1995 (WA), s 11(3).

44 See, eg, *Crimes Act* 1914 (Cth), s 4C(2); *Interpretation Act* 1987 (NSW), s 57; *Sentencing Act* 1995 (WA), s 11(2); *Interpretation Act* 1967 (ACT), s 33F(2).

45 Barry, *The Courts and Criminal Punishments*, (1969) at 14-15.

46 Radzinowicz, *In Search of Criminology*, (1961) at 181.

40 To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

41 In the present case we need not decide whether this result is properly to be characterised as good sentencing practice or as a positive rule of law[47]. There is nothing in ss 33 or 110 or the *Crimes Act* more generally which suggests that Parliament intended that an offender such as the appellant should be twice punished for his inflicting grievous bodily harm on his victim. Nor do we consider that any such intention can be gathered from s 57 of the *Interpretation Act* 1987 (NSW). As stated above, that section merely supplements and does not supplant the practice or rule with which we now deal.

42 It is clear in this case that a single act (the appellant's inflicting grievous bodily harm on his victim) was an element of each of the offences under ss 33 and 110. The identification of a single act as common to two offences may not always be as straightforward. It should, however, be emphasised that the enquiry is not to be attended by "excessive subtleties and refinements"[48]. It should be approached as a matter of common sense, not as a matter of semantics.

43 The trial judge sentenced the appellant to identical terms of imprisonment on counts 9 and 10 and made those sentences wholly concurrent. We can only conclude that the sentence on each of those counts contained a portion which was to punish the appellant for his inflicting grievous bodily harm on his victim. Prima facie, then, he was doubly punished for the one act.

44 Does that matter if, as was the case here, an order was made that the sentences be served concurrently?

45 To an offender, the only relevant question may be "how long", and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than

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47 cf *R v Hoar* (1981) 148 CLR 32 at 38.

48 Barry, *The Courts and Criminal Punishments*, (1969) at 14.

one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality[49].

46 Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision[50]. It is, then, all the more important that proper principle be applied throughout the process.

47 Questions of cumulation and concurrence may well be affected by particular statutory rules[51]. If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation.

48 Further, the need to ensure proper sentencing on each count is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing practices in relation to particular offences[52].

49 Looked at overall, it may well be said that the effect of the sentences imposed on this appellant was not disproportionate to the criminality of his conduct. Nevertheless, we consider that the individual sentences imposed on counts 9 and 10 were flawed because they doubly punished the appellant for a single act, namely, the infliction of grievous bodily harm. Further, to make the sentences imposed on those two counts wholly concurrent may also be said to reveal error in that to do so failed to take account of the differences in the conduct which were the subject of punishment on each count. The appeal under s 5(1) of the *Criminal Appeal Act* 1912 (NSW) being an appeal against "a sentence" it was, of course, the individual sentences that fell for consideration, not just their overall effect. If the Court "is of opinion that some other sentence ... is warranted in law and should have been passed, [it] shall quash the sentence and pass such other sentence in substitution therefor"[53].

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49 *Mill v The Queen* (1988) 166 CLR 59.

50 cf *House v The King* (1936) 55 CLR 499.

51 See *Crimes Act*, s 444(2) and (3); *Sentencing Act* 1989 (NSW), s 9; see also *Sentencing Act* 1991 (Vic), s 16.

52 *L* (1997) 91 A Crim R 270 at 282 per Ormiston JA.

53 *Criminal Appeal Act*, s 6(3).

50 We would, therefore, allow the appeal, set aside the order of the Court of Criminal Appeal dismissing the appellant's application for leave to appeal against sentence and remit the matter to that Court to be dealt with consistently with the reasons for judgment of this Court. Otherwise, we would dismiss the appeal.

51 GUMMOW J. The appellant was indicted in the Supreme Court of New South Wales for offences against the law of that State. The facts are detailed in the judgments of the other members of the Court and I need not repeat them. After his unsuccessful application for a stay of proceedings on one or other of the disputed counts 9 and 10, the appellant had pleaded guilty to them. He was sentenced on each of counts 9 and 10 to 12 years penal servitude, comprising a maximum term of 8 years, less an allowance for time already served, and an additional term of 4 years. It was ordered that the sentences imposed on counts 9 and 10 be served concurrently, but cumulatively upon a sentence imposed for another offence which was the subject of a separate indictment.

52 The appellant's appeals against conviction and sentence were dismissed by the Court of Criminal Appeal. The appellant submits that the Court of Criminal Appeal erred in holding that there had been "no double jeopardy or abuse of process involved" in the indictment and that he had not been "punished twice for the same offence".

53 Consideration of the issues the appellant raises may begin with attention to what was said by Deane and Gaudron JJ in *Rogers v The Queen*[54]. Their Honours pointed to three principles, each expressed in a Latin maxim, which have come to be of fundamental importance to the structure and operation of our legal system. The first concerns the public interest in concluding litigation by a judicial determination which is final, binding and conclusive[55]. The second is the need for orders and other solemn acts of the courts to be accepted (unless set aside or quashed) as incontrovertibly correct, thereby limiting the scope for conflicting decisions[56].

54 The third principle concerns the injustice to the individual which would be occasioned by a requirement to litigate afresh matters already determined by the courts. The maxim, *nemo debet bis vexari pro una et eadem causa* (it is the rule of law that a man shall not be twice vexed for one and the same cause), appears in *Sparry's Case*[57]. The maxim applies not only to *res judicata* doctrines but also to

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54 (1994) 181 CLR 251 at 273.

55 The maxim is *interest reipublicae ut sit finis litium*.

56 The maxim, *res judicata pro veritate accipitur*, appears in *Coke on Littleton* 103a.

57 (1589) 5 Co Rep 61a [77 ER 148].

vexatious litigation and abuse of process[58]. In its application to criminal proceedings, it "has become known as the rule against double jeopardy"[59].

55 To these three principles there might be added a fourth, expressed in the maxim *transit in rem judicatam*, 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[60]. Thus, in respect of an alleged criminal liability, conviction brings about "the substitution of a new liability"[61]. What in this context is meant by "conviction" was considered in *Maxwell v The Queen*[62].

56 These principles (or precepts or values) necessarily are general in nature. They have been implemented in civil and criminal law in various specific doctrines (particularly by many of those gathered uneasily under the rubrics of merger and estoppel) and influence such matters as the control by the courts of their process to prevent abuse and the principles of sentencing. This appeal concerns their operation in criminal law and procedure.

57 In submissions much attention was given to the pleas in bar, *autrefois acquit* and *autrefois convict*. As will become apparent, I do not regard these pleas as determinative of the issues before the Court. Nevertheless, it is appropriate to say something with respect to them.

58 The pleas which developed in England perhaps to mitigate the hazard of capital punishment now operate in respect of statutory offences with common elements which bear upon the one incident or series of events[63]. Caution is called for in any exaltation of the history of the law of English criminal procedure[64]. It has been said that "contrary to modern statements about the rule [against double

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58 Kersley, *Broom's Legal Maxims*, 10th ed (1939) at 220.

59 *Rogers v The Queen* (1994) 181 CLR 251 at 277.

60 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 606.

61 *R v Wilkes* (1948) 77 CLR 511 at 519.

62 (1996) 184 CLR 501.

63 Horack, "The Multiple Consequences of a Single Criminal Act", (1937) 21 *Minnesota Law Review* 805 at 819-822.

64 *Nicholas v The Queen* (1998) 72 ALJR 456 at 487; 151 ALR 312 at 354-355; Beattie, *Crime and the Courts in England 1660-1800*, (1986) at 375-376, 377-378; Durston, "The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century", (1996) 5 *Griffith Law Review* 177 at 182-193.

jeopardy] being at the very cornerstone of English justice", until the modern period the pleas of *autrefois acquit* and *autrefois convict* "remained the only manifestations of the rule against double jeopardy"[65].

59 A starting point for a doctrinal consideration of the pleas is the statement in Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*[66]:

> "There is a crucial distinction between pleas of *autrefois acquit* and *autrefois convict* though the two are often associated. *Autrefois acquit* is the species of estoppel by which the Crown is precluded from reasserting the guilt of the accused when that question has previously been determined against it. *Autrefois convict*, on the other hand, is akin to merger. It is the application to criminal proceedings of the maxim *transit in rem judicatam*."

The learned editor also points out, with respect to *autrefois convict*, that "[i]t is the conviction, and not the harassment, which constitutes the bar"[67].

60 In *Rogers v The Queen*, Deane and Gaudron JJ, after observing that the two pleas were often seen as different sides of the same coin, continued[68]:

> "To some extent they are: to the extent that they prevent the prosecution of crimes for which an accused has either been acquitted or convicted, they prevent inconsistent decisions and serve to maintain the principle embodied in the maxim res judicata pro veritate accipitur."

The emphasis is upon the significance attached to the court record. Hence the statement by Lord Goddard CJ in *Flatman v Light*[69] that the pleas should be

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65 Hunter, "The Development of the Rule Against Double Jeopardy", (1984) 5 *Journal of Legal History* 3 at 14-15.

66 3rd ed (1996), par 309 (footnotes omitted). See also *R v Brightwell* [1995] 2 NZLR 435 at 437.

67 3rd ed (1996), par 429.

68 (1994) 181 CLR 251 at 276.

69 [1946] KB 414 at 419. See also *R v Brightwell* [1995] 2 NZLR 435 at 437.

asserted formally because they form part of the record of the court[70]. Mandamus would issue out of the King's Bench at the instance of a prisoner wishing to make such a plea, so as to provide the prisoner with a copy of the earlier record[71].

61 In *Rogers v The Queen*, Deane and Gaudron JJ went on[72]:

> "Beyond that, however, they reflect quite different considerations. Autrefois convict is the application in criminal proceedings of the doctrine of merger which gives rise to res judicata or cause of action estoppel in civil proceedings; autrefois acquit operates within its confines to prevent the prosecution from asserting the contrary of what has previously been judicially determined in favour of an accused. In this respect, autrefois acquit is analogous to issue estoppel in civil proceedings, although it clearly operates within a more limited area. In large part, that is the result of the different character of civil and criminal proceedings and the difficulty involved in identifying precisely what, besides guilt or innocence, has been determined by the jury's verdict."

Their Honours pointed out[73] that the preclusive aspect of the plea of *autrefois acquit* (which prevents re-litigation of matters already determined in favour of the accused) derives from the principle known as the rule against double jeopardy. Further, where the matter arises not in a court of record but in a court of summary jurisdiction, the court gives effect not to the technical plea, there being no record, but to the maxim which is reflected in the double jeopardy rule[74].

62 In the present case, no plea of *autrefois acquit* or *autrefois convict* was entered to the disputed counts 9 and 10, nor could there have been such a plea. There had been no previous judicial determination in favour of the accused to

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70 His Lordship observed, however, that "if during the course of a case it turned out that a man had been previously convicted or acquitted of the same offence with which he was then charged, the court would, of course, allow him to plead it and would give effect to that plea": [1946] KB 414 at 419.

71 See the course of the litigation in *Middlesex Special Commission* (1833) 6 Car & P 90 [172 ER 1159]; *R v Bowman* (1833) 6 Car & P 101 [172 ER 1164]; *R v Middlesex Justices, In re Bowman* (1834) 5 B & Ad 1113 [110 ER 1104]; *R v Bowman* (1834) 6 Car & P 337 [172 ER 1266].

72 (1994) 181 CLR 251 at 276-277 (footnotes omitted).

73 (1994) 181 CLR 251 at 277.

74 *Flatman v Light* [1946] KB 414 at 419. The same is true with respect to reliance upon *autrefois convict*: *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381.

found a plea of *autrefois acquit* and no conviction upon which the doctrine of merger could operate.

63 Had the occasion required a comparison between the elements of the two disputed counts 9 and 10 for the purposes of ascertaining the availability of a plea in bar, in my view the applicable principles would have been those explained by McHugh, Hayne and Callinan JJ, with particular reference to what they say respecting *Wemyss v Hopkins*[75] and *Blockburger v United States*[76]. It may also be noted that in *United States v Dixon*[77], Rehnquist CJ stated that the cases applying *Blockburger* "have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue". The New Zealand Court of Appeal took a similar approach in *R v Brightwell*[78].

64 The expression "double jeopardy" imparts a value which appears not only in the fashion discussed above. Thus, there is a rule that evidence is inadmissible where, if accepted, it would overturn or tend to overturn an acquittal[79]. It has been said that the rationale of the rule against "double jeopardy" applies to the question of quantification of punishment as well as to the determination of guilt or innocence[80]. In *Rohde v Director of Public Prosecutions*[81], Deane J said that the statutory conferral of a right of appeal by the prosecution against sentence infringes "the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal". "Double jeopardy" also bears upon other stages of the criminal process including the exercise of curial discretion. It is in this field that "double jeopardy" is significant in the present case.

65 The application made by the appellant was a response to the inclusion in the indictment of all charges which were to be preferred arising out of the one incident. The gravamen of the appellant's complaint appears to have been that he was placed

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75 (1875) LR 10 QB 378.

76 284 US 299 at 304 (1932).

77 509 US 688 at 716-717 (1993).

78 [1995] 2 NZLR 435 at 438-439.

79 See *Garrett v The Queen* (1977) 139 CLR 437 at 445; *R v Davis* [1982] 1 NZLR 584 at 590-591; *Rogers v The Queen* (1994) 181 CLR 251 at 277-278.

80 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 129.

81 (1986) 161 CLR 119 at 128.

in hazard of the imposition of multiple punishments for what in substance was the one offence.

66 The Fifth Amendment to the Constitution of the United States includes a provision:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

It is settled doctrine that this provision, as a constitutional imperative, protects against two types of abuse, "multiple punishment" for a single offence and "successive prosecution" for the same offence[82]. The submissions for the appellant rather assumed that in this country "double jeopardy" was an independent doctrine of avoidance which of itself would found a stay application. That is not the position. Somewhat like notions of unjust enrichment, double jeopardy is a "concept" rather than "a definitive legal principle according to its own terms"[83].

67 In Australia, concerns with "double jeopardy" have come to be expressed at common law in differing ways by an evolutionary process which has crossed what often in the legal system is a false divide between substance and procedure[84]. Thus, even if a plea in bar is not available, successive prosecutions may be an abuse of process[85]. It should also be accepted that the inclusion of separate counts for what in substance, if not entirely in form, is the same offence may be an abuse of process. For the reasons given by the other members of the Court, there was no abuse of process here. The decision of the Court of Criminal Appeal to dismiss the appeal against conviction was correct.

68 However, the principles involved in the notion of "double jeopardy" also apply at the stage of sentencing. They find expression in the rule of practice, "if not a rule of law", against duplication of penalty for what is substantially the same act[86].

69 In the present case, I agree with McHugh, Hayne and Callinan JJ that the sentencing process miscarried and that the Court of Criminal Appeal should not

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82 *United States v Dixon* 509 US 688 at 696, 704 (1993).

83 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378; *Hill v Van Erp* (1997) 188 CLR 159 at 239.

84 See the remarks of Fullagar J in *Maxwell v Murphy* (1957) 96 CLR 261 at 286.

85 See *Williams v Spautz* (1992) 174 CLR 509 at 521; *Rogers v The Queen* (1994) 181 CLR 251.

86 *R v Hoar* (1981) 148 CLR 32 at 38.

have dismissed the accused's appeal against sentence. The appeal to this Court should be allowed to the extent that the order of the Court of Criminal Appeal dismissing the appeal against sentence should be set aside. It will be for the Court of Criminal Appeal to reconsider the appeal against sentence in accordance with the reasoning in the judgment of McHugh, Hayne and Callinan JJ.

70 The Supreme Court was not exercising federal jurisdiction. No question arises as to whether a court exercising federal jurisdiction may be required or authorised in the exercise of that jurisdiction to proceed in a manner which would involve an abuse of the process of that court[87].

71 Nor has any question arisen in this case with respect to the effect of "double jeopardy" where what is involved are statutory offences created by federal and State legislatures, or by two or more State legislatures. Constitutional questions may arise in each category[88]. These may be left for another day.

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87 *Nicholas v The Queen* (1998) 72 ALJR 456 at 473-474; 151 ALR 312 at 335-336.

88 See as to the latter, *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78; Leeming, "Resolving Conflicts between State Criminal Laws", (1994) 12 *Australian Bar Review* 107; cf *Heath v Alabama* 474 US 82 (1985).

72 KIRBY J. This appeal, from the New South Wales Court of Criminal Appeal[89], concerns the law's response to a complaint about double jeopardy.

73 It has been said that the principle that a person should not twice be placed in jeopardy for the same matter is a cardinal rule lying "[a]t the foundation of criminal law"[90]. The rule has been explained as arising from a basic repugnance against the exercise of the state's power to put an accused person in repeated peril of criminal punishment[91].

74 Legal relief against double jeopardy was known to the laws of ancient Greece[92] and Rome[93]. It was also known to ecclesiastical law. In the Old Testament writings of the prophet Nahum, it is recorded[94]:

> "What do ye imagine against the Lord? he will make an utter end: affliction shall not rise up the second time…Though I have afflicted thee, I will afflict thee no more."

75 In the law of England, the origins of the rule are sometimes traced to the conflict in the late 12th Century between the civil and ecclesiastical powers

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89 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996.

90 *Cullen v The King* [1949] SCR 658 at 668; cf *R v King* [1897] 1 QB 214 at 218.

91 *Cullen v The King* [1949] SCR 658 at 668; *Green v United* States 355 US 184 at 187-188 (1957); *Cooke v Purcell* (1988) 14 NSWLR 51 at 55-56; cf Westen and Drubel, "Toward a General Theory of Double Jeopardy", (1978) *Supreme Court Review* 81 at 84.

92 See Jones, *Law and Legal Theory of the Greeks*, (1956) at 148: "The main concern of a man brought into court was to win a verdict by one means or another, for once tried he could not be prosecuted again on the same charge, the rule *ne bis in eadem re* being accepted in Athens if not in Sparta". See also Demosthenes' speech 'Against Leptines' in 355 BC, "Now the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort.": *Demosthenes I*, (Vance trans 1962) at 589 as cited in *United States v Jenkins* 490 F 2d 868 at 870 (1973); affmd 420 US 358 (1975).

93 See eg *Digest of Justinian,* Book 48, Title 2 "Accusations and Indictments" n7; Radin, *Roman Law*, (1927) at 475; *Bartkus v Illinois* 359 US 121 at 151-152 (1959).

94 I Nahum 9, 12 (King James Version). St Jerome drew from this the rule that God does not punish twice for the same act. See *Bartkus v Illinois* 359 US 121 at 152 (1959) per Black J.

represented, respectively, by King Henry II and Archbishop Thomas à Becket[95]. However that may be, English criminal procedure developed rules of pleading which an accused could invoke where reliance was had on a previous acquittal or conviction[96]. In some jurisdictions of the common law, the rule has now been supplanted by constitutional[97] or statutory[98] formulae. It is also now recognised as one of the rules of universal human rights[99].

76 Judges, seeking to explain the law applicable to a complaint of double jeopardy, have remarked on the loose and imprecise expressions appearing in judicial reasons and textbook analyses[100]. Textwriters have declared that it is futile to search for a formula which provides "a *single* test to determine when a second prosecution for a different offence should be barred"[101]. In the morass of judicial

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95 Friedland, *Double Jeopardy*, (1969) at 326. According to other writers, the acceptance of the doctrine by the common law from ecclesiastical law (derived in turn from Roman law) was much more hesitant and intermittent and was not the result of a single event. See *Cooke v Purcell* (1988) 14 NSWLR 51 at 54-55.

96 See *R v O'Loughlin* [1971] 1 SASR 219 at 239-252 where the history is traced by Wells J; Friedland, *Double Jeopardy*, (1969) at 5-15; Sigler, *Double Jeopardy: The Development of a Legal and Social Philosophy*, (1969) at 1-37.

97 See eg United States Constitution, 5th Amendment; Canadian Charter of Rights and Freedoms, Art 11(h); Constitution of India, Art 20(2); Constitution of the Republic of South Africa, Ch 3, s 25(3)(g); Constitution of Papua New Guinea, ss 37(8) and 37(9); Constitution of the Solomon Islands, ss 10(5) and 10(6).

98 See eg *Criminal Code* (Q), ss 16 and 17: *R v Gordon, ex parte Attorney-General* [1975] Qd R 301; *Criminal Code* (WA), s 17: *Phillips v Carbone (No 2)* (1992) 10 WAR 169; *Criminal Code* (Tas), s 11: *Enslow* (1992) 62 A Crim R 119. See also the terms of the *Interpretation Act* 1889 (UK), s 33 and its derivatives discussed in Friedland, *Double Jeopardy,* (1969) at 110-113; *Bill of Rights Act* (1990) (NZ), s 26(2). There is no precise equivalent in New South Wales.

99 *International Covenant on Civil and Political Rights,* Art 14.7: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country". See Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, (1993) at 272-273. See also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Protocol No 7, Art 4(1); *American Convention on Human Rights*, Art 8(4).

100 See eg *R v O'Loughlin* [1971] 1 SASR 219 at 238.

101 Friedland, *Double Jeopardy,* (1969) at 93.

authority there is a great deal of confusion and uncertainty. The precise issue raised by the present appeal has not previously been addressed by this Court[102]. The expanded understanding of the power of judges to stay criminal proceedings which would constitute an abuse of process[103] affords an opportunity to cut away at least some of the confusion and uncertainty of the old law and to place the provision of relief against double jeopardy on a clearer foundation.

An accused alleges double jeopardy

77 Mr Douglas Pearce ("the appellant") is a 33 year old Aboriginal Australian of disadvantaged background. In March 1996, in the Supreme Court of New South Wales, he pleaded guilty to a number of counts found in two indictments presented by the Crown. The first contained ten counts, one of which was not proceeded with. In respect of the eighth count of that indictment – a charge of attempted murder – the appellant pleaded not guilty. The Crown accepted his pleas of guilty to the remaining counts in full discharge of that indictment. He also pleaded guilty to the single count found in the second indictment.

78 The counts of the first indictment referred to a series of events on 24 and 25 June 1994 in Yamba, New South Wales. There were three episodes. All of them involved violence. The first occurred at a convent (counts 1, 2, 3 and 4). The second involved events in the home of an elderly couple (counts 6 and 7). The third concerned a victim, Mr William Rixon, then aged 72 years (counts 9 and 10). It is the alleged overlap of the charges in counts 9 and 10 which gives rise to the argument of double jeopardy in this case.

79 Counts 9 and 10 relate to a sequence of events which involved the appellant entering Mr Rixon's home at night, armed with a heavy wooden object, in company with a co-offender. Mr Rixon lived there alone. The appellant repeatedly struck Mr Rixon with the wooden object. He took $45 from Mr Rixon's wallet and decamped. Mr Rixon was seriously injured. Eventually, he attracted the assistance of a neighbour. He was taken to hospital where he was found to have sustained major life-threatening trauma to his head, face and body. As a result of the trauma he lost the use of the left eye and suffered brain damage. He was confined to a nursing home where he was described as "a mere shadow of the man

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102 But see *Li Wan Quai v Christie* (1906) 3 CLR 1125 at 1131; *Saraswati v The Queen* (1991) 172 CLR 1 at 13.

103 *Williams v Spautz* (1992) 174 CLR 509 at 520-521; *Cooke v Purcell* (1988) 14 NSWLR 51; *Connelly v DPP* [1964] AC 1254; *R v Beedie* [1998] QB 356 at 366-367.

that he was before the assault"[104]. He is confused, becomes agitated and gets lost even in his own environment. His mental and physical states are deteriorating.

80 The single count of the second indictment concerned an aggravated sexual assault against a fellow prisoner in the Grafton Correctional Centre to which the appellant was committed. He pleaded guilty to this offence. It was accepted by the appellant's counsel that his offences were serious and required appropriate punishment according to law. But it was complained that errors in the trial had resulted in a sentence which was excessive.

81 When the sentencing proceedings commenced before the primary judge (Ireland J), counsel for the appellant sought an order that proceedings on the indictment be stayed as oppressive and/or an abuse of process. It was made clear that this application related to counts 9 and 10 of the first indictment. Specifically, counsel argued that, by preferring the charge in count 10, the Crown was placing the appellant in double jeopardy and requiring him to face "substantially the same charge twice". After hearing argument, the primary judge rejected this application. It was then that the appellant pleaded guilty to all charges, including those contained in counts 9 and 10.

82 The primary judge sentenced the appellant, in respect of all offences on both indictments, to a total minimum term of penal servitude of 11 years, with an additional term of 4 years[105]. On each of the ninth and tenth counts of the first indictment, the appellant was sentenced to 12 years penal servitude, less a period which it is unnecessary to detail. These sentences were to be comprised of minimum terms of 8 years (less pre-sentence custody) and an additional term of 4 years. The primary judge ordered that both sentences were to be served concurrently with each other and cumulatively upon the sentence imposed for the sexual assault charge contained in the second indictment[106]. He made no differentiation between the charges referred to in counts 9 and 10. In relation to the other counts of the first indictment, concerned with the two earlier episodes in Yamba, the primary judge sentenced the appellant to varying terms of penal servitude, all to be served concurrently with those imposed in relation to the two counts arising out of the episode of violence involving Mr Rixon.

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104 Report of Dr David Hope (20 March 1996). Quoted by Ireland J, *R v Pearce* unreported, Supreme Court of New South Wales, 28 March 1996 at 8.

105 Pursuant to the *Sentencing Act* 1989 (NSW), s 5; cf *R v Moffitt* (1990) 20 NSWLR 114.

106 *R v Pearce* unreported, Supreme Court of New South Wales, 28 March 1996 at 21 per Ireland J.

83 This Court is not concerned generally with the components of the sentence or the way it was structured to deal cumulatively with the several episodes dealt with in the separate indictments. The only issue raised for us relates to the way in which the complaint of double jeopardy was dealt with at the trial. Specifically, it concerns whether the appellant was entitled, as of right, to relief in relation to one of counts 9 and 10 of the first indictment and whether the trial judge erred in refusing to grant a stay or in failing to differentiate between the punishments imposed in respect of the convictions entered on those counts.

Refusal of stay and appeal

84 The only relief sought by the appellant at the trial was the stay requested immediately before his pleas were taken. The overlap between the offences charged, which were suggested to give rise to double jeopardy, arose from the terms of the *Crimes Act* 1900 (NSW) ("the Act") upon which the counts were respectively founded. The offence in count 9 was based upon an alleged breach of s 33 of that Act. The offence in count 10 was based on s 110. Relevantly, the two sections provide:

> "33. Whosoever:
>
> maliciously by any means wounds or inflicts grievous bodily harm upon any person ...
>
> with intent in any such case to do grievous bodily harm to any person ...
>
> shall be liable to penal servitude for 25 years.
>
> 110. Whosoever breaks and enters any dwelling-house ... and while therein ... inflicts grievous bodily harm upon any person, shall be liable to penal servitude for 25 years."

85 In refusing a stay, the primary judge acknowledged that each count referred to the infliction of grievous bodily harm upon a person, namely Mr Rixon. Each count arose out of the same continuous episode. However, there were two distinctions between them which the judge regarded as critical. Count 9, based upon s 33 of the Act, contained the element of specific intent to do grievous bodily harm. This was absent from count 10. Count 10 involved the element of breaking and entering a dwelling house. This was missing from count 9. Thus, although the facts were generally the same and the infliction of grievous bodily harm on the victim was the same, the counts, like the sections upon which they were based, contained differentiating elements of aggravation: specific intent to inflict grievous bodily harm in count 9 and invasion of a dwelling house in count 10.

86 Acknowledging that the point was "certainly not absolutely clear-cut in the way in which the authority is to be applied to these two counts"[107], the primary judge rejected the stay sought by reference to the criterion stated by Griffith CJ in this Court in *Li Wan Quai v Christie*[108]. He held that the respective offences contained different elements such that conviction of one would not necessarily lead to conviction of the other.

87 In the Court of Criminal Appeal, the relevant question was whether the primary judge had erred in refusing to grant the stay. Newman J gave the principal judgment. On the point now in contention, his Honour rejected the appellant's complaint. He said that the common law did not recognise as an injustice the existence of two separate offences for the one act[109]. He drew attention to the remarks of the primary judge to the effect that, while sentencing, he had kept in mind the totality of the appellant's criminality, the large number of offences and the fact that the maximum penalty provided by statute for the two in question was identical warranting "no distinction between them in the sentences to be imposed"[110]. Newman J went on[111]:

> "In these circumstances, I am of the view that his Honour, in fact, was dealing with the two charges on a truly concurrent basis and not on a separate basis and, that being so, no miscarriage of justice has occurred as a result of his Honour declining the stay and no error, I believe, in law has arisen.
>
> I should add that in my view it may well have been better if the offences under sections 33 and 110 had been charged in the alternative. It seems to me that there was a misappreciation as to the effect of the High Court's decision in *De Simoni*[112] in relation to the charging of the offences under sections 110 and 33."

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107 *R v Pearce* unreported, Judgment on application for a stay, Supreme Court of New South Wales, 25 March 1996 at 3 per Ireland J.

108 (1906) 3 CLR 1125 at 1131.

109 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 9, citing *Australian Oil Refining Pty Ltd v Cooper* (1987) 11 NSWLR 277 at 282.

110 Per Ireland J cited in *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 10 per Newman J.

111 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 10-11 per Newman J.

112 *R v De Simoni* (1981) 147 CLR 383.

In the result, Newman J proposed that the appeal against conviction, relevantly on counts 9 and 10, be dismissed and that the appeal against sentence should also be dismissed.

88 Hunt CJ at CL emphasised that two different offences were provided by law. The prosecutor was entitled to charge both offences in the one indictment on the basis that, for example, the jury might not accept the allegation of specific intent charged in count 9. He acknowledged that, where there was an overlap of the elements constituting separate offences, even when charged in the same indictment and tried in the same trial, there could be a risk of double punishment against which a court should be vigilant. But he concluded that there was no such error in the present case[113]:

> "[I]t is important to emphasise that the circumstances that both offences arise out of substantially the same facts must be taken into account when sentencing the prisoner where he is convicted of both offences, to ensure that there is no measure of double punishment for the same conduct. The judge did not expressly state that he was taking that circumstance into account, but I am not persuaded that he failed to do so. There is, it must be conceded, one passage in his remarks on sentence which is perhaps equivocal, but the total effective sentence which was imposed does not suggest to me that such an error has occurred."

Hunt CJ at CL and Bell AJ (who concurred without separate reasons) agreed in the orders of Newman J. In this way they became the orders of the Court of Criminal Appeal. This appeal comes by special leave from those orders.

Fundamental rationale: non-vexation

89 In seeking to find and apply the rules against double jeopardy apt to the circumstances of the present case, it is useful to start with an understanding of its foundations. They are not confined to relief against double punishment for the one crime (reflected in the legal maxim *nemo debet bis puniri pro uno delicto*)[114]. There is an additional notion, although the cases often demonstrate the difficulty of keeping the two ideas separate[115]. The second notion derives from the rule

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113 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 20 per Hunt CJ at CL.

114 No one should be punished twice for the same offence.

115 *R v Gordon, ex parte Attorney-General* [1975] Qd R 301 at 314.

encapsulated in the maxim *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*[116].

90 The reason why the law is concerned to avoid not simply the risk of double punishment but also that of repeated prosecution for criminal offences is obvious enough. It was explained by the Supreme Court of the United States in these terms[117]:

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

Similar explanations have been given in this Court[118] and in other appellate courts of Australia[119] and overseas[120].

91 Accordingly, the expression of a principle confined to the prevention of double punishment for the same crime would be too narrow. It would conform neither with the statements of the applicable principle in national law, nor in international law[121]. By those statements of law a person is entitled to protection not only from the risk of double punishment (*puniri*) but also from vexation (*vexari*) by repeated or multiple prosecution and trial.

Common law principles and practices

92 *Successive protections:* In Australia, there is no express constitutional prohibition against double jeopardy. The principle stated in international law has not been incorporated into Australian municipal law. Whilst international law may

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116 No one should be twice vexed if it be proved to the court that it is for one and the same cause.

117 *Green v United States* 355 US 184 at 187-188 (1957).

118 *Davern v Messel* (1984) 155 CLR 21 at 67-68.

119 See eg *Cooke v Purcell* (1988) 14 NSWLR 51 at 56-57; *R v Tait* (1979) 46 FLR 386 at 388-389.

120 *Cullen v The King* [1949] SCR 658 at 668.

121 *International Covenant on Civil and Political Rights,* Art 14.7 ["No one shall be liable to be *tried* or *punished* again ..."].

influence the elaboration of Australian common law where there is doubt or ambiguity, it is not, as such, part of that law[122]. In the present case, no legislative codification[123] or interpretative rule[124] is available to determine or guide the outcome of the appeal. That outcome must be found by examining established common law principles and practices which have been elaborated to provide relief against the dangers of double jeopardy in its several manifestations. In summary, such relief has been afforded in respect of criminal trials at successive stages of the process:

1. By the practices adopted by prosecutors.

2. By the plea of *autrefois acquit* or *autrefois convict* in answer to an offending count of an indictment.

3. By a plea in bar, not strictly *autrefois acquit* or *autrefois convict,* in reliance upon the fact that the circumstances constituting the gist or gravamen of a later charge are, in terms or in effect, the same as those constituting the gist or gravamen of the former charge[125].

4. By the adoption of various practices in the conduct of criminal trials designed to reduce the risks of double jeopardy.

5. By the exercise of a judicial discretion to prevent an abuse of process which might otherwise arise if a person were subjected twice to prosecution or the peril of punishment inconsistent either with a previous conviction or a previous acquittal[126] or otherwise subjected to unfair oppression or prejudice[127].

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122 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1426; 147 ALR 42 at 147-151.

123 See eg *Criminal Code* (Q), ss 16, 17; *Criminal Code* (WA), s 17; *Criminal Code* (Tas), s 11.

124 See eg *Interpretation Act* 1889 (UK), s 33 and provisions derived therefrom; cf *Interpretation Act* 1987 (NSW), s 57 which relates to punishment under federal or interstate legislation.

125 *R v O'Loughlin* [1971] 1 SASR 219 at 256.

126 *Connelly v DPP* [1964] AC 1254 at 1364.

127 *Connelly v DPP* [1964] AC 1254 at 1301-1302. See also *Rogers v The Queen* (1994) 181 CLR 251 at 256.

6. Where a person is lawfully convicted of separate offences which involve overlapping elements and reliance upon common facts, by ensuring that, in sentencing, double punishment for what is essentially the same conduct is avoided.

93 Some of the protections afforded in the foregoing list depend, at least in the first instance, upon the conduct of the prosecutor. Most depend upon the actions of the judge. Some (such as the pleas in bar and some rules of criminal procedure) are rights belonging to the accused as a matter of law. Others (such as the provision of a stay or the adjustment of punishment) depend upon the exercise of a judicial discretion or upon the quasi-discretionary function of judicial sentencing. It is desirable that the applicable rules should be as clear as possible. Only if this is so, will prosecutors know what they should do in framing multiple charges with reference to a single episode of criminal activity. Only then will the accused know the pleas as of right or the discretionary relief available against double jeopardy. Then only will the judge know how to respond to the kind of problem which has arisen in this case as in many others. Typically, as here, the judge will be called upon to rule on the point in the midst of a trial. To the extent that authority permits, the rules to be applied should be simple and such as to provide the judge with the powers appropriate to the circumstances to protect an accused against the risks of repeated prosecution and the risk of double punishment in respect of the same offence.

94 Before expressing the solutions which I would offer in the present case, I will illustrate, by reference to authority, the ways in which the common law has sought to avoid the unfairness of double jeopardy in criminal proceedings.

95 *The prosecutor's discretion:* The first defence against unfair exposure of an accused to the risks of double jeopardy lies in the prosecutor's discretion to frame criminal charges in a way that will prevent oppression and unfairness[128]. Because it is within the Crown's entitlement to shape its charges so as to avoid artificialities, an unrealistic view of the facts or the needless exposure of the accused to double jeopardy, it can be expected that the worst abuses will ordinarily be removed before an accused is required to plead[129]. In the normal case, in accordance with conventions which are ordinarily observed, prosecutors for the Crown can be trusted not to abuse their powers[130]. As a matter of practicality, in most cases, their decisions have a profound effect on the course which the criminal process

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128 cf *R v De Kuyper* [1948] SASR 108 at 112.

129 *R v Newman* [1997] 1 VR 146 at 151.

130 *Connelly v DPP* [1964] AC 1254 at 1291.

follows[131]. Prosecutors must therefore be conscious of the vast expansion of statutory offences that has occurred during this century. This development has inevitably presented a risk of overlap and duplication of charges arising out of the same facts and circumstances. Without care, such duplication could result in the danger of double punishment for what is essentially the same conduct. It is a danger which should in all proper cases be avoided.

96 The dangers were smaller when the law afforded fewer and more generic criminal offences to the prosecutor's armoury. The multiplication of statutory crimes has necessitated the adoption of rules and practices to avoid outcomes offensive to a sense of justice. In many instances, where the elements of offences substantially overlap (although they may not be identical) sound prosecutorial practice will result in charges being expressed in the alternative. In the present case, in the Court of Criminal Appeal, Newman J stated his view that it might have been better if the charges in counts 9 and 10 had been preferred in the alternative[132]. There are very strong inhibitions upon the interference of courts in the exercise of prosecutorial decisions[133]. On the other hand, especially in recent times, judges have been unwilling to surrender entirely to the conscience of a prosecutor the fairness of subjecting an accused to the peril of prosecution and punishment for multiple offences arising out of the same facts and circumstances[134].

97 A practical difficulty which prosecutors may face is that judicial instruction can sometimes point in opposing directions. Thus, it is often said that a prosecutor ought, as far as reasonably practicable, to prosecute an accused for the offences which most aptly represent the essence of the criminal conduct of which he or she is alleged to be guilty[135]. It is also commonly said that, as a general rule, the prosecutor should ensure that all charges arising out of the same facts are combined in one indictment to prevent there being a series of indictments and trials on

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131 Campbell and Campbell, "Punishing Multiple Harms", (1992) 17 *University of Queensland Law Journal* 20.

132 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 11 per Newman J.

133 *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *R v Sang* [1980] AC 402 at 454-455. See *Director of Public Prosecutions v B* (1998) 72 ALJR 1175 at 1193; 155 ALR 539 at 564.

134 *Connelly v DPP* [1964] AC 1254 at 1354; Friedland, *Double Jeopardy*, (1969) at 90; cf *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502 at 508-509.

135 *R v O'Loughlin* [1971] 1 SASR 219 at 247.

substantially the same facts[136]. Prosecutors must also take note of the "fundamental and important principle, that no one should be punished for an offence of which he has not been convicted"[137]. Where an accused might have been, but was not, charged with and convicted of an offence involving particular circumstances of aggravation, the judge imposing sentence may have regard to such circumstances only if they would not render the accused liable to greater punishment if charged and convicted of the more serious offence. Uncontested facts may be taken into account in sentencing where they are put forward as no more than background. But where it is suggested that they constitute circumstances of aggravation which, if proved, would have justified conviction of a more serious offence, it would be contrary to principle to punish the accused as if convicted of that offence where it has not been charged.

98 The decision of this Court in *R v De Simoni*[138] has stood for seventeen years. Its correctness was not questioned in this appeal. Although addressed to the principles governing punishment, necessarily whilst it stands[139] it has consequences for the exercise of prosecutorial discretions. In many cases, prosecutors will, understandably, frame the charges contained in the counts of an indictment in terms of several overlapping offences. They will do so to avoid the risk that an accused might escape punishment for circumstances of aggravation appearing in the elements of separate offences. Thus, in the present case, it was accepted for the appellant that if he had pleaded only to count 10 (based upon s 110 of the Act), there would have been a good argument that it would not have been open to the Crown to rely upon the specific intent to cause grievous bodily harm to Mr Rixon, which is an ingredient of the offence based on s 33 of the Act, alleged in count 9. That concession was properly made. In such circumstances, it is unsurprising that prosecutors should charge an accused with separate offences which they consider to be applicable and different. This then leaves it to the judge, at a later stage of the proceedings, to ensure against any impermissible double jeopardy which this course produces.

99 *Autrefois convict and acquit:* To afford an accused protection as of right against a requirement to stand trial and suffer the peril of punishment for a second time in respect of the same crime, the criminal procedure of the common law developed pleas described by Coke in his *Commentaries* as "*auterfoitz acquite*,

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136 *Connelly v DPP* [1964] AC 1254 at 1296.

137 *R v De Simoni* (1981) 147 CLR 383 at 389; *R v Newman* [1997] 1 VR 146 at 151.

138 (1981) 147 CLR 383.

139 Wilson J and Brennan J dissented. It has been suggested that the rule can sometimes lead to artificiality. See eg per Mahoney JA in *Overall* (1993) 71 A Crim R 170 at 173-175.

auterfoitz convicte and *auterfoitz attaint*"[140]. By the time of Sir Matthew Hale's *Pleas of the Crown*, the spelling had been simplified to "*auterfoits acquit*", "*auterfoits attaint*" and "*auterfoits convict*". They related to the "*mesme felony ou treason*", ie the same felony or crime of treason. What amounted to "the same felony" already occasioned debate in the 17th century, as Hale's commentary shows. Hale illustrated the operation of the plea with these instances[141]:

> "If A. commit a burglary in the county of B. and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal ...
>
> But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or e converso, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same."

100 Serjeant Hawkins, in his *Treatise of the Pleas of the Crown*[142], emphasised that an acquittal (or conviction) might be pleaded in bar to a subsequent indictment but only for "the same crime". This strictness was apparently softened by the elaboration that the crime must be "in substance the same"[143], wherein we find the seeds of later uncertainty. Blackstone's treatment[144] evidenced "some slight signs of relaxation of the rules"[145]. He wrote[146]:

> "[T]he pleas of *auterfois acquit* and *auterfois convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime, 'or for such a charge as that, by statute or otherwise, the defendant

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140 The history is recorded in *R v O'Loughlin* [1971] 1 SASR 219 at 239 by Wells J.

141 Hale, *Pleas of the Crown*, (1800), vol II, Ch XXXI at 245. See discussion in *R v O'Loughlin* [1971] 1 SASR 219 at 240.

142 8th ed (1824), vol II, Ch XXXV (*Autrefoits Acquit*), Ch XXXVI (*Autrefoits Attaint*, or *Convict*).

143 Hawkins, *Treatise of the Pleas of the Crown*, 8th ed (1824), vol II at 516 discussed in *R v O'Loughlin* [1971] 1 SASR 219 at 241.

144 Blackstone, *Commentaries*, 3rd ed (1862), vol 4 at 390-394.

145 *R v O'Loughlin* [1971] 1 SASR 219 at 244.

146 Blackstone, *Commentaries*, 3rd ed (1862), vol 4 at 391-392.

> might have been convicted upon it of the identical act and crime subsequently charged against him.'"

101 It was at this point in our legal history that there began to emerge the principle (noted by Blackstone) that, although "differ[ing] in colour and degree", two offences could for the purposes of the common law principle, be treated as relating to "one and the same crime"[147]. Wells J, in his most thorough review of this history in *R v O'Loughlin*, points out that, at the time the common law was received into Australia, the *autrefois* pleas had to relate to the same *crime*[148]. There was no hint that the accused might not be troubled twice by the same *evidence*. Nor was it suggested that a judge had a discretion in the matter. However, imprecision and equivocation were the result of accepting that a test of "substantial" identity in the crimes might be allowed. This softening of the formerly strict rule might be explained by the partial relaxation of rigidity in criminal pleading and practice and by the introduction of many new statutory crimes, inevitably involving overlap in their essential ingredients.

102 In the absence of a developed discretionary jurisdiction to stay a second prosecution judged oppressive (which was to come later) there was an understandable tendency on the part of the judiciary in the eighteenth and nineteenth centuries to enlarge the application of the *autrefois* pleas[149]. Nevertheless, the usual formulae applied to sustain the pleas were that the accused had undergone trial for the "same felony", "same crime" or "same offence". It is the last-mentioned expression which found its way into the Fifth Amendment to the United States Constitution[150]. In English authority, by which the governing principle is expressed, the rule is so stated[151]:

> "[T]he law does not permit a man to be twice in peril of being convicted of the same offence."

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147 Noted by Wells J in *R v O'Loughlin* [1971] 1 SASR 219 at 245.

148 [1971] 1 SASR 219 at 245-246.

149 This inclination was admitted by Lord Devlin in *Connelly v DPP* [1964] AC 1254 at 1340; cf Friedland, *Double Jeopardy*, (1969) at 108.

150 "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". In *Grady v Corbin* 495 US 508 at 529 (1990), Scalia J drew attention to the fact that the words of the clause protects individuals from being twice put in jeopardy "for the same *offence*" and not "for the same *conduct* or *actions*".

151 *R v Barron* [1914] 2 KB 570 at 574 citing 2 Hawkins, PC, c 35 (ed 1824).

103 In this Court, although the matter is sometimes complicated by the application of the language of criminal codes[152], the identity of the successive *offences* has repeatedly been stated as the test[153]. The rule has been explained as requiring not identical offences as such[154] but identity of the essential elements of the offences under comparison so as to establish that the accused has previously been in a relevant peril of conviction. In *Li Wan Quai v Christie* , Griffith CJ said[155]:

> "In order that a previous conviction or discharge can be a bar to subsequent proceedings, the charges must be substantially the same. The true test whether such a plea is a sufficient bar in any particular case is, whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first".

Thus the inquiry is not into what evidence might be given, but what must be proved to establish the commission of each of the offences. The test is therefore directed at the elements of the offences charged.

104 A similar test was adopted by the Supreme Court of the United States in *Blockburger v United States*[156]. Subsequently, that Court, in *Grady v Corbin*[157], by majority, concluded that the *Blockburger* test was not an exclusive definition of whether the "same offence" was established for constitutional purposes. A broader criterion was accepted. This directed attention to whether, to establish the elements of the later offence, the prosecutor would prove conduct constituting the offence for which the defendant had already been prosecuted[158]. In this, the Supreme Court gave a larger ambit to the "double jeopardy clause" of the Constitution as earlier, in dissent, Douglas J had repeatedly done[159]. His dissenting

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152 *Connolly v Meagher* (1906) 3 CLR 682 considering the *Criminal Code* (Q), s 16; cf *R v Hull (No 2)* [1902] St R Qd 53 per Griffith CJ (Q).

153 *Li Wan Quai v Christie* (1906) 3 CLR 1125 at 1131.

154 *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502 at 507-508; *R v Sessions* [1998] 2 VR 304 at 309-310.

155 (1906) 3 CLR 1125 at 1131.

156 284 US 299 at 304 (1932) citing *Gavieres v United States* 220 US 338 at 342 (1911).

157 495 US 508 (1990).

158 *Grady v Corbin* 495 US 508 at 521 (1990).

159 *Gore v United States* 357 US 386 at 395-397 (1958); *Iannelli v United States* 420 US 770 at 791-798 (1975).

view had, in turn, drawn upon an expression of the English rule on double jeopardy in *R v Elrington*[160] to the effect that:

> "[T]he well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again *on the same facts* in a more aggravated form."

More recently, however, in *United States v Dixon*[161], the United States Supreme Court has returned to the rule in *Blockburger*. It has overruled *Grady*. The majority in *Dixon* declared that *Grady* was not only wrong in history and principle, but that it had already proved unstable in application[162].

105 The most recent consideration of the scope of the plea of *autrefois convict* in England appears in the decision of the House of Lords in *Connelly v DPP*[163] which the English Court of Appeal applied in 1997 in *R v Beedie*[164]. In the latter decision, giving the judgment of the Court, Rose LJ concluded that the majority in *Connelly v DPP* had "defined autrefois in the narrow way ... that is when the second indictment charges the same offence as the first"[165]. In his Lordship's view, it was not sufficient that the offence was "substantially" the same.

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160 (1861) 1 B & S 688 at 696 [121 ER 870 at 873]. (Emphasis added.)

161 509 US 688 (1993).

162 *United States v Dixon* 509 US 688 at 704, 709 (1993).

163 [1964] AC 1254.

164 [1998] QB 356.

165 [1998] QB 356 at 361 applying Lord Devlin's formulation in *Connelly v DPP* [1964] AC 1254 at 1339-1340: "For the doctrine to apply it must be the same offence both in fact and in law." Lord Pearce, at 1368, agreed with the opinion of Lord Devlin. Lord Reid said, at 1295: "many generations of judges have seen nothing unfair in holding that the plea of autrefois acquit must be given a limited scope … I cannot disregard the fact that with certain exceptions it has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial."

106 In India, where the Constitution[166] provides a protection narrower than that afforded by the common law or by its United States constitutional counterpart[167], the words "same offence" have been repeatedly defined to mean an offence, the elements of which are the same as that for which the person was previously prosecuted or punished[168]. Although care must be exercised in the use made of the authorities of other jurisdictions founded upon a constitutional text, the common legal origins of such provisions in the common law of England and the similarity of the expression of the principle in national constitutions and international law make it pertinent to observe the common point reached in a number of countries with a legal tradition similar to that of Australia. In England, the United States and India, the most populous jurisdictions of the common law, a strict test is applied. It is one which looks to the elements of the successive charges. If those elements are different, there is no foundation for the plea of *autrefois acquit* or *autrefois convict*, or for invoking constitutional protection against double jeopardy. In such circumstances, it matters not that, in proof of a separate offence, reference may be made to facts common to each matter charged[169]. It is the definition of the offence and not the common evidence which grounds the legal complaint of double jeopardy.

107 There are two questions which I will mention but leave to another day, for they are not essential to this appeal. The first concerns the theoretical foundation for the pleas of *autrefois acquit* and *autrefois convict*. It has been suggested that *autrefois convict* can best be explained in terms of merger in judgment, whereas *autrefois acquit* relies upon concepts akin to issue estoppel or wider notions of a court's duty to control executive power[170]. For the time being these interesting questions can be left to scholars. Of more practical potential in Australia is the problem which can arise in a federation where one offence is created by the federal polity and the other by a State. In the United States, this problem has been dealt

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166 The Constitution of India, Art 20(2) ["No person shall be prosecuted and punished for the same offence more than once"].

167 This is the view expressed in Singh (ed), *V N Shukla's Constitution of India*, 9th ed (1996) at 155. See also Seervai, *Constitutional Law of India,* 4th ed (1993), vol 2 at 1056-1057.

168 *State of Bombay v S L Apte* AIR 1961 SC 578 at 581; *Om Parkash v State of UP* AIR 1957 SC 458; *Manipur Administration v Thokchom, Bira Singh* [1964] 7 SCR 123 at 129.

169 *R v Barron* [1914] 2 KB 570 at 576; *R v Thomas* [1950] 1 KB 26; *R v Sessions* [1998] 2 VR 304 at 308-309.

170 See discussion in *Rogers v The Queen* (1994) 181 CLR 251 at 275-278; *Dodd* (1991) 56 A Crim R 451 at 454; *R v O'Loughlin* [1971] 1 SASR 219 at 272.

with under the "dual sovereignty" doctrine[171]. It has been held that a person may be convicted under both federal and state law for the same offence. Analogous problems have arisen for international law. It has been held that the applicable provision prohibits double jeopardy only with respect to an offence adjudicated in a given state[172]. Because in this case the two crimes alleged are of a single jurisdiction, viz New South Wales, the federal question may also be left to circumstances where it needs to be determined.

108 *Alternative plea in bar*: There are three possible difficulties with adopting a strict definition of the pleas of *autrefois*. The first is that it would confine a plea of *autrefois acquit* and *autrefois convict* to a very narrow class of case. Except for accidental oversight or lack of coordination between prosecuting authorities[173], it is virtually unthinkable that an accused would ever be charged with *exactly* the same offence twice. As a practical matter, as many cases show, the real problem arises from prosecution under different statutes where there is significant overlap between the elements of several offences. The result has been many borderline cases turning on very fine distinctions[174]. Confining narrowly the plea of *autrefois acquit* or *autrefois convict* might fail to address one of the suggested purposes of such pleas, viz, to relieve the individual from the abuse of the state's power of prosecution by a proceeding which relies on the accused's legal rights not a judicial discretion.

109 Secondly, this narrow view denies repeated statements of common law authority that the principle of the pleas of *autrefois* applies to offences which, although not exactly the same, are "substantially the same". As I have pointed out, such statements are by no means recent and can be found in Blackstone's treatment of why conviction of manslaughter was a bar to a later indictment of murder, "though the offences differ in colouring and in degree"[175]. They can be found in the suggestions that it is enough that the crimes should be the same "in

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171 *Bartkus v Illinois* 359 US 121 (1959). In New South Wales see *Interpretation Act* 1987 (NSW), s 57.

172 *AP v Italy,* UN Human Rights Committee No 204/1986 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc CCPR/C/Op/2 (1990) at 67 reproduced in Martin et al*, International Human Rights Law and Practice*, Pt II, 1997, at 633-634.

173 *R v Beedie* [1998] QB 356 at 366-367.

174 *R v Weeding* [1959] VR 298 at 301.

175 Blackstone, *Commentaries*, 3rd ed (1862), vol 4 at 391. See *R v O'Loughlin* [1971] 1 SASR 219 at 244-245.

substance"[176]. Griffith CJ reflected this thinking in his statement in *Li Wan Quai v Christie* that the charges "must be *substantially* the same"[177]. To like effect was the exposition of Lord Reading CJ in *R v Barron*[178] where a test of "exactly or *practically* the same" was expressed. Specifically, in *Barron,* it was held that acquittal of a charge of sodomy did not give rise to a plea of *autrefois acquit* to a second indictment charging the accused with gross indecency with the same person. This was because it was not open to the jury to convict the appellant of gross indecency at the first trial and because acquittal of the more serious charge (involving the element of penetration) did not, of necessity, require acquittal of the lesser charge. The first was not to be classified as simply an aggravated version of the second. It contained an additional element which was an aggravating circumstance. But it was one which made the two offences legally different.

110 Thirdly, so far as legal authority is concerned, the position is complicated by a line of decisions which appear to recognise a separate plea in bar, to repel a second or double prosecution for a more serious offence. This plea is usually traced to the reasons of Blackburn J in *Wemyss v Hopkins*[179] and of Hawkins J in *R v Miles*[180]. The existence of a separate plea, in addition to *autrefois acquit* and *autrefois convict,* was accepted by Dawson J in *Saraswati v The Queen*[181]. It has certainly given rise to a line of cases which suggest that there is a bar to an indictment based on the same "matter"[182]. This loose concept led Hawkins J in *Miles* to express the view that the bar related to future proceedings "for or in respect of the same *assault*"[183]. This was an apparent reference to a factual rather than a legal notion.

111 It is possible that the expansion of the idea in the common law plea of *autrefois convict,* evidenced in *Wemyss* and its progeny, explains the broader

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176 *R v King* [1897] 1 QB 214 at 218; *R v Feeley, McDermott and Wright* [1963] 1 CCC 254 at 265, affmd [1963] 3 CCC 201; *O'Sullivan v Rout* [1950] SASR 4 at 6.

177 (1906) 3 CLR 1125 at 1131. (Emphasis added.)

178 [1914] 2 KB 570 at 575. (Emphasis added.)

179 (1875) LR 10 QB 378 at 381.

180 (1890) 24 QBD 423 at 430-431.

181 (1991) 172 CLR 1 at 13.

182 The word used in *Wemyss v Hopkins* (1875) LR 10 QB 378 at 381; cf *R v Cleary* [1914] VLR 571 at 578-579.

183 (1890) 24 QBD 423 at 432.

language of s 16 of the *Criminal Code* (Q)[184]. Griffith CJ, who should have known, recognised that what that section enacted was "not quite the same as the law which allows the defence of '*autrefois convict*'"[185]. However that may be, the line of cases traced to *Wemyss* has encouraged some Australian courts to take a broader view of the pleas available to an accused alleging effective double jeopardy as a result of a second or double prosecution.

112 In *R v O'Loughlin* Wells J was prepared to contemplate "wider groups of cases" where "the facts and circumstances that constitute the gist or gravamen of the later charge are in terms, or in effect, the same as those constituting the gist or gravamen of the former [charge]."[186] This approach has been firmly rejected by some Australian judges[187]. But the "gist or gravamen" test has certainly been applied in other cases[188]. It will be observed that there are striking parallels here with the flow of judicial authority in the United States and England, notwithstanding their now somewhat different provenance. What began as a requirement of exact identity between the elements of the offences, was expanded to a wider class to provide protection against suggested double jeopardy, only to be contracted by more recent authority, insistent upon the presence of the same elements in the two offences.

113 The Crown urged that this Court should follow the same course. It suggested that it could more readily do so because the practical need for expansion of the pleas in bar has declined with the enlargement of the judicial discretion to provide a stay of a second prosecution or punishment (or a prosecution of a second charge) where this would be seriously unfair to the accused and oppressive or vexatious to the court's process.

114 *Other protective rules of the trial*: There are a number of rules governing the conduct of criminal trials by which the common law has, in practical ways, otherwise sought to reduce the risks of double jeopardy. For example, there are the rules which inhibit the Crown from unreasonably splitting the prosecution case[189]. In some jurisdictions the doctrine of issue estoppel has been held

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184 "A person cannot be twice punished ... for the same act or omission".

185 *Connolly v Meagher* (1906) 3 CLR 682 at 684.

186 [1971] 1 SASR 219 at 258. See also Bray CJ at 225.

187 *Australian Oil Refining Pty Ltd v Cooper* (1987) 11 NSWLR 277 at 282; *State Pollution Control Commission v Tallow Products Pty Ltd* (1992) 29 NSWLR 517 at 533-536.

188 See eg *Hallion v Samuels* (1978) 17 SASR 558 at 563.

189 Friedland, *Double Jeopardy*, (1969) at 92-93.

applicable to criminal cases[190]. The influence of the trial judge upon the prosecutor's decision to proceed with multiple charges may be greater in practice than it sometimes appears in legal theory[191]. In some jurisdictions, although not yet in Australia, the statutory discretions of Directors of Public Prosecutions to prosecute have been successfully challenged by judicial review[192]. None of these avenues of redress need be explored in the present case. They are mentioned to illustrate the fact that the legal remedies available to an accused complaining of double jeopardy are not necessarily limited to pleas in bar, the quashing of an offending indictment or the exercise of a judicial discretion to stay a second or double prosecution.

115 *Judicial discretion to stay prosecution*: In *Connelly v DPP,* Lord Devlin remarked[193]:

> "If I had felt that the doctrine of autrefois was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go."

This candid judicial admission helps to explain the "inextricable confusion in the law of double jeopardy"[194] as it developed around the pleas in bar. The judges sought to provide remedies for the perceived injustice of multiple prosecutions for what were, technically, different offences but, in substance, the same matter and referable substantially to the same facts and circumstances. The pleas in bar do

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190 *Connelly v DPP* [1964] AC 1254 at 1334 per Lord Hodson, 1306, 1321 per Lord Morris of Borth-y-Gest, 1364 per Lord Pearce; *R v Wilkes* (1948) 77 CLR 511 at 518-519; *Mraz v The Queen [No 2]* (1956) 96 CLR 62 at 68; cf *R v Storey* (1978) 140 CLR 364 at 371-374 per Barwick CJ, 379-389 per Gibbs J, 400-401 per Mason J. See now *Rogers v The Queen* (1994) 181 CLR 251 at 254-255 per Mason CJ, 275-278 per Deane and Gaudron JJ.

191 See eg Lord Hodson's comments in *Connelly v DPP* [1964] AC 1254 at 1335-1336; cf *R v O'Loughlin* [1971] 1 SASR 219 at 229; *Gore v United States* 357 US 386 at 395-397 (1958) per Douglas J (diss).

192 Instances are cited in *Director of Public Prosecutions v B* (1998) 72 ALJR 1175 at 1192; 155 ALR 539 at 562.

193 [1964] AC 1254 at 1340.

194 American Law Institute, *Double Jeopardy*, (1935) at 10 as cited in Friedland, *Double Jeopardy*, (1969) at 108.

not invoke a judicial discretion[195] but the result has been a great deal of artificiality and uncertainty which the courts themselves have often admitted[196].

116 The acceptance of a general judicial discretion to prevent abuse of the process of the courts is not new. It was affirmed by Lord Selborne LC and Lord Blackburn in their speeches in *Metropolitan Bank Ltd v Pooley*[197]. The existence of a judicial discretion to stay a second prosecution, in appropriate circumstances, was suggested by Lord Alverstone CJ in *R v Miles*[198] and by Lord Reading CJ in *R v Barron*[199]. It was affirmed by the House of Lords in *Connelly v DPP*[200], a fact recognised and accepted by the majority of this Court in *Williams v Spautz*[201]. The purpose of the jurisdiction is not only to prevent the accused from being twice vexed. It is also to prevent such conduct bringing the administration of justice into disrepute[202].

117 In Australia, any earlier doubts about the existence of the judicial discretion to stay a second prosecution or double punishment for what is "substantially the same act"[203] (suggested because of the conflicting opinions expressed in the House of Lords in *Connelly v DPP*[204]) must now be taken as settled in favour of the existence of the power[205]. Nor is the judicial discretion confined to cases which

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195 *R v O'Loughlin* [1971] 1 SASR 219 at 229 per Bray CJ, 282 per Wells J.

196 See eg *R v Barron* [1914] 2 KB 570 at 576.

197 (1855) 10 App Cas 210 at 220 referred to by Lord Pearce in *Connelly v DPP* [1964] AC 1254 at 1361.

198 (1909) 3 Cr App R 13 at 15.

199 [1914] 2 KB 570 at 575.

200 [1964] AC 1254.

201 (1992) 174 CLR 509 at 518, 521.

202 *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Rogers v The Queen* (1994) 181 CLR 251 at 256.

203 *R v Hoar* (1981) 148 CLR 32 at 38.

204 See eg Lord Hodson's remarks in *Connelly v DPP* [1964] AC 1254 at 1337: "If there were such a discretion, I do not understand why so many cases have been decided and so much learning has been expended in considering the doctrine of autrefois convict and autrefois acquit. Has all this been waste of judicial time?"

205 *Williams v Spautz* (1992) 174 CLR 509 at 521.

do not fall squarely within the principles giving rise to a plea in bar[206]. The power to provide a stay represents a separate and independent safeguard afforded by the law and exercised by the judiciary[207]. It does not require an applicant to prove that a second or double prosecution or punishment would be "well-nigh outrageous"[208]. But it does require that special circumstances be shown. The jurisdiction does not exist to give effect to a general judicial sense of "fairness", substituting this for the prosecutor's decisions (made within power) which are ordinarily exempt from judicial superintendence[209]. Clearly however, if oppression of, or prejudice to, an accused person can be demonstrated, the provision of a stay of proceedings upon the offending indictment, or count of the indictment, is warranted.

118 In *R v Beedie*[210], the English Court of Appeal concluded that the existence of the judicial discretion to stay charges on a second indictment (and one might add, a second charge on a single indictment) was one reason for adopting a narrow definition of the pleas of *autrefois* where that was appropriate. Their Lordships held that the proper exercise of such a discretion was to be preferred to further convoluted attempts to squeeze offences which contain significantly different elements into the classification of "substantial" or "practical" identity. Nor were they willing to expand still further the artificial categories attracting the innominate plea in bar derived from *Wemyss*. It may be expected that, as judges exercise their exceptional discretionary jurisdiction in such cases, prosecution practice will itself be improved. Unwarranted instances of double jeopardy will thereby be avoided.

119 *Correction in punishment*: There is one final recourse available to the judge to respond to complaints about double jeopardy. I refer to the exercise of the judicial function of sentencing. Of course, at the stage of sentencing, it is too late to prevent vexation by a second or double prosecution. But it may present the opportunity to avoid double punishment. A judge will doubtless keep in mind that entering a conviction is itself part of punishment. To enter a second conviction would, to that extent, constitute, without more, double punishment. In an appropriate case, therefore, the court hearing a second charge, where a person has been convicted under one of two applicable statutes, could take the fact of conviction on the first into account when deciding whether a second conviction

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206 cf *Dodd* (1991) 56 A Crim R 451 at 457.

207 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28, 58, 74; *Walton v Gardiner* (1993) 177 CLR 378 at 392-396; *Rogers v The Queen* (1994) 181 CLR 251 at 255-256.

208 As suggested by Wells J in *R v O'Loughlin* [1971] 1 SASR 219 at 282.

209 See *Director of Public Prosecutions v B* (1998) 72 ALJR 1175 at 1193; 155 ALR 539 at 564.

210 [1998] QB 356 at 361.

should be recorded at all on the second and, if it is recorded, whether any additional punishment should be imposed[211].

120 If the case is not one for the application of a plea of *autrefois,* nor one for the quashing of the indictment or count of the indictment for multiplicity of charges, nor one in which a judicial stay is appropriate, special care must still be taken by the sentencing judge to avoid the imposition of punishment which imposes sanctions for criminal conduct in respect of which the offender has already received sentence[212]. The judge may make the sentences for multiple offences of which the accused is convicted concurrent if they are considered to be manifestations of the one criminal enterprise, transaction or episode. But that course can never be a complete answer to a complaint about double punishment. Leaving aside the consideration of punishment inherent in recording a second conviction, it remains the judicial duty to impose a sentence apt for each particular offence proved; but to do so in a way that avoids double punishment and takes account of any specific circumstances of aggravation reflected in the elements of the separate offences upon which the accused has been convicted[213].

121 It is tempting to regard the imposition of common concurrent sentences as a practical way of avoiding the risk of double punishment. There may be cases where it does so. But there are distinct risks in proceeding in that way. The duplication of sentences, although to be served concurrently, may yet amount to double punishment. The differential features of the successive offences (which alone justify double prosecution and punishment) may not be taken into account, adequately or at all. In short, the judicial discretion exercised in the consideration of punishment may not readily provide the means of curing the defects of unjustifiable vexation or the risks of double punishment. In the imposition of a sentence in such circumstances, great care must be taken to avoid double punishment for the same conduct. That care should be manifest in the reasons of the sentencing judge.

Arguments of the parties

122 Against the background of this examination of legal history and authority, it is appropriate to record the essential arguments of the parties in these proceedings. At the trial, the appellant did not raise a plea in bar at all: neither at the point where his pleas were taken to counts 9 and 10 nor, once he was convicted of one of those

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211 *Connolly v Meagher* (1906) 3 CLR 682 at 684-685; *Australian Oil Refining Pty Ltd v Cooper* (1987) 11 NSWLR 277 at 283.

212 *R v Hoar* (1981) 148 CLR 32 at 38.

213 *R v De Simoni* (1981) 147 CLR 383 at 389; *Overall* (1993) 71 A Crim R 170 at 173-174.

counts, in objection to a conviction for the other[214]. The failure to plead *autrefois convict* was hardly surprising given that, at the opening of the trial, no such conviction had been entered. But, effectively, in this Court, the appellant suggested that a plea in bar analogous to *autrefois* was available to him to justify an order quashing one or other of the duplicated counts. He suggested that the primary judge ought to have assisted him to gain the benefit of that plea.

123 There are many procedural problems in the path of the course proposed by the appellant, given that the only relief which he sought at the trial was a stay. The decision in this case may make plain the sharp distinction which exists between, on the one hand, the procedures apt to a challenge to the indictment or plea in bar and, on the other, an application for a stay of the prosecution in the exercise of a judicial discretion. Assuming that the failure of the appellant to raise a plea in bar at the trial or formally to seek an order quashing the indictment or a count of the indictment could be overcome[215], the Crown submitted that there was no substance in the appellant's suggestion of a duplication of charges. Analysed by reference to their respective elements, the offences in counts 9 and 10 were not the same. One required proof of the additional and aggravating circumstance of a specific intent to cause grievous bodily harm to Mr Rixon[216]. The other depended upon establishment of the fact that the offence had occurred in a dwelling house[217]. Whilst acknowledging these separate and additional elements, the appellant submitted either that the two offences were "substantially" or "practically" the same or that the "gist or gravamen" of the one was the same as that of the other. In the alternative, the appellant submitted that the primary judge had erred in refusing to stay the prosecution on one or other of counts 9 and 10. The Crown disputed that this was a case attracting the exceptional remedy of a stay of one of the counts, still less of the indictment as a whole. In any case, it was submitted that the appellant bore a heavy onus to secure a stay[218]. No error of principle had been shown in the decision to refuse the stay at trial or in the confirmation of that decision in the Court of Criminal Appeal.

124 Finally, the appellant complained that the sentence imposed involved punishing him twice for what was essentially the same conduct, namely, the grievous bodily harm inflicted on his victim. Despite the order that the sentences

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214 *R v Gamble* [1947] VLR 491 at 493; *Dodd* (1991) 56 A Crim R 451 at 458; cf *Enslow* (1992) 62 A Crim R 119 at 123; O'Regan, "Double Punishment and Double Jeopardy under the Griffith Code", (1987) 61 *Australian Law Journal* 164 at 169.

215 cf *Dodd* (1991) 56 A Crim R 451 at 458.

216 Count 9 (s 33 of the Act).

217 Count 10 (s 110 of the Act).

218 *Williams v Spautz* (1992) 174 CLR 509 at 529.

for the offences in counts 9 and 10 be served concurrently, the failure to differentiate between them and to address the conduct common to each left it open to an inference that no differentiation had occurred in sentencing and that double punishment had been imposed. The Crown, whilst conceding that it would have been preferable for the judge, on sentencing, to have made it plain that he was avoiding duplication of punishment for the same acts and circumstances, argued that no miscarriage of justice had occurred. By making the sentences concurrent, the judge had effectively removed the risk of double punishment in this case.

Conclusions: appeal dismissed

125 This Court should accept the same test for a complaint about duplication in a second indictment or second charge as that now adopted in England, the United States and other jurisdictions of the common law. To make the complaint good, it is necessary to show that the subject of the second prosecution or charge is the same offence or substantially or practically the same. The last words allow for minor variations in the verbal formulae of offences under comparison. It is necessary in each case to analyse the essential elements of the offences said to be duplicated. Minor differences of language may be discarded. But elements which add distinct and different features (normally of aggravation) to the definition of an offence will result in differentiation between charges which is legally significant. To prosecute an accused in respect of such different offences is not to offend the rule of the common law against double jeopardy. There is jeopardy; but it is not double because the offences are not legally the same. By this test, the elements of the offences charged in counts 9 and 10 are different. They are not the same; nor are they substantially or practically the same. The evidence necessary to establish the elements in count 10 might fall short of establishing the specific intent alleged in count 9 necessary to secure a conviction of the offence against s 33 of the Act.

126 As the history of the innominate plea in bar (traced to *Wemyss*) demonstrates, it fails to offer a stable criterion by which to differentiate between cases where a second prosecution or count is permissible and cases where they are not. Talk of the "gist or gravamen" of offences is unavoidably ambiguous and therefore inescapably contentious. In the context of a plea by which an accused person is asserting a *right* to be relieved of a second criminal prosecution or charge, it is essential that the criteria to be applied should be clear. It is desirable that they be productive of a predictable outcome. Otherwise, time will be lost. Costs will be incurred in argument, at trial and on appeal, attempting to define the "gist and gravamen" of successive charges: a phrase necessarily involving impression.

127 The recognition of a larger judicial function to ensure that a person is not twice vexed or punished for what is substantially the same act provides a much more stable principle by which to relieve accused persons from the burdens of double jeopardy, whether of repeated prosecution (*vexari*) or double punishment (*puniri*). It should now be recognised that the attempt to express an acceptable plea, other than the strict plea of *autrefois convict* or *autrefois acquit*, has not been

successful. Unless statute dictates a different course, the plea in bar should be confined to the strict application of the pleas of *autrefois convict* and *autrefois acquit* (or the analogous pleas where the charges appear in the same proceedings) defined in the narrow way I have described. Where there is suggested injustice or oppression occasioned by the bringing of further proceedings, the oppressive inclusion of overlapping charges or the subjection of a person to double vexation and the peril of double punishment, the relief which the law affords is by way of stay provided in the exercise of a judicial discretion in appropriate but exceptional cases. Those who represent accused should be alert to that facility when they scrutinise the indictment containing the charges which the prosecution brings.

128 The appellant's claim for relief based on the argument that the "gist or gravamen" of the offences charged in counts 9 and 10 was the same, therefore fails. But did the judge err in refusing a stay in the circumstances? I think not. Although it is true that the two offences charged contained a common reference to the infliction of grievous bodily harm upon the victim, the elements of each crime were relevantly different. The inclusion of each in the indictment was both prudent and proper, having regard to the requirements of *De Simoni*. I see no ground for the provision of a stay against the prosecution of these separate offences. The Court of Criminal Appeal was correct to reject the appeal against the trial judge's decision to refuse a stay.

129 This conclusion, which disposes of the complaint of repeated prosecution (*vexari*), leaves to be considered the risk of double punishment (*puniri*). There was no differentiation in the sentences imposed for counts 9 and 10. The sentencing judge expressly referred to the principle of totality[219]. He treated the three episodes of breaking and entering and related crimes as part of the same criminal transaction, distinct from the aggravated sexual assault in prison. He ordered that the penal servitude for the earlier episodes of breaking and entering should be served concurrently with the sentences imposed in respect of counts 9 and 10 but cumulatively on the sentence imposed of 3 years penal servitude in respect of the single count of sexual assault. Clearly, this was a course that was open to him.

130 Because the earlier episodes were less serious than those involving Mr Rixon, the sentences in respect of the conviction upon counts 9 and 10 became, as a practical matter, the most important ones in respect of the first indictment. Their importance was obvious. The differentiation between counts 9 and 10 was the justification for proceeding upon each of those counts separately and for punishing the appellant in respect of each. In the absence of any mention of separate consideration of the punishment proper to each offence, the appellant has a legitimate grievance about the primary judge's reasons for sentence. The primary

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219 *R v Pearce* unreported, Supreme Court of New South Wales, 28 March 1996 at 17, 20.

judge failed to make express allowance for the fact that, although separate offences were charged and the appellant was convicted of each of them, each referred to substantially the same facts and circumstances. This omission was mentioned in the Court of Criminal Appeal[220]. But that Court declined to intervene on the ground that the total effective sentence imposed demonstrated no error. I agree that insufficient attention was disclosed to the risk of punishing the appellant twice for the conduct amounting to the infliction of grievous bodily harm common to counts 9 and 10. The result of a strict view as to the availability of the plea in bar and of the recognition that a judicial stay is confined to exceptional cases is that sentencing judges must make abundantly clear, in cases such as the present, that they have recognised and avoided the danger of double punishment. This was not done in the present case.

131 Ordinarily, this Court does not re-examine the correctness of sentences imposed upon individual prisoners. But in this case special leave has been granted. To the extent necessary, we must conduct a re-examination of the sentence passed upon the appellant. In his case, his extreme violence to Mr Rixon, the profound injuries which he occasioned and the circumstances of aggravation in which such injuries were inflicted, bear out the conclusion of the Court of Criminal Appeal that the total effective sentence imposed on the appellant was not erroneous. This was stated explicitly by Hunt CJ at CL (with whom Bell AJ agreed)[221]. It was implicit in the conclusion of Newman J. There would be no point in returning the matter to the Court of Criminal Appeal for resentencing the appellant unless this Court could affirmatively conclude that an error in the total sentence has been shown.

132 In matters of sentencing, this Court is not concerned with theoretical possibilities but with a real risk that the mistakes and omissions in the reasoning of the sentencing judge, that have been exposed here and in the Court of Criminal Appeal, resulted in a risk of double punishment of the appellant for the same, or substantially the same, conduct. If there were any possible risk that that had happened I would certainly agree in the conclusion reached, and orders proposed, by the other members of the Court. I fully agree with them that protection from double jeopardy extends to the sentencing of the accused, once convicted. However, in the circumstances of this case, I am not convinced that such a risk has been demonstrated. On the contrary, like the Court of Criminal Appeal, I regard the total sentence as correct. I see no injustice in this case which calls for

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220 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 20.

221 *R v Pearce* unreported, New South Wales Court of Criminal Appeal, 1 November 1996 at 20.

reconsideration of that sentence by this Court. None is needed to vindicate the principles that the Court has affirmed.

133 Any reconsideration by the Court of Criminal Appeal would doubtless be supported by reasons different from those offered by the primary judge, indicating explicit differentiation in the punishment for the two offences and demonstrating the care expressly taken to avoid double punishment for the common elements of those offences. But in the brutal circumstances of the offences, I am wholly unconvinced that resentencing would result in a shorter sentence when the Court of Criminal Appeal has already considered, and expressly dismissed, that possibility. Why should it reach a different conclusion now when the facts, taken as a whole, remain exactly the same?

134 The reasoning of the primary judge was defective; that is true. But the total sentence which he imposed on the appellant was not. Our ultimate duty is to correct orders; not reasons. If the reasons are defective but the orders right, we should say so.

Order

135 The appeal should be dismissed.