CHAPTER 19

VERDICTS

19.1 This chapter examines two related matters. The first is the alternative verdicts which may be rendered on a charge. In particular, when can an accused be found guilty of an offence other than that which has been charged? The second is the principle and rules against double jeopardy. When does a verdict of guilty or not guilty on one charge bar proceedings on another charge?

Alternative verdicts

19.2 Chapter 17 noted how offences overlap, so that a prosecutor often has discretion as to what charge is brought against an accused. The overlapping of offences sometimes makes it possible for a court to convict an accused of a different, lesser offence from that which has been charged: for example, convicting of intentional assault causing death although the charge was intentional homicide.

19.3 The issue of an alternative verdict can be raised by the prosecution, the defence or the judge. Ultimately, the responsibility lies with the judge regardless of any request or absence of request by counsel: *R v MBX* [2013] QCA 214.

19.4 It has been said that an alternative verdict should not be considered unless it is decided that the accused is not guilty of the greater offence: see the majority ruling in *Stanton v R* (2003) 198 ALR 41; [2003] HCA 29. An alternative verdict should not be used as a compromise solution to a genuine doubt.

19.5 A range of alternative verdicts is specified in the Criminal Procedure Code ss 109-116.

- A general provision authorises conviction of a 'lesser offence' that forms part of the particulars of the offence charged: s 109(1). This covers conviction of a lesser offence that is an element of the offence charged. It permits, for example, a conviction of assault on a charge of assault causing damage.
- In addition, proof of a lesser offence permits a conviction of it although it was not an element of the offence charged: s 109(2). For example, on a charge of intentional homicide, there could be a conviction of intentional assault causing death if death was caused by way of an assault.

- On a charge of a completed offence, there can be a conviction of attempting to commit that offence: s 110. An attempt is not necessarily included in a completed offence because of the requirement that an attempt involve intent to complete the offence: see **13.6**.
- Alternative verdicts for specific offences are detailed in ss 111-115. There can be a conviction of:
    - killing an unborn child on a charge of intentional or unintentional homicide or of unlawful abortion: s 111(1);
    - unlawful abortion on the charge of killing an unborn child: s 111(2);
    - abandoning a child on a charge of intentional homicide, killing an unborn child or unlawful abortion: s 111(3);
    - any offence relating to road traffic or road transport on a charge of unintentional homicide in connection with driving a motor vehicle: s 112;
    - theft on a charge of robbery: s 114
    - receiving stolen property on a charge of theft: s 115(1);
    - theft on a charge of obtaining by false pretences: s 115(2).

The inclusion of some property-related offences is particularly important because of the highly technical relationships between some of these offences and the potential for the wrong charge to be laid: see **8.2**. It is curious however, that there is no provision for the general interchangeability of convictions on the charge of any of the three modes of causing loss in the Penal Code s 125: theft, misappropriation and obtaining by false pretences.

19.6 In addition, the Penal Code s 101E provides for a conviction of an act of indecency under ss 98 or 98A on a charge of having sexual intercourse without consent.

19.7 Where the evidence establishes a greater offence than that which has been charged, there can still be a conviction on the charge: Criminal Procedure Code s 116. That charge has been proved and it is immaterial that the evidence may also establish another, more serious offence.

Double jeopardy

19.8 It is a general principle of common law that a person should not be subject to 'double jeopardy'. At common law, double jeopardy occurs when a person is put at risk more than once of being convicted and sentenced *either* for the same offence *or* for the same wrongful conduct.

- The concept covers prosecuting a person again after the first prosecution has failed: for example, responding to an acquittal for intentional homicide by prosecuting again for intentional homicide or for a lesser homicide offence such as intentional assault causing death. A conviction for intentional assault causing death should have been raised as an alternative verdict at the original trial.
- The concept of double jeopardy also covers exposure to the risk of being convicted of multiple offences for the same wrongful conduct, whether at the same trial or at successive trials: for example, convictions, relating to the same incident, of both having sexual intercourse with a child without their consent and unlawful sexual intercourse with that child.

19.9 Some forms of double jeopardy are addressed in the Constitution s 5(2)(h):

> No person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial.

This provision covers ground lying at the centre of the concept of double jeopardy. It bars both responding to an acquittal by charging the same offence again, and responding to any verdict by charging a different offence that would have been an alternative verdict at the first trial. It concerns forms of double jeopardy that arise from the technical relationship between offences. Where offences are related to one another through the rules on alternative verdicts, then a verdict of guilty or not guilty on a charge of one offence precludes a subsequent trial for the other. The provision treats a pardon as equivalent to an acquittal for the purposes of this rule.

19.10 At common law, the bar on double jeopardy can also apply when where there are multiple overlapping charges that cover the same wrongful conduct, even though they may not be alternative verdicts: for example, theft of property and misappropriation of that property. A trial of one offence precludes a subsequent trial of any other. Where two or more such offences are charged together, a conviction on one count will preclude a verdict on any other.

19.11. It has also been held to be an abuse of process and a form of double jeopardy for the prosecution to attempt to re-litigate essentially the same issue, even if the charges concern notionally different facts: see **17.35**-**17.36**. An example is *Rogers v R* (1994) 181 CLR 251; {1994] HCA 42, where an attempt had been made to evade a ruling that certain confessions were involuntary by laying charges of other offences covered by the same confessional statement. It was held that this was an abuse because it was an attempt to re-litigate the issue of voluntariness which had already been decided. The issue of re-litigation has also arisen in cases where an accused who gave evidence in his or her own defence, denying guilt, was acquitted but was then charged with perjury because of that denial. See *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55, where the High Court of Australia ruled that a perjury charge could not be pursued because the prosecution would be making a second attempt to win effectively the same case. Perhaps most controversially, the High Court held that a perjury prosecution could not be pursued despite there being fresh evidence to support the charge, regardless of the cogency and weight of that evidence.

19.12 The relationships between the different forms of double jeopardy can be confusing. For example, a questionable application of the Constitution s 5(2)(h) occurred in *Urinmal v Public Prosecutor* [2013] VUCA 23. In that case, there had been a Supreme Court conviction of unlawful assembly contrary to the Penal Code s 69, an offence which requires intent to commit an offence or to carry out an unlawful purpose (in that case, kidnapping and assault). The conviction was quashed by the Court of Appeal when attention was drawn to an earlier acquittal of the accused in Magistrates' Court on a separate charge (apparently launched by the police without input from public prosecutors) which was described by the Court as 'soliciting and inciting, an offence under s 35 of the Penal Code': at [25]. Section 35 does not itself create an offence but provides for a mode in which other offences can be committed, in this case the offences of kidnapping and assault that were the subject of the Supreme Court charge of unlawful assembly: at [29]. The Court of Appeal noted the common element in the two charges and the reliance on the same evidence in the two cases. The Court of Appeal ruled that the Supreme Court conviction therefore breached the constitutional prohibition on double jeopardy:

> [31] In the words of Article 5 (2) (h), Mr Maltape could have been convicted in the Magistrates' Court of unlawful assembly if that evidence was accepted as accurate to a point beyond reasonable doubt, and on the same evidence he could have been convicted of unlawful assembly in the Supreme Court. He was theoretically at risk on that evidence in that first hearing, and in bringing the unlawful assembly charge and adducing the same evidence in the Supreme Court the Prosecution was putting him at risk again, despite his earlier

acquittal. This was unfair, and at odds with the generally recognized prohibition on defendants being placed in a situation of double jeopardy.

While the Supreme Court conviction may well have represented a case of double jeopardy, it is questionable whether there was a breach of the constitutional provision. That provision would require that there could have been a conviction of unlawful assembly on the charge of the soliciting and inciting offence. However, the offences in issue are not among those for which alternative verdicts are specifically allowed by the Criminal Procedure Code: see **19.5**. Moreover, the general provision for alternative verdicts in the Code s 109 only applies where some of the particulars of an offence that is charged constitute a 'complete lesser offence'. This condition was not met. The Court of Appeal itself noted that the soliciting and inciting offence 'is a different offence from unlawful assembly with different elements': at [29]. The basis for the finding of double jeopardy was the common elements between the two offences and the use of the same evidence at the two trials. Common law doctrines would therefore need to be invoked to justify the finding of double jeopardy.

19.13 The principle against double jeopardy reflects a number of values. First, finality is important for any system of justice: see the discussion in *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55. A guarantee of finality underpins the authority of the court. It also avoids the oppression of a system in which it is never known whether a matter is at an end. In addition to providing finality, the principle against double jeopardy helps ensure that the accused has full notice of the case to be answered and is not lured into making statements in answer to one charge that would damage the defence to an as yet undisclosed other charge. It also protects the accused against multiple punishments when the legislation has created more than one offence to cover essentially the same ground.

19.14 In recent years, several jurisdictions have qualified their double jeopardy rules to allow a subsequent prosecution in exceptional circumstances where the values protected by these rules might appear clearly outweighed by the public interest in convicting offenders: see, for example, Criminal Code (Qld) ss 678A-678F. The schemes are generally confined to the most serious offences, such as murder, where the public interest in obtaining a conviction is strongest. Moreover, they allow for retrial only where the costs of adhering to the double jeopardy rules are particularly high — where there is fresh and strong evidence of guilt or an acquittal has been obtained by unlawful means. Even where these conditions are satisfied, retrial may be excluded where the right to a fair trial has been impaired (for example, because of the prejudicial effect of delay or publicity) or where the passage of time would make a retrial oppressive or where police or prosecutors are at fault for the original acquittal or for not moving more expeditiously to rectify it.