

DOUBLE JEOPARDY

A response to the Law Commission's Consultation Paper

1. The background to this consultation paper is the failure to secure convictions in the Stephen Lawrence case, and developments in scientific techniques, making prosecutions possible (as in the Diedrick case) as a result of new evidence. Both have led to questioning of the double jeopardy principle.
2. The Stephen Lawrence case was referred to by the Home Secretary (at the launch of the IPPR criminal justice programme on 13 January) as the seminal case of the 1990s. It is accepted that the first and most serious problem after the murder of Stephen Lawrence was the incompetence of the police investigation. The resulting insufficiency of evidence led to the Crown Prosecution's decision not to prosecute. The private prosecution subsequently taken out by Mr Lawrence's parents failed.
3. JUSTICE's comments on the proposals are principally limited to the proposed power to reopen acquittals on the grounds of new evidence, although we also have views on the role of the courts and the scope of the proposed new arrangements.

General points

4. The double jeopardy principle protects the interests of the system in finality and certainty. They are crucial to its functioning; and the public interest in second prosecutions would, in general, be so small as not to justify their displacement. Any interference may have profound and distorting effects upon the investigation, prosecution and trial of offences, and therefore must be shown to be necessary and proportionate to the perceived problem, and to have sufficient safeguards to ensure fairness and protect the presumption of innocence.
5. It is accepted in the Law Commission report that it is only in exceptional cases, and where it can be shown to be in the interests of justice, that acquittals could be reopened, on the basis of compelling new evidence, which could not reasonably have been gathered and presented at the original trial.
6. We consider that there are significant dangers in legislating on the basis of a few exceptional cases. Once the principles of finality and certainty in jury trials are undermined, this is likely to lead to calls for wider changes. In his recent Tom Sargant Lecture, the Attorney-General canvassed the possibility of introducing prosecution appeals against judicial directions, including admissibility decisions. Though the Law Commission, in this report, considers that this is 'severable' from its present proposals, it also recognises that some of its respondents may consider that the law on double jeopardy cannot sensibly be reformed without such changes. We are very concerned that the present proposals will inexorably lead to further piecemeal change, without any clear sense of direction, principles or purpose, but with the overall effect of unbalancing the criminal justice system.
7. Furthermore, we would point out that the present proposals do not address the principal fault in the Stephen Lawrence proceedings: that the initial investigation failed to follow up routes of inquiry that were clearly available at the time. The Law Commission rightly does not propose that inadequate or incompetent investigators or prosecutors should be rewarded by being able to resume inquiries after a trial process that has highlighted the gaps in their case.

Human rights issues

8. The Law Commission reviews the human rights provisions in this area comprehensively, in particular Article 4 of Protocol 7 of the ECHR, which is due to be signed, ratified, and incorporated by the UK government. Article 4 contains a general prohibition against double jeopardy in respect of criminal cases that have been finally determined. But it does permit (Article 4(2)) such cases to be reopened in certain defined circumstances: where there is new evidence, or where there was a fundamental defect in the proceedings. Broadly speaking, these provisions have been interpreted by the European Court of Human Rights as meaning that such a course should be taken only rarely and exceptionally.
9. We accept that the provisions of Article 4 do not constitute an absolute ban on reopening acquittals, as well as convictions, in exceptional cases. However, nor do they specifically endorse such actions. In considering compliance with relevant Articles of the ECHR, the Strasbourg institutions have always recognised the different procedures and principles that underly the different judicial systems of member states. They have looked at the procedure as a whole to see whether it guarantees fair trial rights. This recognises the fact that each system has different safeguards, built in to different stages of its procedures. In the same way, we would argue that, whilst simple compliance with human rights standards is an essential bottom line for criminal justice systems, this may not of itself be sufficient to ensure fairness in the particular circumstances of an individual system.
10. There are aspects of the English criminal justice system that are unusual, if not unique, in Council of Europe member states. They include the unsupervised nature of police inquiries, the limited powers of prosecutors and the limited disclosure of evidence to the court and the defence. It is an adversarial system that has few independent safeguards in the early stages and relies heavily upon the testing of evidence, and the way in which it was obtained, at trial, orally, in front of judge and jury. We therefore go on to look at some of the possible effects of the Law Commission, in terms of their practical application within such a system, and their effect on principles of fairness and human rights.

The proposals in practice

11. The Law Commission suggests three limitations on the circumstances in which cases could be reopened
 - (i) new evidence would need to be strong, and it would be necessary to show that it could not reasonably have been adduced at the first trial;
 - (ii) a court should judge that, in the light of the new evidence, a conviction would be 'highly likely' or certain;
 - (iii) the case would need to be sufficiently serious, with the likelihood of a sentence of 3 years or more;
 - (iv) the court should order a retrial only if it is 'in the interests of justice'.
12. As we have already stated, it is clear that the Stephen Lawrence case would not meet the first test, except in the unlikely event that one of the acquitted defendants were to confess. Confessions and new forensic techniques are the kinds of new evidence that the report envisages. We consider that there are problems about both kinds of evidence.

13. Confession evidence has long been held to be particularly unreliable, and to have been the foundation of many miscarriage of justice cases. Indeed, JUSTICE's last ever appearance before the Court of Appeal Criminal Division in December of last year succeeded in overturning a conviction based largely on unreliable confession evidence. Confessions may be made by fantasists, or people who are particularly suggestible. There are also problems with confessions allegedly made to third parties, who may themselves obtain benefit: such as co-defendants facing criminal charges which may be reduced or dropped, or prisoners who may obtain sentence discounts (so-called cell confessions). At a time when the system has moved away from reliance on such evidence to more reliable forensic and investigative methods, we would consider it highly undesirable to include confession evidence as a matter that can lead to reopening an acquittal. It could place temptations in the way of police officers who genuinely, but wrongly, believe that a wrongful acquittal has taken place, and who come into contact with the acquitted person, or his or her associates, in relation to other unrelated criminal investigations. Nor is it a sufficient safeguard that such evidence would need to be assessed in the light of other available evidence: the danger of unreliable confessions appearing to validate an otherwise weak case was well put to, and accepted by, the Royal Commission on Criminal Justice.
14. New forensic techniques may be presumed to be more reliable than confessions, though it needs to be borne in mind that many have proved less certain than appeared to be the case when they were first brought into use. However, the use of such techniques on material retained, perhaps for long periods, after a trial raises some fresh difficulties, in particular the possibility of accidental, or even deliberate, contamination of, or interference with, the evidence. We do not consider that the procedures for retention of material following a trial are at present sufficiently secure to guard against either possibility.
15. The test that the Law Commission has put forward for such cases to go forward is rightly a high one. But it is also one that appears to us to have potentially fatal consequences for the presumption of innocence at any subsequent retrial. If a case can only go forward for retrial on the basis that a court has already judged that the new evidence renders a conviction 'highly likely' or 'sure', the defendant will have to displace a heavy presumption of guilt, in contravention of Article 6 ECHR. This is, we would argue, clearly different from the questions that arise on a retrial following an appeal against conviction, which a court has ordered as necessary because new evidence renders the conviction unsafe, rather than because new evidence, in its view, renders a conviction highly likely or certain.
16. Finally, we consider that, if these proposals are to be implemented, the threshold for the kinds of case that can be reopened is too low. Offences that attract three years' imprisonment are, in our view, not sufficiently serious or exceptional to warrant interference with jury acquittals properly obtained. All offences are exceptional to their victims: the test for reopening cases, should such a procedure ever be agreed, should be that these are such serious offences that a failure to re-prosecute, on what appeared to be clear proof of guilt, would undermine *general* public confidence in the system of justice. This would, we suggest, be confined to homicide, serious fraud, sexual offences, and offences of serious violence; these would be the only cases where the interests of justice might outweigh the principles of finality and certainty.

Conclusions

17. We do not believe that sufficient grounds have been made out for the necessity of interfering with the double jeopardy principle. The fact that the Lawrence case would be unaffected, and that it is envisaged that such procedures would be wholly exceptional,

does not indicate that there is a systematic problem that needs to be addressed by removing such a fundamental principle. We find it difficult to believe that in practice these powers would be used as rarely as the Commission implies, or that they would not lead to pressure for further inroads into the finality of jury trials. It is very dangerous to extract particular elements of a system without having regard to the system as a whole, and where the present or future effects of these changes are so uncertain.

18. We do not believe that sufficient safeguards can be incorporated into procedures to prevent them being misused or overused. We relate our comments not just to the provisions of the ECHR, but to their application in a common law jurisdiction that relies heavily on the trial as the place where evidence is tested and evaluated and the rights of the defendant safeguarded. We note, for example, that the other common law countries cited in the report's comparative section have retained an absolute bar on reopening acquittals that have been finally determined at trial and appeal.

JUSTICE
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