The Law Commission
(LAW COM No 267)

DOUBLE JEOPARDY AND PROSECUTION APPEALS

Report on two references under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Lord High Chancellor by Command of Her Majesty
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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

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To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

THE REFERENCE ON DOUBLE JEOPARDY

1.1 On 2 July 1999 the Home Secretary made a reference to this Commission in the following terms:

> To consider the law of England and Wales relating to double jeopardy (after acquittal), taking into account: recommendation 38 of the Macpherson Report on the Stephen Lawrence Inquiry that consideration should be given to permit prosecution after acquittal where fresh and viable evidence is presented; the powers of the prosecution to re-instate criminal proceedings; and also the United Kingdom's international obligations; and to make recommendations.

1.2 The reference arose out of the Macpherson inquiry into the Stephen Lawrence case.[1] There was great public dissatisfaction about the way in which the police investigation into the murder of Stephen Lawrence had been conducted, and the Home Secretary set up a Committee of Inquiry. In that case, a private prosecution had been brought unsuccessfully against youths who were accused of the murder. The prosecution failed because the judge ruled that the identification evidence of the prosecution's main witness was too unreliable to be admitted. One of the points considered in the inquiry was the impossibility of bringing a fresh prosecution against those who were allegedly responsible for Stephen Lawrence's death but had been acquitted of it, and it was recommended that "consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented".[2] The report explains:

[1] The Stephen Lawrence Inquiry – Report of an Inquiry by Sir William Macpherson of Cluny (1999) Cm 4262.

[2] Recommendation 38. The inquiry's terms of reference required it "to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes", but our understanding is that this recommendation was not intended to be confined to such crimes. In any event, we see no reason for the rules on double jeopardy to be different in the case of racist crime from those applicable to other kinds of crime.

> Both we and others … have considered, in the context of this case, whether the law which absolutely protects those who have been acquitted from any further prosecution for the same or a closely allied offence should prevail. If, even at this late stage, fresh and viable evidence should emerge against any of the three suspects who were acquitted, they could not be tried again however strong the evidence might be. We simply indicate that perhaps in modern conditions such absolute protection may sometimes lead to injustice. Full and appropriate safeguards would be essential. Fresh trials after acquittal would be exceptional. But we indicate that at least the issue deserves debate and reconsideration perhaps by the Law Commission, or by Parliament.[3]

1.3 We published a consultation paper[4] on 12 October 1999, in which we made a number of provisional proposals, including the proposal that it should in certain circumstances be possible to reopen an acquittal where new evidence has emerged. That paper is referred to in this report as "CP 156".

1.4 The Home Affairs Select Committee of the House of Commons then decided to investigate the issues we had raised. We met the Committee informally to discuss our proposals, and the Committee took evidence from a number of witnesses. On 8 June 2000 it published its report.[5] It recommended, as we had provisionally proposed, that there should be an exception to the double jeopardy rule in cases of fresh evidence, but the details of its conclusions differed from ours in various respects. The Committee's report was debated in Westminster Hall on 26 October 2000.

1.5 We have of course taken account of the Committee's report, and of the points made by MPs in the debate, in formulating our final recommendations. In particular we note the remarks of the Committee on the rapid advances made in recent years in the field of DNA testing:

> … blood samples taken at a murder scene in the early 1980s might not have produced sufficient identification evidence at that time. The prime suspect may have been prosecuted on the basis of other evidence. If the prosecution failed to satisfy the jury that the defendant was guilty beyond reasonable doubt, the defendant would have been acquitted and left the court a free man. A decade later, advances in DNA testing could enable the original blood samples to be analysed and show with near certainty that the acquitted person had been at the crime scene.[6]

1.6 In addition, there have in recent years been a number of well-publicised cases in which persons acquitted of serious offences are reported to have subsequently

[3] Para 7.46.

[4] Double Jeopardy (1999) Consultation Paper No 156.

[5] Session 1999–2000, 3rd Report: The Double Jeopardy Rule.

[6] *Ibid*, para 3.

confessed their guilt. It would not, however, be appropriate for us to comment on whether our recommendations, if implemented, would enable any particular case to be reopened, and we make no such comment. We have tried in this report to consider the issues in the abstract, without reference to any actual case.

THE REFERENCE ON PROSECUTION APPEALS

1.7 On 24 May 2000, the Home Secretary formally asked us to undertake a review of the law governing prosecution appeals against judge-directed acquittals in criminal proceedings and other adverse rulings by a judge which may lead to the premature ending of the trial. The terms of reference for this review are:

> To consider
>
> (1) whether any, and if so what, additional rights of appeal[7] or other remedies should be available to the prosecution from adverse rulings of a judge in a trial on indictment which the prosecution may wish to overturn and which may result, or may have resulted, whether directly or indirectly, in premature termination of the trial;
>
> (2) to what, if any, procedural restrictions such appeals would be subject;
>
> and to make recommendations.

1.8 Our work on the subject considerably pre-dated this formal reference. In a lecture given in November 1999 the Attorney-General had indicated that the Government would be asking us to do some work in this area. He said:

> My concern is simply this: that there is an imbalance in the system. If a judge decides to stay a prosecution on the ground of abuse of process, or to direct the jury to acquit a defendant, or to make a ruling concerning the admissibility of evidence which has the effect of depriving the prosecution of a crucial plank in its case – ought not the prosecution to be able to test that decision on appeal? If it cannot, are we not allowing in fact a system in which judges are unaccountable to the appeal courts as to a crucial aspect of their responsibilities, at the very time that we are providing them with greater powers through the implementation of the Human Rights Act?
>
> I recognise that there are a large number of issues involved in this suggestion. We must not over correct the imbalance, so that the defence are left at a disadvantage. We must not introduce unnecessary delay into the system. If new rights are given to the prosecution, we must take care to ensure that they are not greater than those available to the defence. There is a case for considering some filter in the system, for instance ensuring that no appeal is brought without the consent of the DPP or the Law Officers. Practical and resource issues would need to be addressed. But I strongly suspect that the mere existence of a prosecution right of

[7] In this report, we follow the reference in using the conventional phrase "right of appeal" to include a right which is subject to a leave requirement.

> appeal, even if only sparingly used, could lead to a significant and beneficial change in the culture of practice in the criminal courts.[8]

In January 2000, we agreed to undertake the project.

1.9 On 8 June 2000, the report was published of an inquiry by His Honour Gerald Butler QC, a retired circuit judge, into a Customs and Excise prosecution which had been stayed by Mr Justice Turner as an abuse of the process of the court.[9] The case involved the importation of 309 kilograms of cocaine, said to have a "street value" of about £34 million. One of Judge Butler's recommendations was that "Consideration should be given as to whether or not the prosecution should have a right of appeal where a prosecution is terminated consequent upon a finding that there has been an abuse of process".

1.10 On 25 July 2000 we published a consultation paper,[10] in which we provisionally proposed that the prosecution should in certain cases be given a right of appeal against rulings which bring the proceedings to an end. That paper is referred to in this report as "CP 158".

1.11 The issues of double jeopardy and prosecution appeals, though distinct, are clearly related. They both concern the circumstances in which an acquittal may be revisited at the instigation of the prosecution, with the possibility of a retrial. Some of the arguments apply to both. We have therefore decided to publish our recommendations on both subjects as a single report.

THE IMPLICATIONS OF HUMAN RIGHTS LAW

1.12 In the case of double jeopardy, in particular, we have had to consider the implications of the United Nations' International Convention on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).[11] Article 4(1) of the Seventh Protocol to the ECHR prohibits the bringing of a second prosecution for the same offence, but Article 4(2) permits the original proceedings to be reopened in certain circumstances. The UK has not yet ratified this Protocol, but the Government has indicated its intention to do so.[12] By virtue of the Human Rights Act 1998, the rights conferred by Article 4 may well then become Convention rights enforceable in the courts of England and Wales.[13] For the purposes of this report we have disregarded the fact that the Protocol has not yet been ratified.

[8] Tom Sargant Memorial Lecture, 29 November 1999.

[9] Report of the Inquiry into the Prosecution of the case of Regina v Doran and Others (2000) by His Honour Gerald Butler QC (available from Customs and Excise).

[10] Prosecution Appeals Against Judges' Rulings (2000) Consultation Paper No 158.

[11] See Part III below.

[12] Written Answer, *Hansard* (HL) 4 March 1999, vol 597, col 201.

[13] Human Rights Act 1998, s l. An order under s 1(4) will be required for this purpose.

1.13 The law of the Convention distinguishes three different ways in which the prosecution may seek to challenge an acquittal. The prosecution may

(1) have rights of appeal;

(2) seek to have the original proceedings *reopened* even after all avenues of appeal have been exhausted, or the time limit for an appeal has expired; or

(3) seek to bring *new* proceedings, as distinct from reopening the old.

Of these three courses, the Convention permits the first, and the second in the circumstances described in Article 4(2); but Article 4(1) prohibits the third altogether.[14] This prohibition is known in other countries as the principle of *ne bis in idem*.[15]

1.14 In English domestic law the principle of *ne bis in idem* takes the form of the "autrefois" rule,[16] under which a person who has previously been acquitted or convicted[17] of an offence may not be prosecuted for the same offence again. We attach great importance to that rule, and in Part VI below we make recommendations for putting it on a statutory basis.

1.15 There is one situation in which English law allows an acquittal to be challenged even after all rights of appeal have been exhausted, namely where the acquittal is "tainted" because it was procured by interference with or intimidation of jurors or witnesses. This is an example of the second kind of challenge referred to above, and is one of the cases in which such challenge is permitted under Article 4(2). In Part V below we discuss possible reforms to this procedure.

1.16 The main issue we have had to consider in the context of double jeopardy is whether English law should recognise a *second* situation in which an acquittal may be challenged after all rights of appeal have been exhausted, namely where further evidence comes to light. This too would be permissible under Article 4(2), and in Part IV below we consider whether it would be desirable.

1.17 Allowing the prosecution to challenge an acquittal by way of *appeal*, on the other hand (that is, before it becomes final), does not in principle present any difficulty in terms of compliance with the ECHR. Such rights of appeal are common on the Continent. Indeed, English law already permits the prosecution to appeal against

[14] At least where the new proceedings are for *the same offence* as the old, and arguably also where they are for a different offence but are based on the same facts. See paras 3.11 – 3.18 below.

[15] A person may not be prosecuted twice for the same thing.

[16] Strictly speaking the term "autrefois" applies only to proceedings on indictment, which may be met by a plea of autrefois acquit or autrefois convict; but a similar rule applies in the magistrates' court, and it is convenient to use the expression "the autrefois rule" as including both.

[17] Our double jeopardy reference is confined to double jeopardy following *acquittal*, and our primary focus is on acquittals rather than convictions; but many of the issues arise equally in both cases, and it would seem anomalous to make recommendations only in respect of the former. Some of our recommendations on double jeopardy therefore apply to both.

a decision of *magistrates* on a point of law, and also (in certain circumstances) against a ruling made in the Crown Court in advance of the trial. In Part VII below we discuss the possibility of extending these rights of appeal to certain rulings, made before or during a trial on indictment, to which they do not at present apply.

OUR MAIN RECOMMENDATIONS

1.18 Our main recommendations on double jeopardy are that the Court of Appeal should have power to set aside an acquittal *for murder only*,[18] thus permitting a retrial, where there is compelling new evidence of guilt *and* the court is satisfied that it is in the interests of justice to quash the acquittal; and that that power should apply equally to acquittals which have already taken place before the law is changed.

1.19 On prosecution appeals we recommend that, in certain types of case, the Crown should have the right to appeal against a ruling by the judge which has the effect of terminating the proceedings. This would include not only (as we originally proposed) rulings made in advance of the trial and those made during the prosecution's case, but also a ruling at the close of the prosecution's case that there is no case to answer, provided that it is made under the first limb of *Galbraith*[19] (that is, on the basis that the Crown has not adduced any evidence of one or more elements of the offence – a ruling on a point of law) as distinct from the second (namely that the evidence adduced is such that a jury could not properly convict on it – a ruling based on the court's view of the evidence). We recommend that rights of appeal against acquittal be limited to the more serious cases. The criterion we adopt for this purpose is whether (had the defendant been convicted) the Attorney-General would have had power to refer the sentence to the Court of Appeal as being unduly lenient.

1.20 We also recommend certain extensions to the scope of the preparatory hearing regime, under which either side can appeal against certain rulings made in advance of the trial. We do *not* recommend a right of appeal against rulings (other than those made at preparatory hearings) which do not result in the termination of the trial, nor against misdirections which may result in an acquittal by the jury.

1.21 A full list of our recommendations appears in Part VIII below.

THE TIMING OF THIS REPORT

1.22 Our usual practice when publishing a report is to append a draft Bill which, if enacted, would implement our recommendations. In this case, however, we have made an exception. This is because the drafting of a Bill inevitably delays the

[18] Including genocide by killing. Our recommendation would also extend to acquittals of reckless killing, if such an offence were created as we recommended in Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

[19] [1981] 1 WLR 1039.

completion of the report, and in the case of this report there are special circumstances which would make such delay undesirable. The Home Office has explained to us that it would be very helpful to be able to take account of our recommendations in formulating its response to the conclusions of Lord Justice Auld's review of the criminal courts, which at the time of writing are expected to be published in February 2001. That response, moreover, may well include the drafting of a Bill which would deal with double jeopardy together with wider issues of criminal procedure, in which case the production of a Bill for this report would involve wasteful duplication of effort. The Home Office has expressed the view that these considerations outweigh the advantages of our usual practice. We agree, and have therefore decided to accelerate the publication of the report by omitting to include a draft Bill.

1.23 This course may incidentally have a further benefit. It may enable us to publish this report during the lifetime of the present Parliament, whereas the inclusion of a draft Bill might render this impossible. We are aware that some of the issues we discuss have already provoked lively public debate, which may well be resumed in the course of the next election campaign. We hope that this report will be a useful contribution to that debate.

PART II
THE PRESENT DOMESTIC LAW

2.1 In this part we summarise the present domestic English law[1] on the matters discussed in this report, namely:

(1) the "autrefois" rule, which states that a defendant who has been finally convicted or acquitted may not be tried again for the same offence, and the exception for acquittals that are "tainted";

(2) the discretion to stay proceedings which would be an abuse of the process of the court, and the way in which that discretion is applied where the defendant has already been acquitted or convicted on the same or substantially the same facts;

(3) the position where, without actually *charging* the defendant with an offence of which he or she has already been acquitted, the prosecution seeks to adduce evidence that the defendant was in fact guilty of such an offence;

(4) the various rights of appeal currently available to the prosecution; and

(5) the circumstances in which a retrial may be held.

THE AUTREFOIS RULE

2.2 The doctrines of autrefois acquit and autrefois convict state that no-one may be put in peril twice for the same offence. Accordingly, where a person has previously been acquitted or convicted (or could, by an alternative verdict, have been convicted) of an offence and is later charged on indictment with the same offence, a plea of autrefois will bar the prosecution. An analogous rule applies in summary trials.

Identity in law and fact

2.3 The offence with which the defendant is now charged must be identical to the offence of which he or she was previously acquitted or convicted. Thus in *Connelly v DPP*[2] the rule was held not to protect the defendant from being tried for robbery after being acquitted of a murder committed in the course of the robbery.[3] Lord Devlin explained that "The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an

[1] By contrast with the relevant law of the ECHR, which is summarised in Part III below.

[2] [1964] AC 1254.

[3] The Court of Appeal had directed a verdict of acquittal, having allowed an appeal against the defendant's conviction for murder.

offence. For the doctrine to apply it must be the same offence both in fact and in law."[4]

2.4 This narrow view of the rule was confirmed by the Court of Appeal in *Beedie*,[5] holding that in *Connelly* the majority had "identified a narrow principle of autrefois, applicable only where the same offence is alleged in the second indictment".[6] The rule therefore did not apply where the defendant, having already pleaded guilty to summary offences under the Health and Safety at Work Act 1974 on the basis of his failure to maintain a gas fire in residential premises owned by him, was charged with the manslaughter of a resident who died from carbon monoxide poisoning as a result.[7]

2.5 Even on this narrow view, however, it is only in *law* that the offence charged must be identical to the previous charge. The *facts* need only be *substantially* the same. As Lord Devlin put it, "I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another", whereas, in respect of identity in law, "legal characteristics are precise things and are either the same or not".[8]

The need for a valid acquittal or conviction

2.6 For a plea of autrefois to succeed there must previously have been a *valid* acquittal or conviction. This means, first, that the defendant must have been acquitted or convicted by a court of competent jurisdiction[9] and the proceedings must not have been ultra vires.[10] Thus a purported acquittal by a magistrates'

4 *Connelly v DPP* [1964] AC 1254, 1339–1340. Lord Reid (at p 1295) and Lord Pearce (at p 1368) agreed. The alternative view that the principle applied also where the offences were substantially the same ([1964] AC 1254 at p 1305, *per* Lord Morris of Borth-y-Gest) was not adopted by the majority. Lord Morris's speech includes a detailed review of the English authorities over 400 years.

5 [1998] QB 356, 361, *per* Rose LJ.

6 [1998] QB 356, 360.

7 But it was held that the second prosecution should have been stayed as an abuse of process: see para 2.16 below.

8 [1964] AC 1254, 1340. Lord Morris' view, that the new charge need only be *substantially* the same as the earlier one, is reflected in the statutory provisions applying the principle of double jeopardy to military law. For example, the Army Act 1955, s 134(1), as amended by the Armed Forces Act 1991, provides that in certain circumstances a person "shall not be liable in respect of the same or substantially the same offence to be tried by court-martial". The amendment predates *Beedie* [1998] QB 356, where Lord Devlin's analysis was preferred.

9 This requirement is satisfied if the court concerned was a *foreign* court of competent jurisdiction: *Treacy v DPP* [1971] AC 537, 562.

10 *R v Kent JJ, ex p Machin* [1952] 2 QB 355. The Divisional Court quashed M's conviction and committal for sentence for the offences of larceny and obtaining credit by fraud because the correct procedure for determining mode of trial had not been complied with and so the magistrates had acted ultra vires. Lord Goddard CJ at p 361 expressed the hope that there would be no further proceedings, but said that the prosecution was entitled to recharge M as he had "never been technically in peril".

court of an offence triable only on indictment will not found a plea of autrefois acquit.[11] Second, a purported acquittal or conviction by a competent court does not preclude a subsequent prosecution if the proceedings were so irregular as to be a nullity – for example, where magistrates purported to acquit without giving the prosecution an opportunity to adduce evidence,[12] or where two defendants were tried together without being joined in the same indictment.[13] An invalid acquittal cannot found a plea of autrefois because in law it does not exist. It is for this reason also that the Court of Appeal cannot "quash" an invalid conviction. However, it can order the conviction to be "set aside and annulled",[14] and award a "venire de novo" (a new trial, as distinct from a retrial after a valid trial).[15]

2.7 The need for an acquittal or conviction at the end of the first trial means that the autrefois rule does not apply where the defendant is discharged in committal proceedings,[16] where a summons is withdrawn before the defendant has pleaded to it,[17] where the information is dismissed owing to the non-appearance of the prosecutor,[18] or where the information was so faulty that the defendant could never have been in jeopardy on it.[19] In these cases, there is no finding of the court which amounts to an acquittal.

2.8 Conversely, if the trial is validly commenced and ends in an unequivocal verdict by a properly constituted tribunal, the fact that there was irregularity in the proceedings does not invalidate the verdict, and a retrial is possible only if ordered under the statutory powers of an appellate court.[20]

The tainted acquittal procedure

2.9 Under the present law, there are three circumstances in which an apparently valid conviction or acquittal may be followed by a further trial for the same offence. Two of these cases, namely: a retrial following the prosecution successfully appealing a summary acquittal to the Divisional Court by way of a case stated; and a retrial ordered by the Court of Appeal upon a successful appeal against conviction, are not genuine exceptions to the autrefois rule. This is because an acquittal or conviction which is subject to appeal is not a *final* acquittal[21] until the appellate process has been concluded or the time allowed for appeal has expired.

[11] *West* [1964] 1 QB 15.

[12] *R v Dorking JJ, ex p Harrington* [1984] 1 AC 743.

[13] *Crane v DPP* [1921] 2 AC 299.

[14] *Booth, Wood and Molland* [1999] Crim LR 413.

[15] *Crane v DPP* [1921] 2 AC 299.

[16] *R v Manchester City Magistrates, ex p Snelson* [1977] 1 WLR 911.

[17] *R v Grays JJ, ex p Low* [1990] QB 54, especially at p 59, *per* Nolan J.

[18] *R v Bennett and Bond, ex p Bennet* (1908) 72 JP 362.

[19] *Dabhade* [1993] QB 329.

[20] *Rose* [1982] AC 822.

[21] See paras 3.2 and 3.10 below.

The existing law on prosecution rights of appeal and retrials is set out below.[22] The only genuine exception to the autrefois rule at present is the tainted acquittal procedure introduced by the Criminal Procedure and Investigations Act 1996.

2.10 That Act created a procedure by which a person could be retried for an offence of which that person had already been acquitted, if the acquittal was "tainted".[23] This procedure is available where

(a) a person has been acquitted of an offence, and

(b) a person has been convicted of an administration of justice offence[24] involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal.[25]

2.11 If these conditions are met, and the court before which the person was convicted certifies that there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and that it would not be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he or she was acquitted, then an application may be made to the High Court for an order quashing the acquittal.[26]

2.12 The High Court may, upon such application, make an order under section 54(3) of the Act quashing the acquittal, but only if

(1) it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;

(2) it does not appear to the court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which that person was acquitted;

(3) it appears to the court that the acquitted person has been given a reasonable opportunity to make written representations to the court; and

(4) it appears to the court that the conviction for the administration of justice offence will stand.

[22] See paras 2.29 – 2.53 below.

[23] Criminal Procedure and Investigations Act 1996, ss 54–57.

[24] This means the offence of perverting the course of justice, the offence under the Criminal Justice and Public Order Act 1994, s 51(1) (intimidation etc of witnesses, juries and others) or an offence of aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under the Perjury Act 1911, s 1: Criminal Procedure and Investigations Act 1996, s 54(6).

[25] Criminal Procedure and Investigations Act 1996, s 54(1).

[26] *Ibid*, s 54(2), (3) and (5).

2.13 Where the High Court quashes the acquittal under section 54(3), new proceedings may be taken against the acquitted person for the offence of which that person was acquitted.[27]

ABUSE OF PROCESS

The general principles

2.14 The House of Lords' decision in *Connelly*[28] established that, outside the boundaries of the strict autrefois rule, protection against double jeopardy is provided by a special application of the abuse of process rules. The general principles of abuse of process as they are now understood cover cases in which it is not possible for the defendant to receive a fair trial, and cases in which, although the defendant could be fairly tried, it is unfair to put him or her on trial.[29] In the first category are cases in which there has been a delay between the commission of the offence and the trial, where potential evidence has been lost or destroyed,[30] or there has been prejudicial pre-trial publicity.[31] The second category includes cases in which the prosecution has gone back on promises not to prosecute or to discontinue proceedings,[32] or where the defendant has been brought within the jurisdiction in unlawful or unconscionable ways.[33]

2.15 It remains rare for a case to be stayed. The formal burden of proof (on the balance of probabilities)[34] rests on the defendant, who normally has to show that there is "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding".[35]

The *Connelly* principle

2.16 Under the *Connelly* principle this burden is reversed. As Lord Devlin explained, where a person has once been tried in respect of particular facts, it is prima facie oppressive to put that person on trial a second time in relation to those same facts, because it will normally be the case that the second charge could and should have been dealt with at the same time as the first. The importance of this principle as a protection against double jeopardy was confirmed by the Court of

[27] *Ibid*, s 54(4).

[28] [1964] AC 1254.

[29] See the distinction drawn in *Beckford* [1996] 1 Cr App R 94.

[30] *McNamara and McNamara* [1998] Crim LR 278.

[31] *Reade* unreported, 15 October 1993.

[32] *Bloomfield* [1997] 1 Cr App R 135; *Townsend, Dearsley and Bretscher* [1997] 2 Cr App R 540.

[33] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42; *Mullen v Conoco Ltd* [1998] QB 382.

[34] *R v Crown Court at Norwich, ex p Belsham* (1992) 94 Cr App R 382; *Tan v Cameron* [1992] 2 AC 205, PC; but see *R v Telford JJ, ex p Badhan* [1991] 2 QB 78.

[35] *Hui Chi-Ming* [1992] 1 AC 34, 57.

Appeal in *Beedie*.[36] It was held that, while the autrefois rule did not protect against subsequent prosecution for a different offence on the same facts, the defendant in such a case is instead protected by a presumption that the proceedings should be stayed in the absence of special circumstances to justify them.[37] Where a defective gas fire on the defendant's premises had caused the death of a resident by carbon monoxide poisoning, and the defendant had already pleaded guilty to summary offences under the Health and Safety at Work Act 1974, a subsequent prosecution for manslaughter should therefore have been stayed.

2.17 The authorities provide little guidance as to what might constitute "special circumstances" sufficient to justify a new charge on the same facts. In *Connelly* itself, Lord Devlin declined to attempt "a comprehensive definition", but gave as an example a case where the prosecution considers that two charges should be charged separately, and prefers two indictments accordingly.

> In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance …[38]

This suggests a relatively narrow application for the rule, applicable to cases where the defence has in effect acquiesced in the separation of the trials.

2.18 A more useful example is provided by the recent decision of three former judges of the Court of Appeal,[39] sitting as the Court of Appeal for Gibraltar, in *Attorney General for Gibraltar v Leoni*.[40] The defendants were seen jettisoning cargo from their boat on the approach of a police launch. The police suspected that the cargo was cannabis, but could not prove this until the cargo was recovered; and by that time the defendants had already pleaded guilty to an offence of jettisoning cargo. The Court of Appeal held that this was not enough to bring the *Connelly* principle into play, because the charges of possessing and importing cannabis did not arise out of the same facts as the charges of jettisoning cargo. The court went on to express the view that the recovery of the cannabis, after the defendants had been dealt with on the jettisoning charge, would in any event have amounted to special circumstances. It has long been established that the occurrence of some new *event* after a conviction for a lesser offence is no bar to a later prosecution

[36] [1998] QB 356.

[37] This casts doubt on the Divisional Court's dictum in *R v Forest of Dean JJ, ex p Farley* [1990] Crim LR 568, that there is a discretion to stay proceedings if to proceed after conviction or acquittal on a lesser charge would be oppressive or prejudicial, but that a stay will rarely be appropriate.

[38] [1964] AC 1254, 1360. He noted that, if the defence wished for a single trial of the two indictments, it could apply for an order in the form made in *Smith* [1958] 1 All ER 475.

[39] Sir Brian Neill (President), Sir John Waite JA and Sir Iain Glidewell JA, who gave the judgment of the court.

[40] Criminal Appeal No 4 of 1998, judgment given 19 March 1999; unreported.

for an aggravated offence: for instance, a defendant convicted of an assault can be prosecuted for manslaughter if the victim of the assault dies after the conviction.[41] The court drew an analogy between the occurrence of a new event and the discovery of new evidence.

2.19 This tends to support the view that the discovery of new evidence may amount to a special circumstance for the purposes of the *Connelly* principle. It is noteworthy that the court took this view although the prosecution had been aware, at the time when the jettisoning charges were dealt with, that evidence of cannabis offences might yet be discovered. The argument for treating the discovery of new evidence as special circumstances must be all the stronger where, at the time of the first trial, the prosecution has no reason to suppose that evidence of another offence might become available.

The *Elrington* principle

2.20 In *Beedie*[42] the defence also relied on a further principle, derived from the old case of *Elrington*.[43] In that case, justices had dismissed an information for assault against the defendant. He was then indicted for causing grievous bodily harm, on the basis of the same assault. Cockburn CJ stated as a principle of general application that "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".[44] In *Beedie* the Court of Appeal treated this principle (as well as the wider principle stated by Lord Devlin in *Connelly*) as a factor relevant to the judge's decision whether to stay the proceedings.[45] On this view, the *Elrington* principle has the effect that the presumption in favour of a stay is *even stronger* where the second charge does not merely arise out of the same facts but is an aggravated form of the first.[46]

2.21 In any event, it is established that a person who has been convicted of an offence can be prosecuted for an aggravated form of the same offence if the facts constituting the aggravated offence were not in existence at the time of the conviction. Thus a person convicted of an assault can be charged with murder or manslaughter if the victim subsequently dies from the injuries sustained.[47] This is an exception to the *Elrington* principle.

[41] See para 2.21 below.

[42] [1998] QB 356; see para 2.16 above.

[43] (1861) 1 B & S 688; 121 ER 170.

[44] (1861) 1 B & S 688, 696.

[45] [1998] QB 356, 366E–F.

[46] Defence counsel cited *R v Forest of Dean JJ, ex p Farley* [1990] RTR 228, where Neill LJ at p 239 referred to the "*almost invariable* rule that where a person is tried on a lesser offence he is not to be tried again on the same facts for a more serious offence" (italics supplied).

[47] *De Salvi* (1857) 10 Cox CC 481; *Thomas* [1950] 1 KB 26. A somewhat analogous recent case is *Law Society v Gilbert*, *The Times* 12 January 2001, where it was held not to be an abuse of process for the Law Society to bring further disciplinary proceedings against a

THE RULE AGAINST CHALLENGING A PREVIOUS ACQUITTAL

2.22 In CP 156 we also examined the rule in *Sambasivam*,[48] which we understood as stating that an acquittal could not subsequently be challenged in other proceedings against the same defendant by adducing evidence that the defendant was in fact guilty of the offence of which he or she had been acquitted. We provisionally proposed that, subject to the rule against double jeopardy and the rules on the admissibility of evidence of a defendant's previous misconduct,[49] the *Sambasivam* rule be abolished.

2.23 Our analysis in CP 156 was that the rule had two aspects. The first was its application to a case of true double jeopardy – that is, the situation where a person is prosecuted for a second time on the same or substantially the same facts, having already been once acquitted. The second and more difficult issue was whether the rule should continue to apply in cases where, although the prosecution's evidence contradicted the previous acquittal, the charge itself did not amount to double jeopardy, and there was therefore no need to get the acquittal quashed before proceeding with the second charge. This latter situation was, by definition, not a case of double jeopardy.[50] We considered it only because it was not easy to disentangle this aspect of the rule from its function in relation to double jeopardy.

2.24 On the first aspect, we concluded that the autrefois rule and the *Connelly* principle protected against second trials, so there was no further need for a restriction on evidence in trials that were anyway prohibited. *Sambasivam* was thus redundant for the purpose of protecting the defendant against double jeopardy. To the extent that second trials were permissible under an exception to the double jeopardy rule, we took the view that it would defeat the aims of the system if a second trial were allowed but without the evidence that would be admissible in any other trial. Moreover, the rule could not logically apply where the first acquittal had been quashed.

2.25 In relation to the second issue, whether evidence contradicting an acquittal could ever be adduced in a trial of the same defendant on another matter, we argued that the *Sambasivam* prohibition was difficult to support and that defendants were sufficiently protected by the ordinary rules on the admissibility of prejudicial evidence. It would not be possible to adduce evidence of another offence allegedly committed by the defendant unless the probative value of that evidence outweighed its likely prejudicial effect. The question for consideration

solicitor convicted of dishonesty offences who had already been disciplined in respect of the same conduct. The court thought it important that he had not yet been convicted at the time of the first proceedings.

48 *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458.

49 On which we expect to publish our final recommendations later this year. See Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) Consultation Paper No 141.

50 There is no question of the defendant's being *convicted* of the first offence.

was whether, where the defendant has been *acquitted* of that offence, the evidence should still be inadmissible even if its probative value *does* outweigh its prejudicial effect.

2.26 This very question came before the House of Lords in *Z*.[51] The defendant was charged with rape. He had already been convicted once and acquitted four times of rape. The Crown wished to call the complainants from the four acquittals. The trial judge, at a preparatory hearing, accepted that their evidence was sufficiently probative to outweigh the risk of prejudice, but felt bound to exclude it under the rule in *Sambasivam*. The Court of Appeal reluctantly felt bound to agree. The House of Lords, however, held that the evidence should be admitted. In a speech with which the other members of the House agreed, Lord Hutton expressly adopted the reasons we had given for abolishing the rule.[52] In particular, he quoted the following conclusion of CP 156:

> The second application of the rule is in the case where the charge laid is not itself inconsistent with the previous acquittal, but the prosecution seeks to adduce evidence which, if accepted, means that the defendant must have been guilty of the offence of which he or she was acquitted. In this context the rule seems to work as a kind of issue estoppel. But even in civil law the doctrine of issue estoppel is subject to certain qualifications, which must be equally applicable to any counterpart of that doctrine in criminal law. For example, it apparently does not apply where new evidence has emerged since the previous decision. Moreover, it does not render evidence inadmissible: it states that, once an issue has been determined, it is *no longer an issue* in subsequent proceedings between the same parties. In criminal law this would presumably mean only that the defendant cannot be charged with an offence if one of the *elements* of that offence (not just the evidence of it) is the defendant's guilt of an offence of which he or she has already been acquitted. But in that case the charge would arise out of the same facts as the first. It would therefore be a case of double jeopardy. It seems to follow that the rule in *Sambasivam* cannot properly be applied outside the context of double jeopardy – where it is redundant.[53]

2.27 The House of Lords further considered that on its facts *Sambasivam* had been rightly decided for *Connelly* reasons, but that Lord MacDermott's general statement of principle in *Sambasivam*[54] had to be read subject to the qualification that its basis was in double jeopardy only. Lord Hope of Craighead said:

> … the issue in the present case is not whether the defendant is guilty of having raped the three other complainants. He is not being put on trial again for those offences. The only issue is whether he is guilty of

[51] [2000] 2 AC 483.

[52] *Ibid*, pp 505–506.

[53] Para 8.39.

[54] [1950] AC 458, 479.

> this fresh allegation of rape. The guiding principle is that prima facie all evidence which is relevant to the question whether the accused is guilty or innocent of the offence charged is admissible. It would seem to follow that the evidence of these three complainants should be held to be admissible in this case, subject to the discretion of the trial judge to exclude unfair evidence under section 78 of the Police and Criminal Evidence Act 1984. …
>
> The principle which underlies [*Sambasivam*] is that of double jeopardy. … But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial.
>
> The evidence of the three complainants was, of course, relevant to the question whether he was guilty of the charges of rape of which he was acquitted. But that is not the question which is before the court in this case. Nor is there any question now of inflicting any kind of punishment on the defendant, whether directly or indirectly, for those alleged offences. I would hold therefore that the double jeopardy rule which Lord MacDermott was seeking to explain in *Sambasivam's* case would not be infringed by the admission of the evidence of these three complainants with a view to showing that the defendant was guilty of the crime of rape when he had sexual intercourse on a different occasion with someone else.[55]

2.28 As the House of Lords' decision in *Z* has clarified the position so that it accords with our provisional proposals, we consider that there is no longer any need for legislative abolition of the *Sambasivam* rule. We therefore make no such recommendation.

PROSECUTION APPEALS

2.29 In this section we set out briefly the main forms of prosecution appeal or review in the current law of England and Wales. As will be seen, there are already many circumstances in which the prosecution enjoys limited rights of appeal.

From the Crown Court

Attorney-General's references on a point of law

2.30 The Criminal Justice Act 1972, section 36, makes provision for the Attorney-General to refer a point of law, arising out of a trial on indictment which resulted in an acquittal, to the Court of Appeal. The Court of Appeal can refer the case to the House of Lords. Provision is made for the acquitted person to argue the point, either through an advocate or, with leave, in person. Where the acquitted person declines to do so, the court may appoint an advocate as an amicus curiae. The Court of Appeal gives its opinion on the point of law. This does not affect

[55] [2000] 2 AC 483, 487–488.

the acquittal of the defendant in any way. The purpose of the provision is to allow the court to correct an error of law made by a first instance judge and, by that means, clarify a difficult issue of law. It operates for the benefit of the development of the law to be applied in future cases, rather than to ensure that justice is done in the case giving rise to the reference.

2.31 The first reference was made in 1974. In the 25 years since then, there have been reported a total of 41. There are no reported references for some years (for instance, 1993 and 1997). In 1995 there were two; in 1996, one; and three for each of 1998 and 1999.

Appeals against rulings at preparatory hearings

2.32 Under two separate statutory regimes, it is possible for a judge to hold a preparatory hearing. The earlier regime relates to serious fraud cases. The Criminal Justice Act 1987 established a new system for the prosecution and trial of serious fraud, largely based on the recommendations of the Roskill Committee.[56] In addition to preparatory hearings, the system included provision for transferring cases to the Crown Court, rather than requiring them to be committed by the magistrates.[57] In 1996, the Criminal Procedure and Investigations Act provided a similar preparatory hearing procedure designed for other types of long or complicated cases. The two systems have been brought generally into alignment with one another.[58]

2.33 The commencement of the preparatory hearing counts as the start of the trial (and so the defendant is arraigned at that time).[59] The purposes for which a hearing can be ordered are (a) identifying issues likely to be material to a jury, (b) assisting their understanding of such issues, (c) expediting proceedings before the jury, or (d) assisting trial management.[60] Under the system relating to serious fraud, it must appear to the judge that the evidence "reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from a hearing before the jury is sworn".[61] The criterion under the 1996 Act is that the indictment must reveal "a case of such complexity, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing before the jury is sworn".[62]

[56] Report of the Fraud Trials Committee (1986), chaired by Lord Roskill.

[57] Criminal Justice Act 1987, ss 4–10. The power to hold a preparatory hearing is not confined to transferred cases.

[58] Criminal Procedure and Investigations Act 1996, Part III.

[59] Criminal Justice Act 1987, s 8; Criminal Procedure and Investigations Act 1996, s 30.

[60] Criminal Justice Act 1987, s 7(1); Criminal Procedure and Investigations Act 1996, s 29(2).

[61] Criminal Justice Act 1987, s 7(1).

[62] Criminal Procedure and Investigations Act 1996, s 29(1).

2.34 At a preparatory hearing, a judge may make a ruling on "any question as to the admissibility of evidence" and "any other question of law relating to the case".[63] Both parties have an interlocutory right of appeal against such a ruling to the Court of Appeal, subject to a requirement for leave.[64] In cases under the serious fraud regime the Court of Appeal has determined that the power to make these rulings is governed by the purposes for which the hearing may be held. As Evans LJ stated in *Hedworth*:

> … two conditions must be satisfied before the Court of Appeal can have jurisdiction [to hear an appeal from a preparatory hearing]: first, there must be an issue of law, or evidence, within section 9(3); secondly, the order appealed from must have been made within the ambit of the preparatory hearing, that is to say within the scope of section 7(1).[65]

2.35 There are, therefore, two categories of ruling made at the same time or on the same occasion as a preparatory hearing, which are not subject to the right of appeal. First, a ruling may be made at a preparatory hearing, but not be a ruling on the law or the admissibility of evidence, and therefore not appealable. An example is an order directing the prosecution to supply a case statement under section 9(4) of the Act, which has been found to be a matter of pure case management.[66] Secondly, a ruling on law or admissibility made on the same occasion as a preparatory hearing may not be for one of the four purposes[67] laid down for preparatory hearings and so would not be considered as a preparatory hearing ruling.[68] As it is only preparatory hearing rulings which are appealable, rulings which are not within the "ambit" of the regime will not be appealable *as an interlocutory matter*.[69] The Court of Appeal has confirmed that certain applications made during the course of a preparatory hearing will not technically be part of that preparatory hearing because their purpose *on an objective view* was not one of the four in the preparatory hearing scheme, with the result that the Court of Appeal has no jurisdiction to hear interlocutory appeals on them,

[63] Criminal Justice Act 1987, s 9(3)(b) and (c); Criminal Procedure and Investigations Act 1996, s 31(3)(a) and (b). In the 1987 Act there is also a specific power to consider a question arising under the Criminal Justice Act 1993, which relates to the relevance of external law to certain charges of conspiracy, attempt and incitement: s 9(3)(aa).

[64] Criminal Justice Act 1987, s 9(11); Criminal Procedure and Investigations Act 1996, s 35(1). See also the Criminal Justice Act 1987 (Preparatory Hearings) (Interlocutory Appeals) Rules 1988 (SI 1988 No 1700) and the Criminal Procedure and Investigations Act 1996 (Preparatory Hearings) (Interlocutory Appeals) Rules 1997 (SI 1997 No 1053).

[65] [1997] 1 Cr App R 421, 430. The defendant had sought to appeal against a refusal to quash an amended indictment in the course of a preparatory hearing.

[66] *Smithson* [1994] 1 WLR 1052.

[67] See para 2.33 above.

[68] It would instead be a trial ruling (albeit an unusual one in that there will not yet be a jury) as the trial commences at the same time as the preparatory hearing: Criminal Justice Act 1987, s 8(1); Criminal Procedure and Investigations Act 1996, s 30(a).

[69] It is possible that they could form the basis of an appeal against conviction.

whether from the prosecution or the defence.[70] Thus, for instance, although an application to quash a count on the indictment might occasionally also serve one of the allowed purposes of preparatory hearings – the expedition of proceedings – the real purpose is to prevent the defendant having to face that count.[71] The result is a list of applications which cannot be made at a preparatory hearing: a motion to quash an indictment, an application based on whether the prosecution had power to bring the prosecution, an application to stay the indictment as an abuse of process, an application to apply reporting restrictions, an application to discharge a witness summons, and an application to sever.[72]

Unduly lenient sentences

2.36 The Criminal Justice Act 1988, section 36, introduced a prosecution right of appeal against sentence in certain limited classes of case. If of the opinion that a sentence passed in proceedings in the Crown Court is unduly lenient, the Attorney-General may refer the sentence to the Court of Appeal for "review". Having reviewed the original sentence, the Court of Appeal may quash it and substitute any alternative sentence it considers appropriate, provided that the Crown Court had the power to impose the alternative sentence. The provision applies to sentences passed for offences triable only on indictment and such other offences or "descriptions" of case as may be specified by order.[73] This order-making power has been used to apply the provisions to the smuggling of drugs and indecent or obscene material; the production, cultivation or supply of controlled drugs; indecent assault; unlawful sexual intercourse with a girl under 16; incitement of a girl under 16 to have incestuous sexual intercourse; gross indecency with a child under 14; threats to kill; cruelty to a child; and serious fraud cases.[74] Where a sentence has been reviewed under section 35, there is a power in the Court of Appeal to certify a point of law for the consideration of the House of Lords.

2.37 This power is much more extensively used than the power to refer a point of law, and the number of references has generally increased year by year. From 1989 to 1998, the figures for each year have been 9, 25, 26, 37, 30, 50, 77, 68, 70 and 95. The percentages of references heard which resulted in increases in sentence, for the same years, were 85.7, 85, 78.3, 87.9, 85.7, 81.3, 93.2, 74.2, 68.1, and 83.9.[75] In

[70] *Hedworth* [1997] 1 Cr App R 421, 425–433.

[71] *Ibid.* See also the discussion of *Moore* (unreported, 4 February 1991) in Alun Jones QC, "The Decline and Fall of the Preparatory Hearing" [1996] Crim LR 460, 463.

[72] See *Archbold 2001*, para 2–119, and cases cited therein.

[73] Criminal Justice Act 1988, s 35(3).

[74] Criminal Justice Act 1988 (Reviews of Sentencing) Order 1994 (SI 1994 No 119); Criminal Justice Act 1988 (Reviews of Sentencing) Order 1995 (SI 1995 No 10); Criminal Justice Act 1988 (Reviews of Sentencing) Order 2000 (SI 2000 No 1924).

[75] Figures provided by the Legal Secretariat to the Law Officers. The figures for references made are those for all cases referred, including those subsequently withdrawn and those in respect of which leave was not granted. The latest figures available for 1999 are that, of 78 references so far heard, the sentence was increased in 55 cases (70.5%).

some cases the sentence is held to be unduly lenient in principle, but for other reasons is not increased.

Judicial review

2.38 The Divisional Court of the Queen's Bench Division of the High Court has a general jurisdiction in respect of decisions of the Crown Court, "other than its jurisdiction in matters relating to trial on indictment" which are for the Court of Appeal.[76] Thus the main business of the Crown Court, trying cases on indictment, is subject to a defence right of appeal only, in accordance with the provisions of the Criminal Appeal Act 1968. Where a matter determined in the Crown Court is not a "matter relating to trial on indictment", the jurisdiction of the Divisional Court remains, and judicial review proceedings can be brought by the prosecution as well as the defence.

2.39 The expression "matters relating to trial on indictment" has been described as "extremely imprecise",[77] and interpreting it has not proved straightforward for the courts. Indeed for a short time it appeared that the judicial review procedure might be available to the prosecution to challenge a decision by a Crown Court judge to stay an indictment as an abuse of process. In *R v Central Criminal Court, ex p Randle*,[78] the Divisional Court concluded that a decision by a Crown Court judge that an indictment should be stayed as an abuse of process was *not* a matter relating to trial on indictment. There is at least one reported case, *R v Norwich Crown Court, ex p Belsham*,[79] in which the prosecution did challenge such a ruling by way of judicial review. However, in *Re Ashton* (*R v Manchester Crown Court, ex p DPP*)[80] the House of Lords overruled *ex p Randle* and *ex p Belsham*.

2.40 There remains a list of matters which have been found not to relate to trial on indictment, and in respect of which the prosecution may apply for judicial review. Some, however, were decided in part on the basis of *ex p Randle* and *ex p Belsham*, so must be seen as open to some doubt. Those within the ambit of judicial review include decisions to extend or refuse to extend custody time limits,[81] a decision on an application under the Criminal Justice Act 1987 to dismiss transfer charges,[82] and a listing decision which could affect the validity of the trial.[83] In *R v Crown Court at Maidstone, ex p Harrow London Borough*

[76] Supreme Court Act 1981, ss 29(3), 15(1), and 53(2). Appeal to the Court of Appeal is generally available only to a defendant, and against a conviction or equivalent final verdict.

[77] *R v Manchester Crown Court, ex p DPP* [1993] 1 WLR 1524, 1528, *per* Lord Browne-Wilkinson.

[78] [1991] 1 WLR 1087.

[79] [1992] 1 WLR 54.

[80] [1994] 1 AC 9.

[81] See, eg, *R v Manchester Crown Court, ex p McDonald* [1999] 1 WLR 841.

[82] *R v Central Criminal Court, ex p Director of Serious Fraud Office* [1993] 1 WLR 949.

[83] *R v Southwark Crown Court, ex p Customs and Excise Commissioners* [1993] 1 WLR 764. For administrative reasons, the trial in a serious fraud case was listed before a judge who had not conducted the preparatory hearing. It was possible, the Divisional Court found,

Council,[84] an insane defendant was committed for trial at the Crown Court on an indictment, but then was made the subject of an order which the judge had no jurisdiction to make. The order was not appealable to the Court of Appeal. The Divisional Court found that, although the subject of the application for judicial review was something that would ordinarily be characterised as a "matter relating to trial on indictment", the court nevertheless had jurisdiction where the Crown Court had no jurisdiction at all to act as it did.

From magistrates' courts

Appeal to the Divisional Court

2.41 There are, in general, two routes to the Divisional Court from a magistrates' court: judicial review and an appeal by way of case stated. Most decisions of the magistrates may be the subject of judicial review at the instance of the prosecution, but there is an exception for an acquittal. Only where the "acquittal" was the result of a trial which was, in fact, a nullity will judicial review be available to the prosecution.[85] The appropriate form of appeal is generally the case stated procedure, particularly where the identification of the facts found by the magistrates is important.[86] Judicial review is available to the prosecution in respect of other decisions of the magistrates, such as whether or not to commit for trial or sentence, and decisions about mode of trial.[87]

2.42 An appeal by way of case stated may be used on the grounds that a decision is either "wrong in law" or "in excess of jurisdiction".[88] A person aggrieved by the decision, including the prosecutor, can apply to the magistrates to state a case. The case is a formal document adopted by the court, setting out the facts found and a question or questions for the Divisional Court. As well as pure points of law, the question may also ask whether, on the facts found, the magistrates came to the correct conclusion. Thus, although case stated does not provide an avenue to appeal against a finding of fact, the conclusions drawn from the facts can be challenged. The use of case stated to appeal against sentence is limited.[89] If it

that such a decision could render the trial a nullity (as it would were the trial judge to change during the course of a normal trial on indictment).

84 [2000] QB 719.

85 *R v Dorking JJ, ex p Harrington* [1984] AC 743. In that case, the House of Lords held that the prosecution could succeed where the magistrates had dismissed the information without having heard any evidence, in breach of their statutory duty to determine the case after hearing evidence (Magistrates' Courts Act 1981, s 9(2)).

86 *R v Morpeth Ward JJ, ex p Ward* (1992) 95 Cr App R 215.

87 Appeals against a decision of the magistrates' court not to extend a custody time limit are to the Crown Court: Prosecution of Offences Act 1985, s 22(8).

88 Magistrates' Courts Act 1980, s 111. It applies only to a final determination of the case: *Streames v Copping* [1985] QB 920, *Loade v DPP* [1990] 1 QB 1052.

89 A sentence may be appealed on the ground that it is wrong in law, but not that it is simply too severe (or too lenient), unless it is so far outside the normal discretionary limits for the offence that the Divisional Court can conclude that it could only have been arrived at as a result of some error of law. Appeals by way of case stated against sentence generally are

allows a prosecutor's appeal against an acquittal, the Divisional Court can either quash the acquittal and remit the case to the magistrates with a direction to convict and proceed to sentence, or convict and sentence the respondent itself. The court also has the power to order a rehearing before the same or a different bench.[90]

Appeal against a grant of bail

2.43 A new right of appeal for the prosecution against a grant of bail was introduced in the Bail (Amendment) Act 1993. Appeal is to the Crown Court. The right relates to offences punishable by five years' imprisonment or more (or either the simple or aggravated forms of taking a conveyance without consent) where the prosecution has made representations to the magistrates against the grant of bail, and it is available only to specified public prosecutors.[91] Before the right can be exercised, the prosecution must give notice orally at the bail hearing itself, before the defendant is released.[92] The notice must then be confirmed in writing and served on the defendant within two hours after the end of the hearing. The appeal must take place within the 48 hours following the day of the notice (not the actual time of the notice).[93] Pending appeal, the defendant remains in custody.

Customs and Excise cases

2.44 The prosecution has a general right of appeal to the Crown Court against "any decision" of the magistrates in proceedings for an offence under the Customs and Excise Management Act 1979 and other customs and excise Acts. This right of appeal is not confined to points of law and is without prejudice to the prosecution's right to apply for a case to be stated. It applies to any decision of the court, including those relating to mode of trial and sentence, as well as acquittals.[94]

rare, although there have been a substantial number of prosecution appeals against sentences in driving cases.

90 *Griffiths v Jenkins* [1992] 2 AC 76.

91 Bail (Amendment) Act 1993, s 1. The prosecutors are the Crown Prosecution Service (s 1(2)(a)), the Serious Fraud Office, the Department of Trade and Industry, Customs and Excise, the Department of Social Security, the Post Office and the Inland Revenue (s 1(2)(b) and Bail (Amendment) Act 1993 (Prescription of Prosecuting Authorities) Order 1994, SI 1994 No 1438).

92 This requirement was satisfied when notice was given to the clerk five minutes after the bench rose, before the defendant had been released: *R v Isleworth Crown Court, ex p Clarke* [1998] 1 Cr App R 257.

93 *R v Middlesex Crown Court, ex p Okoli* [2000] Crim LR 921.

94 Customs and Excise Management Act 1979, ss 147(3) and 1(1); *R v Customs and Excise Commissioners, ex p Wagstaff* (1998) 162 JP 186; *R v Customs and Excise Commissioners, ex p Brunt* (1998) 163 JP 161.

Appeals from appeals

2.45 In general, rights of further appeal are equally available to the prosecution as to the defence. This is so even where the original right of appeal is only available to the defendant. Only a defendant may appeal to the Crown Court against a conviction in the magistrates' court. The appeal is by way of re-hearing.[95] The prosecution may nevertheless appeal by way of case stated against the Crown Court's decision if the defendant's appeal is successful.[96] Similarly, only a defendant can appeal against the verdict of a trial on indictment,[97] but where the Court of Appeal quashes the conviction, the Crown has the same rights as the defence to appeal to the House of Lords.[98] Both sides have the same rights to appeal from the Divisional Court to the House of Lords.[99]

RETRIALS

2.46 In this section we set out the various circumstances in which there may be a retrial under the present law. It will be seen that retrials, like prosecution appeals, are a familiar feature of English criminal procedure.

Discharge of the jury

2.47 The discharge of the jury brings the trial to a halt, but is not equivalent to a verdict of not guilty.[100] The defendant can be tried again, without the need for any further formalities. A jury may be discharged during the ordinary course of the trial, or as a result of a failure to agree (by the necessary majority) on a verdict.

Discharge during the course of the trial

2.48 A judge may discharge an individual juror, or the whole jury, before the jury has given a verdict, where it is necessary to do so.[101] Individual jurors may be discharged because of illness, other personal circumstances which make it impossible for them to continue,[102] misconduct or bias.[103] As long as nine jurors

[95] Magistrates' Courts Act 1980, s 108.

[96] Supreme Court Act 1981, s 28.

[97] Criminal Appeal Act 1968, s 2.

[98] That is, either party can apply to the Court of Appeal to certify a point of general public importance and to grant leave to appeal. If leave is refused (as it usually is), the party applies to the House of Lords for leave: Criminal Appeal Act 1968, s 33.

[99] Appeal is direct to the House of Lords, rather than to the Court of Appeal, "in a criminal cause or matter": Administration of Justice Act 1960, s 1(a).

[100] *Davison* (1860) 2 F & F 250, 175 ER 1046; *Randall* [1960] Crim LR 435.

[101] *Winsor* (1866) LR 1 QB 289, 390.

[102] For instance, in *Richardson* [1979] 1 WLR 1316, a juror was discharged when her husband had died the night before.

[103] The common law test to be applied by the tribunal (the judge or, on appeal, the Court of Appeal), having regard to the relevant circumstances, is whether there is a real danger of bias on the part of the juror concerned, in the sense that that juror might unfairly regard with favour or disfavour the defence or the prosecution: *Gough* [1993] AC 646. There is

remain, the trial can continue.[104] If the number of jurors remaining falls below that number, they must be discharged and the trial brought to a halt. When misconduct or bias is alleged, the trial judge must investigate the allegation by questioning the individual juror concerned, and sometimes the jury as a whole.[105] Where, for instance, it is alleged that improper approaches have been made to a juror (such as offers of bribes, or intimidation), the judge will have to consider whether the trial can safely be continued if the individual juror involved in the approach is discharged. If the approach has been communicated to other jurors, so that they too may be "contaminated", the judge has a discretion to discharge the jury as a whole.[106]

2.49 There may also be circumstances affecting the whole jury which require it to be discharged. This may happen when inadmissible and prejudicial evidence is accidentally elicited. It commonly occurs where the previous convictions of the defendant become known.[107] Other irregularities may relate to the retirement of the jury, such as where the jury bailiffs retired with them,[108] or where some jurors attempted to contact the deceased victim by use of a ouija board in their hotel.[109] If such a matter comes to the attention of the judge, the jury as a whole may be discharged. If it is not revealed until after the verdict, the Court of Appeal may quash the conviction.[110]

2.50 A jury may have to be discharged at any time between being sworn and delivering its verdict.[111] In principle, it is possible for a retrial to follow virtually immediately after the discharge of the jury, but in practice there may be listing constraints.[112]

now also a need to take account of the jurisprudence under ECHR, Art 6 which emphasises the need for objective impartiality; see *Archbold 2001*, para 4–256.

[104] Juries Act 1974, s 16.

[105] *Blackwell* [1995] 2 Cr App R 625.

[106] See *Putnam* (1991) 93 Cr App R 281 for the way in which the judge should approach such a decision.

[107] For an example of a recent case, see *Barraclough* [2000] Crim LR 324.

[108] *McNeil, The Times* 24 June 1967.

[109] *Young* [1995] QB 324.

[110] The general rule is that the jury no longer functions after all its verdicts are given. There are some exceptions, for instance to correct technical errors in the giving of verdicts: *Maloney* [1996] 2 Cr App R 303.

[111] In *Quinn* [1996] Crim LR 516, for instance, a juror recognised an associate of the defendant within minutes of being sworn. The judge initially chose to discharge the jury as a whole so as to be able to use another available potential juror to make up a full jury of twelve rather than continue with eleven. The judge went back on the decision once it became clear that there were no "spare" jurors available. (The appeal was dismissed.)

[112] The Court of Appeal has recently given guidance to Crown Courts on when it is necessary to adjourn a retrial for a brief period, rather than continue immediately, to avoid the danger of the discharged jurors meeting and "contaminating" the new jury in smaller court centres: *Barraclough* [2000] Crim LR 324.

Discharge as a result of a failure to agree

2.51 A jury is always told in the summing-up to come to a unanimous verdict.[113] If it has failed to do so within two hours and ten minutes, it can be told that it may now return a majority verdict.[114] It may also be given a direction explaining that there is a need for "discussion, argument and give and take" in the jury room,[115] but this direction should not be combined with the majority direction.[116] If the jury still fails to return a verdict after such time that it appears that it may be unable to do so, the judge should call the members of the jury back into court and ask them if there is any chance of reaching agreement. Depending on their answer, the judge may discharge them or give them more time. If they still fail to agree, they will be discharged.[117] The defendant may then be retried. It is usual for a defendant to be retried by a second jury where the first disagreed. The practice, however, is for the prosecution to offer no evidence if the second jury also fails to agree.[118]

Retrials ordered by the Court of Appeal, Criminal Division

2.52 The Court of Appeal now has power to order a retrial whenever it allows an appeal against conviction, provided that "the interests of justice so require".[119] The appellant can only be retried for

(1) the offence in respect of which the court has quashed the conviction;

(2) another offence of which the appellant could have been convicted on an indictment for that offence; or

(3) an offence which was put as an alternative to that of which the appellant was convicted, and in respect of which the jury was discharged from entering a verdict because of the conviction.[120]

If the retrial results in a conviction, the defendant cannot be given a more severe sentence than at the first trial, and time spent in prison following the initial

[113] *Practice Direction (Crime: Majority Verdicts)* [1967] 1 WLR 1198. See also the Judicial Studies Board's specimen direction, available on its website (http://jsboard.co.uk).

[114] Juries Act 1974, s 11. Ten jurors must agree where there are eleven or twelve jurors, nine where there are ten jurors. Two hours is the statutory limit: ten minutes was added by *Practice Direction (Majority Verdict)* [1970] 1 WLR 916 to ensure that a full two hours was spent actually deliberating in the retiring room. The terms of the direction allowing the jury to reach a majority verdict are set out in *Practice Direction (Crime: Majority Verdicts)* [1967] 1 WLR 1198.

[115] *Watson* [1988] QB 690.

[116] *Buono* (1992) 95 Cr App R 338.

[117] *Rose* [1982] AC 822.

[118] *Archbold 2001*, para 4–440.

[119] Criminal Appeal Act 1968, s 7. There are limits on the offences for which the defendant may be retried. If the defendant is convicted, the sentence must not be of greater severity than that passed following the original trial: s 8(4), Sched 2, para 2(1).

[120] Criminal Appeal Act 1968, s 7(2).

conviction counts against the second sentence, as does time spent remanded in custody awaiting the retrial.[121]

2.53 The procedure is for the Court of Appeal to order a new indictment to be preferred. The appellant cannot, however, be arraigned on the new indictment more than two months after the order for a retrial was made, without the leave of the Court of Appeal. Once the two months have elapsed, the appellant can apply to the court for an order setting aside the order for a retrial, and directing the Crown Court to enter a verdict of not guilty. On such an application, the Court of Appeal can, alternatively, grant leave to arraign, but only if satisfied that the prosecution has acted with all due expedition, and there remains good and sufficient cause for a retrial despite the lapse of time. The same criteria apply to an application by the prosecution to arraign out of time.[122]

[121] Criminal Appeal Act 1968, Sched 2, para 2.

[122] Criminal Appeal Act 1968, s 8.

PART III
THE IMPLICATIONS OF HUMAN RIGHTS LAW

3.1 The UK is bound under international law to ensure that its domestic practice complies with the obligations which it has undertaken under both the United Nations' International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Both treaties contain provisions which have a direct bearing on issues considered in this report. The UK's international law obligations alone afford a sufficient basis for ensuring that any proposals for reform are compatible with the rights guaranteed under these important human rights treaties.[1] Certain rights conferred by the ECHR, moreover, are now directly enforceable in our national courts by virtue of the Human Rights Act 1998.

THE CONCEPT OF RES JUDICATA

3.2 All European states recognise the principle that once ordinary appellate remedies have been exhausted, or the relevant time limit for appealing has expired, a conviction or acquittal is to be regarded as irrevocable, and acquires the quality of res judicata.[2] The term "res judicata" is used in a number of different ways in different jurisdictions. In this report we use it in the way in which it is used in the Explanatory Report to Protocol 7 to the ECHR, and which informs the Convention case law. An acquittal or conviction is res judicata if it is final, in the sense that all *ordinary* procedures have been exhausted. In England and Wales, an acquittal in a trial on indictment is res judicata as soon as the jury delivers its verdict. Where provision is made for a prosecution right of appeal, an acquittal would only become res judicata when either the time for appealing had elapsed, or an appeal had been determined. Similarly, a conviction in England and Wales is res judicata after the time limit for appealing has elapsed, or the Criminal Division of the Court of Appeal (or, if a point of law is certified and leave is granted, the House of Lords) has determined the appeal.

3.3 A determination can, however, become res judicata even though all *extraordinary*[3] remedies or procedures have not been exhausted. Thus, in England and Wales, it

[1] We have also considered the Charter of Fundamental Rights of the European Union 2000, Art 50 of which gives protection against double jeopardy. Art 51 confines the scope of the Charter to institutions and bodies of the Union and to Member States when they are implementing Union law. Art 52(1) further allows some scope for limitation of the rights in the Charter. Art 51(3) makes corresponding Charter rights the same as ECHR rights, unless Union law provides more extensive protection. See also the Convention between the Member States of the European Communities on Double Jeopardy (1987) Cm 438.

[2] See Explanatory Report to Protocol 7 of the ECHR, CE Doc H (83) 3, para 22.

[3] The distinction between ordinary and extraordinary procedures must depend on the actual practice of the state in question (or, possibly, on what is generally accepted in Council of Europe countries): it is not possible to derive any guidance from Article 4. But the

is possible to challenge a conviction on indictment after it has become res judicata by an appeal out of time to the Court of Appeal, or by seeking a reference to the court from the Criminal Cases Review Commission. The distinction between ordinary procedures, which are available before the determination becomes res judicata, and extraordinary procedures available *after* that point, is important to an understanding of the relevant provisions of the ICCPR and the ECHR.

ARTICLE 14(7) OF THE ICCPR

3.4 The ICCPR was drafted by the United Nations Human Rights Commission in parallel with the drafting of the ECHR by the Council of Europe in the immediate aftermath of the Second World War. The rights contained in it are broadly similar to those contained in the ECHR.

3.5 Article 14(7) of the ICCPR provides:

> 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.

3.6 Article 14 applies to the reopening of both convictions and acquittals. Read literally, therefore, it prohibits even the power of an appellate court to quash a criminal conviction and order a retrial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded. In its General Comment on Article 14(7),[4] however, the United Nations Human Rights Committee, the treaty body charged with implementing the ICCPR, expressed the view that the reopening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of double jeopardy. The Committee drew a distinction between the "resumption" of criminal proceedings, which it considered to be permitted by Article 14(7), and "retrial" which was expressly forbidden. This distinction has not yet been expressly recognised in the law of England and Wales. It has, however, taken firm root in European human rights law, and is now reflected in Article 4(2) of Protocol 7 to the ECHR.

ARTICLE 4 OF PROTOCOL 7 TO THE ECHR

3.7 In addition to Articles 6 (the right to a fair trial) and 7 (the prohibition on retrospective application of the criminal law), the ECHR contains a provision of particular relevance to the issue of double jeopardy. Article 4 of Protocol 7 provides:

> (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence

criminal procedures of Council of Europe states are themselves governed by *other* parts of the Convention, particularly Article 6.

[4] General Comment 13/21, para 19.

> for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> (3) No derogation from this Article shall be made under Article 15 of the Convention.

3.8 Article 4(1)[5] thus embodies the principle of double jeopardy as it applies to the unilateral action of a prosecuting authority or private prosecutor. Article 4(2), however, permits a case to be "reopened", in accordance with the provisions of domestic law, if there is "evidence of new or newly discovered facts", or if there has been "a fundamental defect in the previous proceedings".

3.9 The UK has not yet ratified Protocol 7, but the Government has expressed its intention to do so.[6]

The scope of Article 4(1)

3.10 Article 4(1) prohibits the bringing of proceedings only where the defendant has been "finally acquitted or convicted" of the offence now charged, "in accordance with the law and penal procedure" of the state in question. The Explanatory Report to Protocol 7 states that a decision is to be regarded as final for the purposes of Article 4(1)

> if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.

Thus, for example, a defendant has not been "finally acquitted" if the acquittal is set aside, and a rehearing ordered, in the course of an ordinary appeal.

3.11 There are conflicting decisions as to whether Article 4(1) applies only where the second charge is in fact and law the same, or also to a second charge for a different offence based on the same facts. The latter was the view taken in the first case in which the Strasbourg Court considered Article 4, *Gradinger v Austria*.[7] The applicant was convicted of a criminal offence of causing death by negligent driving, but acquitted of an aggravated form of the offence. This offence required proof that the amount of alcohol in his blood had exceeded the prescribed limit, and the court accepted medical evidence which placed his

[5] In this report "Article 4" means Article 4 of Protocol 7.

[6] Rights Brought Home: The Human Rights Bill (1997) Cm 3782, para 4.15.

[7] A 328-C (1995).

blood-alcohol level beneath that limit. The local administrative authorities subsequently acquired a medical report which contradicted the evidence adduced by the applicant at his trial. On the basis of the new report the authorities imposed on the applicant an administrative penalty (a fine) for driving with excess alcohol. The Strasbourg Court concluded that, following the acquittal in the first proceedings, Article 4(1) was applicable.[8] In determining whether Article 4(1) had been violated, the Court adopted a substantive rather than a formalistic approach to the double jeopardy principle. Although the elements of the two offences were different, and they pursued different aims, the blood-alcohol level required for the two offences was the same. Since both charges were "based on the same conduct" the Court concluded that there had been a violation of Article 4.

3.12 It is of interest that, although the case might be thought to have involved "new or newly discovered facts", there was no discussion in the judgment of the effect of Article 4(2), and there appears to have been no argument based on it. Presumably, this is because there was no relevant "law" or "penal procedure" providing for the "reopening" of the earlier proceedings in the particular circumstances.

3.13 By contrast, a narrow view of Article 4(1) was taken in the subsequent case of *Oliveira v Switzerland*.[9] The Court held that successive prosecutions will not violate Article 4 if they relate to separate offences arising out of the same act. The applicant was involved in a road traffic accident in which another motorist was seriously injured. Owing to an administrative error, her case was dealt with by the police magistrate, whose jurisdiction was limited to minor offences. The magistrate convicted her of a minor offence of failing to control her vehicle, and imposed a fine of 200 francs. He had no jurisdiction to consider the more serious offence of negligently inflicting physical injury, and he failed to refer the case to the district attorney as he was required to do under Swiss law. The district attorney's office subsequently issued a penal order fining the applicant 2,000 francs for the more serious offence. The conviction was upheld on appeal.

3.14 The applicant complained that she had been prosecuted twice in respect of the same offence. The Court rejected this complaint, holding that this was "a typical example of a single act constituting various offences". As the Court explained:

> The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of Protocol No 7 since that

[8] Although the second set of proceedings were classified as "administrative" for the purposes of national law, it was held that they fell to be categorised as criminal proceedings for the purpose of the Convention, applying the criteria laid down by the Court in *Engel v Netherlands (No.1)* A 22 (1976) and *Öztürk v FRG* A 73 (1984).

[9] 1998-V p 1990.

> provision prohibits people being tried twice for the same offence, whereas in cases concerning a single act constituting various offences one criminal act constitutes two separate offences.[10]

3.15 The Court observed that it would have been more consistent with the principles governing the proper administration of justice for sentence in respect of both offences to have been passed by the same court in a single set of proceedings. Nevertheless, the fact that this had not occurred was irrelevant to the issues arising under Article 4 since

> that provision does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater.[11]

3.16 In previous cases the Commission had consistently distinguished between successive prosecutions for the same offence, and prosecutions for multiple offences arising out of the same course of conduct.[12] But *Oliveira* goes further than these cases, in that the second fine related to precisely the same act as the first. The only difference lay in the nature of the charges. The decision suggests that Article 4(1) is triggered only where the offence with which the defendant is charged is, *in law*, the same offence as that of which he or she was previously acquitted or convicted. This interpretation would mean that Article 4(1) went no further than the autrefois rule in English law.

3.17 A point of distinction between the two cases might have been that in *Gradinger* the applicant had been *acquitted* of the aggravated offence, whereas in *Oliveira* the applicant had been *convicted* of the minor offence. The effect of the second set of proceedings in *Gradinger* was to call the previous acquittal into question; in *Oliveira* they had no such effect, but only exposed the applicant to a more severe penalty. There is, however, virtually no suggestion in the majority judgment that the distinction between a previous acquittal and a previous conviction was regarded as crucial.[13] Nor is there any support for it in the wording of Article 4(1) itself.

[10] *Ibid*, para 26.

[11] *Ibid*, para 27.

[12] In *Palaoro v Austria* (unreported, Application No 16718/90), for example, the Commission rejected as manifestly ill-founded a complaint brought under Article 4 by an applicant who had been convicted of two offences of exceeding the prescribed speed limit in the course of a single journey, since the two offences had been committed on separate sections of road. Similarly, in *Iskandarani v Sweden* (unreported, Application No 23222/94) the Commission rejected a complaint under Article 4 where the applicant had previously been convicted of abducting his daughter, and was subsequently prosecuted for withholding the child from her legal custodian after the abduction had occurred. These were separate offences arising out of the same course of criminal conduct, and Article 4 did not prohibit separate proceedings for such offences.

[13] Arguably there is a hint of this in the remark that successive prosecutions for different offences are permissible "especially where … the penalties were not cumulative, the lesser

3.18 In *Oliveira* the Court itself considered that the analysis quoted above was sufficient to distinguish *Gradinger*, noting that in that case two different courts had come to inconsistent findings on the applicant's blood-alcohol level. In a powerful dissenting judgment, Judge Repik disagreed:

> No difference can be seen between the Gradinger case and the Oliveira case that can justify these two wholly conflicting decisions. In both cases, the conduct that led to the prosecution was identical. In both cases, owing to a mistake by the court that first convicted the accused, one aspect of the actus was not taken into account in the conviction. Lastly, in both cases, the same conduct, aggravated by the aspect that the first court had omitted to take into account, led to a second conviction under a different legal qualification.

We prefer this view, and conclude that there is a real conflict between the two decisions.

The scope of Article 4(2)

3.19 The reopening permitted by Article 4(2) must be distinguished from an appeal by the prosecution. A prosecution appeal is an ordinary procedure which may be invoked before the decision has become res judicata. Reopening is an extraordinary procedure which may be invoked *after* the decision is res judicata.

3.20 Although it is not specifically stated, we think it clear that Article 4(2) envisages a case being reopened only with the authority of a court. A simple decision by the prosecuting authorities to launch another prosecution is precluded altogether. This view is probably implicit in the reference to "reopening", as distinct from a fresh prosecution. In any event, it would in our view be contrary to the principle of the independence of the court (guaranteed by Article 6 of the Convention) if the executive were permitted, of its own motion, to treat an earlier decision as of no effect.[14]

being absorbed by the greater". But the word "especially" seems to imply that this consideration is not crucial. It is perhaps of interest that van Dijk and van Hoof's *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) says that in *Gradinger* the applicant was initially convicted, not mentioning the relevant acquittal of the aggravated offence. The authors can hardly have considered that the distinction between an acquittal and a conviction was of any moment. Van Dijk was one of the judges in *Gradinger*.

[14] In *Van der Hurk v Netherlands* A 288 (1994) the relevant legislation allowed the Minister to decide that a judgment of the Industrial Appeal Tribunal should not be implemented. The power had never been exercised and was due to be repealed. The Court found that the very existence of the power gave rise to a violation of Article 6, despite the fact that it had not been referred to in the proceedings, and "there was nothing to indicate that [it] had any influence on the way the tribunal handled and decided the cases which came before it" (para 47).

Similarly, in *Findlay v UK* 1997-I p 263, para 77, the Court concluded that the role of the "convening officer" who had the duty to confirm a decision of a court martial and to vary its sentence was "contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the

3.21 Article 4(1) prohibits the bringing of a second prosecution on the same facts. That prohibition is, prima facie, absolute. The effect of Article 4(2), however, is that a member state's law may permit a case to be "reopened", but only on certain specified grounds. It does not permit a new prosecution. Even reopening is permitted only on certain specified grounds – namely that new evidence has been found, or that there was a fundamental defect in the original proceedings. In any other circumstances, the reopening of the case is prohibited no less than would be the bringing of a second case.

very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6(1)".

PART IV
NEW EVIDENCE AND THE DOUBLE JEOPARDY RULE

4.1 In Part III we explained that Article 4(2) of Protocol 7 to the ECHR, by way of exception to the rule against double jeopardy, permits the reopening of an acquittal where new evidence of the defendant's guilt has become available. In this part we consider whether, and if so in what circumstances, such an exception should be introduced into English law.

SHOULD THERE BE AN EXCEPTION FOR NEW EVIDENCE?

4.2 The crucial question is whether the principles underpinning the rule against double jeopardy can ever be outweighed by the need to pursue and convict the guilty. In favour of an exception, we can identify a high value in terms of the accuracy of the outcome of the proceedings – that is, convicting the guilty, and only the guilty – which is a key aim of the criminal justice system. To justify an exception, the advantages in terms of accuracy of outcome must override the collective and individual process values served by the rule.

4.3 In CP 156 we identified four process values: the risk of wrongful conviction, the distress of the trial process, the need for finality, and the need to encourage efficient investigation. We postulated some cases where the argument for allowing a retrial on the basis of new evidence seemed strongest, and concluded that the justifications for the rule were not such as to require an absolute ban on reopening an acquittal even in such a case.[1] We therefore provisionally proposed that the double jeopardy rule should be subject to an exception in certain cases where new evidence is discovered after an acquittal.[2] We then went on to examine individual features of our hypothetical strongest case to assist us in formulating the limits of the new exception we proposed.[3]

The case for an exception

4.4 CP 156 put the positive case for a double jeopardy exception largely in terms of accuracy of outcome. Professor Ian Dennis has recently taken up this theme and has linked it to another important issue, namely the erosion of the legitimacy of the initial acquittal in the light of new compelling evidence of guilt:

> We are … used to the idea that new evidence of innocence, a previously unknown alibi witness for example, calls into question the legitimacy of a conviction. It suggests that a mistake has been made that calls for investigation and possible rectification. Similarly the emergence of significant new evidence of guilt calls into question the

[1] Paras 5.6 – 5.16.

[2] Para 5.17.

[3] Paras 5.18 – 5.60.

> legitimacy of an acquittal. It suggests likewise that a mistake has been made. Why should we not investigate and if necessary rectify the mistake, so as to lead to a retrial? It is not apparent now that a different verdict on a second trial would be inconsistent, given significant new evidence. The criminal justice system exists to enforce the criminal law, and the correct enforcement of the criminal law against those whom we have reason to believe may be guilty is a matter of state policy. The interests of justice seem therefore to call for a retrial in these circumstances. A retrial will resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty.[4]

4.5 There is, further, the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrongful convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.

The response on consultation

4.6 The issue whether an exception could be justified, and our conclusion that it could, attracted much robust discussion in the responses to CP 156. In total, 51 responses supported our proposal and 32 opposed it. This is indicative of the fact that the issue is both complex and sensitive. As a snapshot, the judiciary was split on the question, with divergent views being expressed by judges of the highest rank. A clear majority of individual judges were in favour of an exception, but the Council of HM Circuit Judges was against. A clear majority of individual practitioners were in favour, as well as two circuits of the Bar. The Criminal Bar Association, the London Criminal Courts Solicitors' Association, the Criminal Law Committee of the Law Society and the Law Society of Scotland were against. Police and prosecuting bodies were overwhelmingly in favour. Pressure groups and academics were mostly against. Members of the general public were equally divided.

4.7 The reasons given by those who supported our proposal were largely the same as those that we gave in CP 156 – essentially, that (in some cases at least) accuracy of outcome is more important than finality. That is not a point which needs, or is capable of, much elaboration. We merely note at this point that a clear majority of respondents shared our judgment on it.

4.8 On the other hand we attach great importance to the views of the substantial minority who disagreed with that judgment. All of these responses were cogently argued and required us to look again at our reasoning. We now examine the objections raised, and consider whether our provisional proposal can be defended against them, or modified in such a way as to meet them.

[4] "Rethinking Double Jeopardy" [2000] Crim LR 933, 945.

The case against an exception

4.9 Those opposed to reopening acquittals frequently cited, as the reasons for their opposition, the justifications for the double jeopardy rule which we had set out in CP 156. Consistent themes were the principle of finality of criminal proceedings, undue distress to defendants and the acquitted, difficulty in ensuring a fair second trial, the risk of wrongful conviction, the need to encourage probity and diligence in the investigation of crime and the need to ensure that the prosecution presents the whole case. One academic respondent predicted public anger at the reopening of acquittals.[5]

4.10 What was most apparent from the arguments put by those opposed to a new exception was that we did not give sufficient weight to the importance of finality as a value in the criminal law. In CP 156 we largely identified the value of finality as a species of our concern with the distress and anxiety suffered by defendants.[6] In this sense, finality was necessary to allow the acquitted defendant "repose" – freedom from the fear of having to go through the ordeal of trial again at some time in the future. We did not accord substantial value to any *independent* notion of finality. We are now persuaded that we were mistaken in this respect.

Finality as antidote to distress and anxiety

4.11 A very senior judge argued that it was "important to preserve the principle that a defendant acquitted by a jury need not worry that he may have to undergo the trial process all over again." In CP 156 we had argued that it would only be the guilty who would fear the future reopening of an acquittal, though we accepted that there was a danger that others would be subject to an ill-founded fear of reopening.[7] We now accept that this latter danger may be greater than we recognised. We stated that "the reopening of a prosecution would by its nature be a very occasional occurrence".[8] This may well be the case but, unless the limits of the reach of any exception to the double jeopardy rule were clear cut and notorious, the potential lack of finality and the associated distress and anxiety would affect a much larger group of acquitted defendants than would ever be proceeded against under the exception. This larger group would itself be composed of two groups: those to whom the exception could technically apply, but in respect of whom it would never in practice be invoked, and those to whom it did not even technically apply, but who might nevertheless fall prey to anxiety that it might. If, as we provisionally proposed, the exception were to apply to all cases in which the sentence would be likely to be at least three years' imprisonment, the category of defendants to whom it would be capable of applying would be very large and ill defined. Even for the second group, to whom the exception would not apply at all, we may have been wrong to describe their fear as necessarily "ill-founded". Even were the initial exception narrowly,

[5] Professor D W Elliott.

[6] Paras 4.9 – 4.10.

[7] Paras 5.14 – 5.15.

[8] Para 5.14.

specifically and notoriously drawn, it might be added to. By way of example, the history of extensions to the power of the Attorney-General to refer unduly lenient sentences to the Court of Appeal suggests that government might wish to extend the range of offences to which the exception applied.

Finality and individual liberty

4.12 We are now persuaded that there is an important sense in which finality as a value can impact on individual liberty or autonomy. In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime. We did not recognise in CP 156 that autonomy or liberty in this sense is to be valued for its own sake. We only recognised want of finality as a cause of distress and anxiety. Reducing the personal autonomy of the individual may, of course, occasion distress and anxiety, but that is not the only reason for valuing it.

4.13 The importance of finality in civil law is derived from the importance of having reasonably settled property and other private law rights. Such rights themselves are justifiable, in part, as important for personal autonomy. Just as the independent value of finality in the civil law, which we recognised in CP 156, has its roots in personal autonomy, so too is it so in the case of the criminal law, in which the relationship between a final freedom from pursuit by the state on a particular matter and personal autonomy is more direct.

Harassment by state officials

4.14 The value of double jeopardy protection is underlined by a further, related but distinct, argument, put by a number of respondents, which did not feature at all in CP 156. If a power to reopen acquittals existed, it could be used *illegitimately* by ill-intentioned state servants. Peter Mirfield wrote that the present rule "denies the prosecution the opportunity for oppressing the acquitted person simply because it believes the acquittal to be unjustified." Anthony Edwards, a very experienced and highly respected criminal solicitor, put it in this way:

> Any but the most limited changes in the law will be used by some investigators to intimidate persons whom they believe but cannot prove to have committed crime. This may tend to concentrate on those from disadvantaged and minority groups.

4.15 Liberty pointed up a further potential disparity with regard to dealings with prosecuting authorities:

> If the prosecution promised a defendant not to prosecute, proceedings would be stayed as an abuse of the court's process, whereas if a jury acquitted the defendant there would be no bar to a further prosecution.

Finality and third parties

4.16 We recognise that there is some value in protecting certain third party interests by finality of criminal proceedings. Some such interests, for example the reliance placed on an acquittal by an employer, may be of only marginal importance. More weight may properly be given, however, to the emotional and financial interests of an acquitted person's family and dependants.

Finality as wider social value

4.17 There is also, we now accept, a related wider social value achieved by delineating the proper ambit of the power of the state. The finality involved in the rule against double jeopardy (known by almost everyone, even if not by name) represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject. The rule against double jeopardy is, on this view, a symbol of the rule of law and can have a pervasive educative effect. The rule serves to emphasise commitment to democratic values. As Paul Roberts expressed it:

> Double jeopardy protection is very imperfectly expressed in terms of fairness to the accused … It is more illuminating to think of double jeopardy as forming one, significant strand of the limits on a state's moral authority to censure and punish through criminal law. A defendant is not pleading unfair treatment *qua* criminal accused when invoking the pleas in bar, but rather reminding the state – as the community's representative, the community in whose name the business of criminal justice is done – of the limits of its power. … Defendants asserting double jeopardy protection act almost as private attorneys general, policing the boundaries of legitimacy in criminal law enforcement, keeping state power in check for the benefit of all who value democracy and personal freedom. This is the special value of finality in criminal proceedings, and the principal rationale underpinning double jeopardy protection. The fundamental nature of the values at stake explains why English law's pleas in bar operate as near-absolute barriers to re-prosecution whenever their conditions precedent are satisfied.[9]

4.18 It is, of course, always the case that the law (and particularly the criminal law) should represent the prevailing values of society, and it is important to recognise that such values can and do change. Even so, double jeopardy serves to maintain confidence in the criminal justice system in a way that is too easily underestimated. The reaction to a particular case can be vocal, powerful and immediate. In a highly charged atmosphere which might understandably arise it may be all too easy to discount the reassurance gained by reflecting, in less emotive circumstances, on long-standing traditional bulwarks of individual liberty.

[9] "Acquitted Misconduct Evidence and Double Jeopardy Principles, from *Sambasivam* to *Z*" [2000] Crim LR 952, 954.

4.19 We concluded in CP 156 that the rule against double jeopardy was a fundamental principle which protects the individual from oppression by the state and gives the community as a whole a collective sense of security. It reflects one of the principal terms of the bargain between the people and the state, on the basis of which the state has and uses its coercive powers with the consent of the citizen. As a result of the responses to CP 156, and our own reconsideration in the light of those responses, we have come to the conclusion that the principle is even more important than our provisional proposals recognised. In particular, the concept of finality of issues as between the individual and the state is a fundamental process value, which operates on the collective as well as the individual level.

Implications of giving a higher value to finality

4.20 Our conclusion that we significantly undervalued finality has caused us to reconsider the balancing exercise which we undertook. Adopting the language of the analysis in CP 158,[10] a new evidence exception would have a very high value in terms of accuracy of outcome in those cases to which it applied. If we were to consider only the particular case to which the exception applied, this very high enhancement to the accuracy of outcome might well overcome the process value of finality enjoyed by the individual defendant. We now recognise, however, that we have to consider where lies the balance of advantage between the contending values over the system as a whole. Although the accuracy of outcome value of the exception is very high *in those cases in which it is used*, if one looks at *the system as a whole*, the point at which the balance of advantage in favour of reopening acquittals arises, if it ever does, will be different from that identified in CP 156.

4.21 Our judgment is that once greater value is given to finality we can no longer justify an exception as wide in scope as that proposed in CP 156. By "scope", we mean the types of cases which would potentially fall within the exception – in practice, how serious a case has to be, and how probative the new evidence, before the exception can apply to it.

4.22 That does not necessarily mean that *no* exception can be justified. Any exception must, however, be limited to those types of case where the damage to the credibility of the criminal justice system by an apparently illegitimate acquittal is manifest, and so serious that it overrides the values implicit in the rule against double jeopardy. The boundaries of any such exception must be clear cut and notorious. Thus the question whether there should be an exception at all is inextricably bound up with the scope of any exception. Is it possible to identify a category of cases in respect of which the objective of achieving accurate outcomes clearly outweighs the justifications underlying the rule against double jeopardy?

[10] See para 7.12 below.

Defining the category of cases to which an exception might apply

4.23 There are a number of ways in which we might seek to define such a category. At one end of the spectrum, we could do so by venue – by including all indictable offences, or all offences which are triable *only* on indictment. Although some respondents (including the CPS and ACPO) suggested one or other of these approaches, or variants of them, we consider that it is far too broad a category of case to be justifiable in terms of the principles we have outlined.

4.24 Another possibility is the provisional proposal in CP 156, defining the category by reference to the sentence likely to be imposed on the facts of the individual case. This approach was widely rejected by respondents, including many who supported the broad thrust of the rest of the paper. It was seen as too arbitrary and inexact, and as placing the judge hearing the application in a difficult position. The information available to that judge would be inadequate for a proper, though speculative, sentencing exercise. It would be difficult to assess personal mitigation, and there would be the potential for injustice in relying on the untested prosecution case.

4.25 Further, if the likely sentence *were* to be the criterion, the great majority of respondents (including some of the prosecutors and police bodies) thought that our proposed minimum of three years' imprisonment was far too low.

4.26 We accept these criticisms. The criterion we proposed would have been too hard to apply, and it set the level of seriousness too low.

4.27 Some respondents suggested more objective measures. The majority favoured determining seriousness by reference to either the type of offence alleged or the maximum sentence available for it. Suggestions included limiting the exception to offences carrying a maximum of 14 years' imprisonment, or to murder alone.

4.28 Some, including the Home Affairs Select Committee, proposed that only offences punishable with life imprisonment should be subject to the exception. In our view this is too blunt an instrument. There is an extensive list of offences which attract the penalty of life imprisonment. It includes some which, although they clearly justify life imprisonment for the most serious instances, also cover comparatively trivial conduct. Robbery, for instance, may amount to theft accompanied by any degree of force, however minor, and may attract any sentence from life imprisonment to a supervision order. In any event, it would be necessary to edit the list. It includes those common law offences for which the penalty is still "at large", and which can therefore technically attract a life sentence. Some of these offences (such as keeping a disorderly house, or blasphemous libel) are clearly not sufficiently serious to justify a life sentence. On the other hand we could not simply exclude all offences in respect of which sentence is at large, because some of them (such as kidnapping) probably *could* justify a life sentence.

Our approach

4.29 The approach we have decided to adopt, therefore, is to see whether we can identify specific offences, within the larger category of offences potentially

attracting a life sentence, which we believe are inherently serious enough to justify the application of a new evidence exception. We have come to the conclusion that, under the present law,[11] the only such offence is murder.[12]

4.30 The main reason for this conclusion is the widespread perception, which we share, that murder is not just more serious than other offences but qualitatively different. The effect of this difference is that murder satisfies the test we have proposed[13] for the scope of any new exception, namely whether a manifestly illegitimate acquittal sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy.

4.31 As Professor Andrew Ashworth has put it:

> The harm caused by homicide is absolutely irremediable, whereas the harm caused by many other crimes is remediable to a degree. Even in crimes of violence which leave some permanent physical disfigurement or psychological effects, the victim retains his or her life and, therefore, the possibility of further pleasures and achievements, whereas death is final. This finality makes it proper to regard death as the most serious harm that can be inflicted on another …[14]

4.32 This position has been taken in relation to other debates relating to the treatment of murder.[15] For instance, in its 14th Report, the Criminal Law Revision Committee said:

> Should [murder] continue to be regarded, as it has been since the beginnings of our law, as a crime standing out from all others? In our opinion it should. In modern English usage the word "murderer" expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being.[16]

[11] For another case which may arise in the future, see para 4.38 below.

[12] In "murder" we include the technically separate offence of genocide where it involves homicide: see para 4.41 below.

[13] See para 4.22 above.

[14] Andrew Ashworth, *Principles of Criminal Law* (3rd ed, 1999) p 263.

[15] There is even a relevant historical precedent in the form of an Act of Henry VII (1487, 3 Hen VII, c1) which expressly permitted a second trial by "appeal" (akin to a private prosecution) after an acquittal on an indictment for homicide only, despite the double jeopardy rule; see M L Friedland, *Double Jeopardy* (1969) pp 9–10. The Act was motivated, so it says, by "The King remembering how Murders and slaying of his Subjects daily do increase in this Land … and thereby great Boldness is given to Slayers and Murderers". Although the provision was principally a means of evading procedural problems caused by the year and a day rule, it was used to try defendants again when they were acquitted against the evidence: eg *Young v Slaughterford* (1709) 11 Mod 217 and 228, 88 ER 999 and 1007, 18 How St Tr 326. The appeal procedure was abolished in 1819 by 59 Geo 3, c 46.

[16] Criminal Law Revision Committee, 14th Report "Offences against the Person", para 15.

4.33 In our written evidence to the House of Lords Select Committee on Murder and Life Imprisonment in 1989, we justified maintaining murder as a separate offence, rather than adopting a single offence of homicide:

> The Commission sees force in the view that the law should recognise and reinforce the social inhibitions against deliberate killing by placing such killing in a separate category of criminality, and by providing that deliberate killing should only *not* be murder in specific and specifically defined cases. Thus in law, as in morals, deliberate killing will be marked off as a special category of act, indulgence in which invites condemnation and requires justification of a special kind.[17]

4.34 On that basis murder, as the most serious form of homicide, is in a unique position and can as a matter of principle be separated off from all other offences. There is, we must accept, a potential problem with using such an analysis to justify treating murder in this way. Murder, as defined in English law, is not confined to deliberate killing. The mental element which must be proved on a murder charge can be satisfied by proof of an intention to cause grievous bodily harm rather than death.[18] This point is of considerable practical importance. A committee chaired by Lord Lane thought in 1993 that "only a minority of people convicted of the offence have [an intent to kill]".[19] The result of this, according to the Committee, was that "There is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder".[20] Even if most murderers are not "deliberate killers", however, there is still an important sense in which deliberate killing is the *core* of the offence of murder. That is sufficient, in our view, to justify concluding that it remains a unique offence, not merely one which is more serious than others.

4.35 Confining the exception to murder would meet our requirement that its scope should be clear cut and notorious. By radically reducing the number of acquitted defendants to whom the exception could ever apply, it would also reduce the number who might be subject to a continuing fear of their acquittals being reopened. It is a striking fact, moreover, that all of the factual or near-factual[21]

[17] Report of the Select Committee on Murder and Life Imprisonment, vol II – Oral Evidence, Part 1 (HL Paper 78–II) p 119.

[18] This was not a problem in the context of our 1989 evidence, because we proposed limiting the mens rea of murder to an intention to kill.

[19] Report of the Committee on the Penalty for Homicide (1993) p 19. The Committee was set up by the Prison Reform Trust.

[20] *Ibid*, p 21. Note also Lord Hailsham's characterisation of mercy killing as "almost venial, if objectively immoral": *Howe* [1987] 1 AC 417, 433.

[21] By "near-factual" examples we mean cases in which a defendant was convicted on the basis of evidence which came to light a considerable time after the offence was committed. If there had been a little more evidence available earlier, it is possible that such a defendant would have been tried and acquitted before the really compelling new evidence came to light.

concrete examples of cases in which it has been suggested that the new evidence exception could be used have been cases of murder.

4.36 For these reasons we conclude that a new evidence exception is appropriate and desirable in the case of murder.

Manslaughter

4.37 We do not believe that all *homicide* offences are serious enough to justify bringing them within what is intended to be a narrow exception overriding the principles underlying the rule against double jeopardy. We have concluded that many cases of manslaughter are not so serious as to justify inclusion in such an exception. Yet, we would accept that some forms of manslaughter can involve a comparable degree of moral culpability.

4.38 In our report on involuntary manslaughter,[22] we pointed out that one of the main drawbacks of the existing offence is its enormous width. The most serious examples border on murder, whereas the least serious are barely more than actionable negligence. We therefore recommended that the single offence of manslaughter be replaced by two new offences, of which the more serious would be called "reckless killing". This offence would be committed by a person who knows that his or her conduct involves a risk of death or serious injury to another, unreasonably takes that risk, and causes death. An example would be the terrorist who places a bomb in a public place, intending to cause panic and chaos without caring whether lives are lost. The offence would be potentially punishable with life imprisonment, and, in our view, would be sufficiently serious to justify applying the new exception to it.

4.39 That recommendation has not yet been implemented, although the Home Office has adopted it in its own consultation paper on the subject.[23] In view of this we have considered whether to recommend that the substance of the new exception should apply to reckless killing before its creation as a separate offence. This would involve establishing an exception to the rule against double jeopardy where the existing offence of manslaughter is alleged to have been committed recklessly (that is, in such circumstances that it would have amounted to reckless killing had our recommendations for that offence been implemented). We do not believe this would be workable. In practice, prosecutors and courts rarely find it necessary to speculate about whether a defendant's conduct amounted to reckless manslaughter or some lesser form. This would make the criterion very difficult to apply. An alternative approach would be to make the seriousness of the alleged manslaughter a factor for the court to take into account in deciding whether the interests of justice require a retrial. We reject this as being too uncertain and subjective. In cases which are not sufficiently serious to justify allowing the exception to apply, it is in our view better that it should be *incapable*

[22] Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

[23] Reforming the Law on Involuntary Manslaughter: the Government's Proposals, 23 May 2000.

of applying, rather than leaving it to the court to reject the application as a matter of discretion.

4.40 We therefore conclude that the exception should apply *only* to murder, until such time as a separate offence of reckless killing is created. If and when that time comes, however, we recommend that the exception should apply to that offence too.

Genocide

4.41 Under the Genocide Act 1969, a person commits the offence of genocide by doing any of a number of specified acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. One of the acts specified is the killing of members of the group, and in this case alone the offence is punishable with life imprisonment. In substance this form of the offence is akin to aggravated murder. It would be illogical not to include it in the exception.

4.42 **We recommend that the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing.**

(Recommendation 1)

RETROSPECTIVE EFFECT

4.43 In CP 156 we invited views on whether any new evidence exception should have retrospective effect, in the sense of applying equally to acquittals which had already taken place before the exception came into force.[24] On the assumption that (as we now recommend) any new exception would be confined to murder,[25] the responses were equally divided on this suggestion. Unsurprisingly, those who objected to it included many of those who thought there should not be a new exception at all. Of those who thought there *should* be a new exception, a clear majority thought it should have retrospective effect.

4.44 We consider that the arguments in favour of giving the exception retrospective effect are powerful. Substantive retrospective criminal legislation renders an act, which was legal when it was performed, subsequently illegal. In the case of the procedural change we propose, the alleged act was already a crime. The new procedure merely makes it possible (or easier) to bring the offender to justice, a desirable outcome whenever it is achieved.

[24] Para 10.16.

[25] Two police bodies were prepared to support the idea only in relation to the most serious offences.

4.45 Further, if the new exception were not retrospective, it could well be a number of years before it could be used. In deciding to recommend a new exception we have taken account of the fact that, in recent years, we have seen considerable advances in forensic science, particularly in DNA analysis. It is the possibility of bringing these new techniques to bear on materials from old cases that is likely to constitute a major source of cases said to fall within the new exception. If there were no retrospective effect, the potential advantage in being able to bring these new techniques to bear on materials from old cases would be lost.

4.46 Furthermore, if the exception were not retrospective, arbitrary distinctions would be drawn between persons who happened to have been acquitted before and after the relevant date. This would open up the prospect of public outrage where new evidence came to light and the exception would otherwise have been available. By recommending that it should be confined to murder, we are limiting the exception to the most serious cases – cases which might be thought particularly to cry out for justice for the deceased and his or her relatives. In such cases, we do not believe that a person against whom there is compelling evidence of guilt should be protected by a mere accident of timing.

4.47 In its report, the Home Affairs Select Committee said:

> Retrospection will be a controversial area if legislation is brought forward to amend the double jeopardy law. Without retrospection, the change would take years to have any impact and would leave a sense of frustration about past cases. Time limits would further restrict the benefits of such a change and there is a risk that the strongest cases for a retrial would happen to fall just outside the limits chosen.
>
> We conclude that, if there is a case for relaxing the double jeopardy rule, then it should not be fettered and should apply to past and the future cases without limit.[26]

4.48 Two members of the Committee expanded on this in the House of Commons debate on the report. Mr Martin Linton MP said:

> We think that it should apply retrospectively. As I understand it, the principle is that it would be wrong to change the law so that someone is punished retrospectively for doing something that was not an offence at the time. However, we are talking about people who knew that they were committing crimes, lied in court and got away with it. Such cases are entirely different from those with which the retrospectivity principle intends to deal in law.[27]

4.49 Mr Paul Stinchcombe MP added:

> I am always slow to support retrospective enforcement, but I can conceive of nothing more self-evidently appropriate than where the

[26] "The Double Jeopardy Rule", Third Report of the Home Affairs Select Committee (1999–2000) HC 190, paras 54–55.

[27] *Hansard* (HC) 26 October 2000, vol 355, col 143WH.

> sole purpose of the legislation in question is to prevent past miscarriages of justice. The double jeopardy rule has been an integral part of our criminal legal system for many centuries, but the time has now come to relax it in order better to protect the integrity of the system and of the citizens of this country.[28]

4.50 Mr Robert Marshall-Andrews MP, on the other hand, argued that

> to make the operation of the statute retrospective would be abhorrent to all criminal concepts, and probably contrary to the Convention.[29]

4.51 If retrospective effect would infringe the ECHR then it would of course be out of the question; but we do not think it would. Article 7 provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

4.52 The first sentence of Article 7 prohibits the creation of retrospective offences by legislation, or through the development of the common law, so as to encompass conduct which would not previously have been regarded as a crime.[30] It also "embodies, more generally, the principle that only the law can define a crime … and the principle that the criminal law must not be extensively construed to an accused's detriment".[31] The objective of this guarantee is to ensure that a person should be able to judge, at the time of engaging in particular conduct, whether or not it amounts to a crime.[32] The article does not, however, prohibit retrospective changes in the rules of criminal procedure so as to remove a bar or obstacle to a prosecution.[33] The requirements of Article 7 are, in our view, satisfied if the conduct in question constituted a crime at the time when the offence was committed: it is immaterial that the procedural rules in existence at the time of an acquittal or conviction prevented it from being reopened. Article 7 would not prevent the reopening of such an acquittal or conviction under provisions subsequently coming into force.

4.53 One respondent suggested that the change proposed was not merely procedural because it would impose a potential liability to criminal conviction and punishment on people who are presently immune from it. We respectfully

[28] *Ibid*, col 151WH.

[29] *Ibid*, col 139WH.

[30] *X Ltd and Y v UK* (1982) 28 DR 77.

[31] *Kokkinakis v Greece* A 260-A (1993) at para 52.

[32] *S W v UK* A 335-B (1995); *C R v UK* A 335-C (1995).

[33] In *X v UK* (1976) 3 DR 95, for example, the Commission held that there was no violation of Article 7 where the Court of Appeal upheld the applicant's conviction by reference to an important precedent in the law of evidence which had been decided by the House of Lords after the conviction.

disagree. The crucial question, in our view, is whether the effect of the change in the law is to expose the defendant to greater liability than he or she might reasonably have expected *at the time of the alleged offence* – not some later time when the defendant has been acquitted of it. In our view the clear answer to that question is that it would not. The defendant's exposure is to being convicted of murder, both at the time of the alleged offence and at the time of the retrial.

4.54 The tainted acquittals procedure was not made retrospective. In our view that is not a persuasive precedent as there are differences of principle between that procedure and the one we propose. The tainted acquittals procedure was rightly made prospective only as it involved a new adverse consequence of committing the relevant criminal offence. Had the tainted acquittals procedure been retrospective, it would have been analogous to a retrospective increase in maximum sentence for the administration of justice offence which triggered the application, no less so whether the acquitted defendant, thereby put at further risk, was the person who committed the administration of justice offence or the beneficiary of the commission of that offence.

4.55 On the other hand, we recognised in CP 156 that acquitted defendants will have organised their lives on the justified basis that they would not be troubled by criminal proceedings a second time. This is a serious concern, the more so in the light of our revaluation of the importance of finality in criminal proceedings. Although, in our view, the arguments in favour of retrospective effect are compelling, we accept the force of this particular concern, and we seek in our recommendations to provide some recognition of their force. Where the new evidence is already in the hands of the authorities at the time when the new exception comes into force, we would expect an application for a retrial to be made with all reasonable despatch or not at all. If the prosecution were unduly dilatory in making such an application, under our recommendations the court hearing the application would be required to take account of that delay in deciding whether to order a retrial.[34] If, moreover, the court hearing the application thought it would be unjust to reopen the acquittal because the defendant had acted in reliance on the assumption that it could not be challenged, that is an argument which a defendant might wish to advance in order to persuade the court to refuse a retrial on the grounds that it would not be in the interests of justice, or thereafter at the retrial to seek to persuade the court to stay the proceedings as an abuse of process. We do not suggest that the date of the acquittal should be wholly disregarded, but only that there should be no *absolute bar* on retrospective application of the exception.

4.56 **We recommend that the new exception should apply equally to acquittals which have already taken place before the exception comes into force.**

(Recommendation 2)

[34] See para 4.85 below.

WHAT NEW EVIDENCE WILL TRIGGER THE EXCEPTION?

4.57 In CP 156 we proposed that the prosecution should have to overcome two separate hurdles in relation to the impact of the new evidence on the strength of the prosecution's case.

(1) First it would have to show that the new evidence makes the prosecution's case, as a whole, substantially *stronger* than it was at the first trial.

(2) Secondly, it would have to show that the *likelihood of a conviction at a retrial* is of some minimum level. We suggested several possible levels at which the threshold might be set, and invited views on two: namely (a) that it is *highly probable* that a jury would convict, and (b) that the court is *sure* that a jury would convict.

A substantially stronger case

4.58 Most respondents supported the first of our proposed hurdles (that the new evidence must make the case substantially stronger than it was at the first trial), but there were notable exceptions. Judge Rodwell QC described the proposal as "a fallacy" because, "as every practitioner knows, no evidence makes a case substantially stronger until that evidence has been tested in court". The Serious Fraud Office thought that the proposed criterion might be difficult to apply in fraud cases. Professor Colin Tapper thought that the application of this criterion would be extremely uncertain and contentious.

4.59 Our proposal was intended to preclude a retrial where the new evidence added only marginally to the cogency of the evidence adduced at the first trial, because in such a case the new evidence might be used as a pretext for what is in effect little more than an appeal against the jury's verdict. The corollary is that this test is more likely to be satisfied where the original case was weak than where it was strong, because where it is weak there is more room for it to be strengthened. We now think that this is a fundamental flaw. The focus of the inquiry should be whether the new evidence is sufficiently strong to justify putting an acquitted defendant at risk for a second time of conviction for the serious offence to which the exception applies, not how strong or weak was the case first time round. We therefore do not recommend the adoption of this criterion.

The likelihood of conviction at a retrial

4.60 The second hurdle we proposed (that the likelihood of the defendant being convicted at a retrial should be assessed as reaching a specified level) attracted a great degree of comment. Nearly all respondents noted the difficulty of arriving at a standard which was appropriately demanding but which did not allow the court hearing the application to usurp the role of the jury at the retrial. The proposed test was also criticised as requiring the court to predict the outcome of a trial which is yet to take place, with the fear that the knowledge that the new evidence has passed such a test would inevitably affect the minds of the second jury. We accept these criticisms. We now believe that the new exception should not require the court to speculate about the likely outcome of a retrial.

Whether the first jury would have convicted

4.61 We have therefore considered possible alternative approaches. One such alternative would be to look *backwards* to the *first* trial and ask whether, had the new evidence then been available, the jury would have convicted instead of acquitting. This approach would be comparable to that adopted by the present law in the context of tainted acquittals (where the court must consider how likely it is that, but for the interference or intimidation, the acquitted person would not have been acquitted). We do not think that this approach would be appropriate in the context of new evidence. The tainted acquittal procedure focuses on the legitimacy of the first trial. What happened at the first trial, and what might have happened at the first trial but for the conduct complained of, is of the essence of the exercise. The justification for that procedure is that there has not yet been a proper trial. By contrast, the new evidence exception applies where there has been a proper first trial at which a legitimate verdict was reached. Thus the focus of the question should be whether the effect of the new evidence is such that the first jury's verdict (legitimately reached after a proper trial) cannot in the interests of justice be allowed to stand. What the first jury would, or might, have done if the case presented to it had been different is neither here nor there. Its task is done.

The strength of the new evidence itself

4.62 We therefore think it is necessary to devise a test which does not require the court to speculate either forward or backwards on what a jury would decide in the future, or would have decided in a hypothetical situation in the past, but which focuses instead on the occasion for the application – namely the new evidence itself. In CP 156 we gave examples of the type of evidence which we thought might justify an exception to the double jeopardy rule. The examples we gave were of evidence which was so compelling *in itself* that, when placed in context, it would have the effect of driving the recipient to the conclusion that the defendant must be guilty. Only in these circumstances do we believe that a retrial should be allowed.

4.63 In CP 156 we considered a test under which the court would judge the *independent* strength of the new evidence, in isolation from the rest of the evidence.[35] We rejected this because, save for the possible example of a full and uncontestable confession, any evidence (particularly evidence of a scientific nature) would be meaningless if taken completely out of context. That objection can, however, be met by modifying the proposal. What we now propose is that the strength of the new evidence be considered in the context of *the issues that arose at the trial* (whether or not matters of dispute between the prosecution and defence), thus enabling its probative force properly to be judged. In this way the strictness of the test is preserved, but it can be applied in a realistic manner. Some examples may helpfully elucidate what we have in mind.

4.64 Where the only issue at trial is identity but after D's acquittal further evidence of D's involvement is discovered (for example, the weapon, bearing D's fingerprints

[35] Para 5.33.

is found in D's house or garden; or DNA evidence showing that D had contact with the victim; or the victim's blood on D's clothing; or CCTV footage showing D at the scene of the crime) it would not be realistic to ask whether such new evidence is *in itself* compelling evidence of guilt, in isolation from the issues raised at the trial. The probative value of the new evidence will vary according to the matters that are and are not in dispute. For example, it may be the case that in interview or in evidence at the first trial D had denied knowing or having any contact with the victim, or being anywhere near the scene of the crime at the relevant time. Seen in that context, the new evidence may acquire the quality of being compelling. On the other hand D may already have accepted, in interview or in evidence, that he knew the victim, or had been at the scene and come into contact with her and/or was the owner of the weapon (but had lent it to another). In such a case the context within which the new evidence is considered may deprive it of any great significance.

4.65 The proposal does *not* involve assessing the cogency of the new evidence in the context of the *evidence* adduced at the trial, except to the extent that it is necessary to examine that evidence in order to identify the issues. Where the issue at the trial was that of identity, for example, the court would have to consider simply whether the *new* evidence was compelling evidence on that issue – not whether there would be a compelling case in total if the new evidence were added to the old. The point of the exercise is not to consider how strong the original case now is with the enhancement of the new evidence. That would give rise to the risk that cases were reopened merely because there is a bit more to boost what had been a strong case and a surprising verdict. Rather, its point is to enable a case to be reopened when evidence comes to light which is itself so apparently compelling that the court hearing the application is driven to the conclusion that at that stage there is a high probability that the defendant is guilty.

4.66 The test recommended by the Home Affairs Select Committee was whether the new evidence makes the acquittal "unsafe". It thus harks back to the initial verdict. As we have explained, we do not think this is the right approach. In any event, we find the concept of an unsafe acquittal a difficult one. The word "unsafe" is presently used as the test for appeals against conviction. A *conviction* is unsafe if, upon appeal, there is (or may be at a retrial) reasonable doubt about the defendant's guilt, because, if there were such a doubt, the defendant is entitled to an acquittal. This is the corollary of the rule that the onus is on the prosecution to prove guilt beyond reasonable doubt. Given that rule, however, it is hard to see how an *acquittal* might properly be described as unsafe.

4.67 Our recommendation is that a successful application to quash the acquittal on the ground of new evidence must satisfy the test that the new evidence is such, when taken in the context of the issues at the trial, that it appears at that stage to be compelling, in that it drives the court to the conclusion that it is *highly probable* that the defendant is guilty.

Reliability

4.68 One aspect of the cogency of the new evidence is its reliability – the extent to which it is likely to be believed. In the case of oral testimony this may have to be assessed through cross-examination, and in the light of any admissible evidence which may cast doubt on the new evidence or discredit the witness giving it. In the case of scientific evidence it would involve issues such as continuity and the absence of any opportunity to tamper with the evidence. Whilst logically the reliability of the evidence is an aspect of its probative strength, we believe that it would be better to emphasise the importance of this aspect by requiring the court to make a specific finding that the new evidence appears to it to be reliable.

4.69 **We recommend that**

(1) the new exception should be available only where the court is satisfied that the new evidence

(a) appears to be reliable; and

(b) when viewed in context, appears at that stage to be compelling;

(2) the context in which the court views the new evidence for this purpose should comprise the issues that arose at trial, whether or not a matter of dispute between the prosecution and the defence;

(3) the court should be permitted to have regard to the evidence adduced at trial solely for the purpose of identifying those issues and assessing the impact of the new evidence in the light of them; and

(4) the new evidence should be regarded as compelling if, in the opinion of the court, it makes it highly probable that the defendant is guilty.

(Recommendation 3)

Private prosecutions

4.70 In CP 156 we queried whether a less demanding standard should apply where the previous prosecution was a private one.[36] Respondents were unanimous that it should not. As one prosecutor noted, a lower standard might result in an increase in private prosecutions. We make no such recommendation.

THE INTERESTS OF JUSTICE

4.71 In CP 156 we said we thought it clear that, before quashing an acquittal on the grounds of new evidence, the court should be required to consider whether it is, in all the circumstances, in the interests of justice to do so. For example, it may be clear that for some reason (such as prejudicial publicity, or the lapse of time since the alleged offence) a fair trial is now impossible. By rejecting the application to

[36] Para 5.45.

quash the acquittal in such a case, the court can anticipate the application to stay the proceedings as an abuse of process which would otherwise be made at the retrial. (Granting the application to quash the acquittal, on the other hand, would not preclude an application at the retrial to stay the proceedings on the grounds of abuse of process.) The great majority of respondents were in favour of such a criterion, and we recommend that it be adopted.

4.72 There are certain factors which we believe the court should be expressly directed to consider, in determining where the interests of justice lie. Some of these factors appeared in CP 156 as possible conditions precedent to the quashing of an acquittal. We now consider, however, that they are better treated as factors relevant to the exercise of the court's discretion.

Due diligence in the original investigation

4.73 In CP 156 we proposed that the power to reopen an acquittal on grounds of new evidence should be available only where that evidence could not, with due diligence, have been adduced at the first trial. Although the majority of respondents agreed, we find the arguments of the minority persuasive. There are four principal arguments against a due diligence test.

4.74 The first argument against a due diligence test is that it would not (as we suggested)[37] work as a disciplinary mechanism at the level of the police, to ensure proper investigation first time. Thus Jeremy Roberts QC asked:

> How realistic is it to suppose that the existence of a "due diligence" restriction on the power to receive new evidence would make any significant difference to the efficiency and thoroughness with which the original investigation is carried out (especially in the type of case where it is proposed to give the courts power to reopen an acquittal: by definition these will be cases of serious crime and/or other public importance)? Is it really to be supposed that police officers, customs officers or CPS officials will say: "We won't bother pursuing this line of enquiry now because, if we don't prove our case first time round, we can always have another bite at the cherry"? I would have thought not.

4.75 Others assert the contrary, including some police respondents (such as the RUC). The Jeremy Roberts line is strengthened, vis-à-vis the voices on the other side, by the limiting of the exception to murder, as suggested in his parenthesis. It is also reinforced by Paul Roberts' discussion, which makes the point that there are competing incentives operating on the police, some pushing them towards effective investigation and others pushing them in the other direction, and that, compared to these powerful forces operating in every case, the impact on their behaviour of the potential use of a double jeopardy exception would be small.[38]

[37] Para 5.46. See also paras 4.11 and 5.16.

[38] "Double Jeopardy First Principles and the Criminal Justice Deal: a commentary on the Law Commission's proposals", (2001) 64 MLR forthcoming.

4.76 The second argument against a requirement of due diligence is that it will not work as a disciplinary device at the level of the courts. It is fair to say that this argument was put mostly by those who were against the new evidence exception generally, who thought that there was a danger that an exception would lead to sloppy police work, but did not see our proposal as an adequate safeguard. The Criminal Bar Association, for instance, put it like this:

> The "due diligence" test will be easily satisfied … A previously undiscovered witness or unexamined item of clothing or implement may result in significant new evidence. It will not be difficult for prosecutors to assure the court that there was no reason to think X was an eye witness or that an item of clothing belonged to the defendant and hence pass the due diligence test. The acceptance by the courts of routine assurances by the prosecution as to due diligence in custody time limits extension cases (s 22 Prosecution of Offences Act) therefore gives no grounds for thinking this will be a rigorous test.

The force of this argument is that, even if the police would be chastened by the proper application of a requirement of due diligence, it would not be properly applied by the courts.

4.77 A third argument is that it is simply wrong to refuse to reopen a case which should otherwise be reopened, merely because of some extraneous earlier failing of the police. This is always an inherent problem in the use of a procedural mechanism to discipline the police. The sanction is not aimed in any direct sense at the police, but at the public interest in convicting the guilty and at the particular interests in justice of the victim or his or her family. The system imposes a sanction on X to make Y do its job properly. Even if it works, it is hard on X. Thus the House of Commons Home Affairs Select Committee's view that "If a second trial is ruled out because police incompetence had failed in the first, the only winner is the guilty. The victim or the victim's family are left doubly denied justice." The Committee concluded that there should be no due diligence test.

4.78 The fourth argument relates to the process required by our original proposal. In a very interesting discussion of the history of the power of the Court of Appeal to receive new evidence on appeals against conviction, Jeremy Roberts emphasises the long-standing reluctance by the court to use its powers to act on such evidence. One of the effects of this, he says, is to divert the appellant into making criticisms of trial counsel, to get round the objection that the evidence could, and therefore should, have been adduced at trial, whereas the proper focus should be on whether or not the conviction should be upheld. Our original proposal would have a similar effect, diverting attention away from the merits of the case and towards a close examination of the adequacy of the original investigation, even more so than it is presently in appeals against convictions. First, it would be a mandatory requirement, whereas that governing new evidence for the defence is not. Secondly, the competence under examination in defence appeals is mostly that of counsel, or sometimes defence solicitors, which is obviously something that the members of the court are in a good position to assess. In cases of

reopening, the focus is more likely to be on the details of the police investigation itself, which may well require expert evidence. It would be unattractive (and we put the argument no higher) if the reopening of an acquittal on a murder charge were to depend on the court's assessment of the competing claims of police experts as to the proper conduct of an investigation which might have taken place some time earlier.[39]

4.79 These arguments are to a considerable extent compelling (the first three perhaps more so than the fourth), and we now believe that we were wrong to propose in CP 156 that the exercise of due diligence should be a condition precedent for the reopening of an acquittal.

4.80 On the other hand we think it would be wrong to conclude that, far from being a complete bar to such reopening, a want of due diligence should be wholly disregarded. That such a rule would have *some* impact on the conduct of investigations cannot be overlooked. The fact is that, unfortunately, a combination of resources and human weaknesses already means that some very serious investigations are botched even where there is an absolute rule against double jeopardy. If it is the case, then, that some investigations, even into the most serious crimes, are already conducted lazily or carelessly, it takes little imagination to see that the tendency towards such an approach cannot but be encouraged if, at the back of the mind of the investigator, is the prospect that there may be a second chance and no risk that it will be ruled out for want of diligence, or, perhaps just as importantly, no obligation to have to justify the evidence's non-availability in court. Thus if the investigation is proceeding well but there is a further step which will advance it yet further but which is onerous or expensive, in the absence of any due diligence test at all there may be a temptation, whether conscious or unconscious, not to undertake that further step. In such a case, if, against expectation, the defendant is acquitted, the further step can always be taken as the basis for an application for a retrial. Our view is that these are real concerns against which some safeguards should be erected. They are, however, somewhat remote and to a degree speculative, and do not warrant the erection of a *mandatory* hurdle.

4.81 Similarly, the argument at the level of the courts is sound, but must not be taken too far. It may well be that a due diligence condition would be less than perfect because some judges may have an unnecessarily unquestioning attitude to bland assurances given by the prosecution. That would not render it wholly useless. The Criminal Bar Association may be right that some judges are too indulgent towards applications to extend custody time limits. We doubt, however, that this failing is so widespread that the protection given to defendants by the custody time limit regime is rendered illusory.

[39] The Court of Appeal has in recent times had some difficulties in determining the proper approach to old cases, where standards have improved since the trial (eg *King* [2000] Crim LR 835). Similar questions would attend the reopening of an old case. Should the original police investigation be judged by the standards of the time or by today's standards?

4.82 A discretion to take account of want of due diligence would also have the considerable advantage of broadly mirroring the present state of the law in respect of applications for the admission of new evidence by appellants against conviction in the Court of Appeal. In determining whether to admit such evidence, the court is required to have regard to whether there is a reasonable explanation for the failure to adduce the evidence at the trial[40] – that is, whether it could, with reasonable diligence, have been obtained for use at the trial.[41] Additionally, it would arguably be a breach of the principle of equality of arms, and therefore of Article 6 of the ECHR, if the defence could be prevented from adducing new evidence in an appeal against conviction on the ground that the evidence could have been adduced at the trial, but there were no equivalent discretion to prevent the *prosecution* from adducing new evidence on the same grounds.

4.83 Our judgment, therefore, is that the balance of argument is against a mandatory requirement, but in favour of a statutory direction that the court should take account of any want of due diligence in determining where the interests of justice lie.

4.84 The practical effect of including this as a relevant factor would probably be limited. If the case satisfies our criteria in other respects, it is perhaps unlikely that the court would refuse a retrial solely on the grounds of a want of due diligence in the original investigation. As in the case of fresh evidence relied upon by the defence in an appeal against conviction, the want of due diligence will often be of marginal importance by comparison with the other considerations involved; but in certain borderline cases it may be right that it should tip the balance. The Court of Appeal is well used to applying this factor in the context of defence appeals.

Reasonable despatch since the discovery of the new evidence

4.85 Similarly, we think that any failure by the prosecution to act with reasonable despatch after the new evidence is discovered (or after it would, given due diligence, have been discovered)[42] is another factor to be taken into account in deciding whether a retrial is in the interests of justice.

Lapse of time since the alleged offence

4.86 In CP 156 we discussed whether the exception for new evidence should be subject to any time limit. We came to no conclusion.

4.87 A narrow majority of respondents were against the idea of a time limit. It was argued that such a limit would arbitrarily exclude cases which were otherwise

[40] Criminal Appeal Act 1968, s 23(2)(d).

[41] *Beresford* (1971) 56 Cr App R 143.

[42] Or, where the evidence is already available when the new exception comes into force, after that date.

wholly suitable for retrial. The analogy with war crimes was pointed out. Perhaps the most compelling argument, raised by a number of respondents, was that, where the acquittal took place a long time ago, it may be strongly arguable that a retrial would be an abuse of process. In that case the court could not certify that a retrial would be in the interests of justice.

4.88 It is noteworthy that, of the minority of respondents who were in favour of the idea, some suggested that the time limit should be calculated according to a sliding scale, with the longest time limit (or no limit at all) applying to murder. Obviously the argument for a time limit is weaker if, as we recommend, the exception is in any event to be confined to murder.[43]

4.89 Our view is that there should be no absolute time limit, but that the length of time which has elapsed since the alleged offence should be another factor to which the court is directed to have regard in determining whether a retrial would be in the interests of justice.

4.90 **We recommend that a retrial should be allowed on grounds of new evidence only where the court is satisfied that, in all the circumstances of the case, it is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to**

(1) whether a fair trial is likely to be possible;

(2) whether it is likely that the new evidence would have been available at the first trial if the investigation had been conducted with due diligence;

(3) whether the prosecution has acted with reasonable despatch since

(a) the new evidence was discovered (or would, with due diligence, have been discovered), or

(b) the new exception came into force, whichever is the later;

and

(4) the time that has elapsed since the alleged offence,

together with any other considerations which appear to the court to be relevant.

(Recommendation 4)

THE APPROPRIATE COURT

4.91 In CP 156 we proposed that the court charged with determining whether an acquittal should be quashed should in the first instance be the High Court, with a right of appeal to the Criminal Division of the Court of Appeal against a decision

[43] And reckless killing: see paras 4.37 – 4.40 above.

to order a retrial.[44] The majority of respondents agreed with the proposal, but some suggested that the Court of Appeal would be a more appropriate forum to hear the application in the first instance. We find this suggestion persuasive. The Court of Appeal presently considers and decides questions of the introduction of new evidence and whether there should be a retrial on appeals against conviction. Under section 23 of the Criminal Appeal Act 1968 the Court of Appeal has the power to hear any new evidence proposed to be relied on. We anticipate that the statutory provisions governing an application to reopen an acquittal on the grounds of new evidence will give the court hearing the application a similar power. If the court decides to hear the new evidence, it will be desirable for the court which finally decides the matter to be the court which sees and hears the witnesses. Yet further, these decisions may be extremely high profile and controversial, especially if the decision is to reject the evidence or refuse a retrial. In such a case, which depends on judgments on matters of fact, it may be that a decision of a panel of senior judges would be more likely to be, and be perceived as being, correct than that of a single judge.

4.92 If the application for a retrial is first heard by the Court of Appeal, there is no suitable route for an appeal against the granting of the application.[45] However, if the initial decision is taken at a suitably senior level, a right of appeal is in our view unnecessary. Indeed, if the decision is based on a judgment as to the reliability of the evidence, it might be positively unsatisfactory for an appeal to be heard by a court which had not seen the witnesses. The alternative would be for the witnesses to give their evidence before the Court of Appeal as well as before the first instance court. This would both protract the procedure and subject the witnesses to repetition of the ordeal of giving evidence before even getting to the retrial. The absence of an appeal would also accelerate what might otherwise be a lengthy procedure.

4.93 **We recommend that the court empowered to quash an acquittal on grounds of new evidence should be the Criminal Division of the Court of Appeal, and that there should be no right of appeal against that court's decision.**

(Recommendation 5)

EVIDENCE WHICH WAS INADMISSIBLE AT THE FIRST TRIAL

4.94 In CP 156 we proposed that, for the purposes of the new exception, evidence should count as new evidence if, having been inadmissible at the first trial, it becomes admissible through a change in the law. This proposal was comprehensively rejected by respondents, largely through fears that the law might be changed *in order* to secure a second trial. Even if this seems a little far-fetched, anyone arguing for a change in the law of evidence would be bound to point to

[44] We invited views on whether the prosecution should have a right of appeal against a *refusal* to order a retrial.

[45] The success of the application is unlikely to turn on an issue of law suitable for consideration by the House of Lords.

examples of cases in which the change would have been effective to secure a conviction; if the argument was successful and the law was changed, the "example" case could be reopened and the effect would be much the same. We consider these objections well founded. **We recommend that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law.**

(Recommendation 6)

SUCCESSIVE RETRIALS, AND SUCCESSIVE APPLICATIONS FOR RETRIALS

4.95 In CP 156 we proposed that the exception for new evidence should not be available where the acquittal was at a retrial which itself was held by virtue of that exception. A substantial majority of respondents agreed. A further suggestion advanced by some respondents was that there should only be one *application* for a retrial on this ground, even if the first application is unsuccessful and no retrial has taken place. We accept this suggestion. Where there has already been a proper trial which resulted in an acquittal, it would in our view be oppressive to subject the defendant to repeated attempts at further prosecution. Once one such attempt has been made, the principle of the finality of criminal process should come to the fore.

4.96 Where the acquittal was at a retrial held on some other grounds, on the other hand (for example because the jury at the first trial had to be discharged, or failed to agree), we proposed that this should not be a complete bar to an application for a retrial on grounds of new evidence, but should be only one factor to be taken into account in determining whether another retrial would be in the interests of justice. This proposal provoked a more mixed response, but we think it strikes the correct balance. It follows that this would be another matter to be explicitly considered by the court in deciding whether a retrial would be in the interests of justice.

4.97 **We recommend that**

(1) where an acquittal is quashed on grounds of new evidence, and the defendant is acquitted at the retrial, no application to quash that later acquittal on grounds of new evidence should be permitted;

(2) where an unsuccessful application is made to quash an acquittal on grounds of new evidence, no further application to quash that acquittal on grounds of new evidence should be permitted;

(3) where a person is acquitted at a retrial held on some other ground,[46] it should be possible to make one application to quash that acquittal on grounds of new evidence, but the fact that the

[46] Including a retrial where the defendant has previously been acquitted but the acquittal has been held to be tainted: see para 5.31 below.

acquittal occurred at a retrial should be one of the factors to which the court should be required to have regard in determining whether a further retrial would be in the interests of justice.

(Recommendation 7)

CONSENT TO THE MAKING OF AN APPLICATION

4.98 We have just recommended that the mere making of an unsuccessful *application* on grounds of new evidence should bar subsequent applications. This makes it all the more important to avoid inappropriate applications being made. It would be unfortunate if, for example, the family of a murder victim were to bring a private prosecution which failed for want of evidence, and then applied for a retrial on the basis of new evidence which was clearly inadequate to satisfy the criteria we propose, with the result that the CPS could not reopen the acquittal even if compelling new evidence did subsequently arise.

4.99 In our view the way to ensure that applications are not made where there is no real prospect of their succeeding is to impose a consent requirement.[47] HM Customs and Excise argued that applications should only be made with leave of the Attorney-General, and that leave should only be given where the Attorney is satisfied that (i) there is a strong public interest to be served in allowing the application to proceed and (ii) the High Court is reasonably likely to quash the acquittal. We adopt the suggestion, but would substitute the Director of Public Prosecutions (DPP) for the Attorney-General on the grounds that the DPP has primary responsibility for assessing the strength of the evidence against a defendant. In view of the sensitivity of such decisions, however, we suggest that this should be an exception to the usual rule that the powers of the DPP may be exercised by any Crown Prosecutor.[48] **We recommend that it should be necessary to obtain the consent of the Director of Public Prosecutions, in person, before making an application for an acquittal to be quashed on grounds of new evidence.**

(Recommendation 8)

REPORTING RESTRICTIONS

4.100 Given that, under our recommendations, a retrial could be ordered only where the new evidence is apparently "compelling" in the sense we have described, there is an obvious danger of prejudice if the jury at the retrial becomes aware of the circumstances in which the retrial was ordered. There is no difficulty merely because the second jury may learn that the trial *is* a retrial. This often happens at present (for example, where a witness is cross-examined about an inconsistency between the evidence given by the witness at the first trial and that given at the second), and does not appear to present a problem. What the second jury would not learn, unless the defence chose to tell it, is the potentially prejudicial fact that

[47] See generally Consents to Prosecution (1998) Law Com No 255.

[48] Prosecution of Offences Act 1985, s 1(7).

the retrial is being held after an acquittal has been quashed *on grounds of new evidence*, as distinct from the existing grounds for a retrial.

4.101 Merely not telling the jury that the retrial is being held on grounds of new evidence after a quashed acquittal, however, does not necessarily ensure that the jury will remain unaware of that fact. In a high profile case some of the jurors may know it anyway. The likelihood of their knowing it will be a factor for the court to consider in determining whether a fair trial is likely to be possible, and therefore whether the interests of justice require a retrial. This is not to say that the exception could never be invoked in a high profile case. The risk of prejudice may be effectively countered by a suitable direction to the jury, after consultation with counsel. In the recent case of *Montgomery v HM Advocate*[49] the Privy Council expressed the view that seeing and hearing the witnesses may be expected to have a far greater impact on the minds of the jury than such residual recollections as may exist about reports of the case in the media. Further, their impact can be expected to be reinforced by such warnings and directions as the trial judge may think it appropriate to give. The entire system of trial by jury is based upon the assumption that the jury will follow the instructions of the trial judge, and will return a true verdict according to the evidence.

4.102 Even so, we think it desirable that steps should be taken to minimise the risk of the jury becoming aware of the grounds on which the retrial was ordered. There are already a number of provisions prohibiting reporting which might prejudice a subsequent trial. In the case of preparatory hearings, for example, and appeals in relation to them, there is an automatic ban on reporting unless the court orders otherwise.[50] Clearly a similar provision would be justified in relation to the new exception.

4.103 **We recommend that**

(1) there should be a prohibition on the reporting of the hearing of an application for a retrial on grounds of new evidence until the application is dismissed or any retrial has finished; but

(2) the Court of Appeal should have power to make an order disapplying or varying that prohibition if

(a) the defendant does not object to the making of such an order, or

(b) having heard representations from the defendant, the court is satisfied that it is in the interests of justice to make it.

(Recommendation 9)

[49] *The Times*, 6 December 2000.

[50] Criminal Justice Act 1987, s11; Criminal Procedure and Investigations Act 1996, s 37. At para 7.143 below we recommend similar restrictions on the reporting of appeals against acquittals.

4.104 In addition, the defendant would be free to argue at the retrial that further proceedings should be stayed as an abuse of process, on grounds of prejudicial publicity or any other ground, and whether or not the arguments adduced had already been considered by the Court of Appeal when considering whether a retrial would be in the interests of justice.

PART V
THE TAINTED ACQUITTAL PROCEDURE

5.1 In CP 156 we made a number of proposals, and raised a number of consultation issues, relating to the "tainted acquittal" procedure created by the Criminal Procedure and Investigations Act 1996,[1] under which an acquittal may be set aside (thus opening the way for a retrial) where a person has been convicted of an offence of interference with, or intimidation of, witnesses or jurors at the first trial (an "administration of justice offence"), and the acquittal appears to have resulted from that offence.[2]

THE OBJECTS OF THE INTERFERENCE OR INTIMIDATION

5.2 At present, an acquittal can be set aside only where it was secured by interference with or intimidation of a *witness* or a *juror*. In CP 156 we provisionally proposed that the procedure should be extended so as to allow retrials after an administration of justice offence against a judge or magistrate.[3] Nearly all the respondents agreed.

5.3 We also believe (though we did not raise this possibility in CP 156) that if judges and magistrates are to be included it would be inconsistent to exclude magistrates' clerks. Their role, at least when assisting lay justices, is somewhat analogous to that of the judge in the Crown Court. We believe that it would be wrong if an acquittal by magistrates could not be reopened where it was based on bad advice deliberately and improperly given by the clerk, and a prosecution appeal would be out of time.

5.4 We have considered extending the category to include *anyone* involved in the trial process in any capacity. It is arguable, for example, that an acquittal should be liable to be set aside if it resulted from deliberate sabotage of the prosecution's case by the prosecution advocate, those instructing that advocate, or the police. However, we believe that this would be going too far, and that (with the exception of witnesses, who are already included and must clearly continue to be) the line should be drawn at those who are directly involved in the court's decision, as distinct from the investigation and presentation of the case.

5.5 **We recommend that the tainted acquittal procedure should be extended so as to apply where the administration of justice offence involves interference with or intimidation of a judge, magistrate or magistrates' clerk.**

(Recommendation 10)

[1] Sections 54–57.

[2] See also "Acquittal Following Perversion of the Course of Justice", New Zealand Law Commission Preliminary Paper 42, September 2000.

[3] Para 6.8.

THE DEFINITION OF "ADMINISTRATION OF JUSTICE OFFENCE"

5.6 In CP 156 we invited views on whether the definition of an administration of justice offence should be extended.[4] Our main query was whether perjury in the first trial (as distinct from aiding, abetting, counselling, procuring, suborning or inciting perjury by another) should be sufficient; and we provisionally thought that it should not. Respondents overwhelmingly supported this view.

5.7 Nearly all respondents thought that no other offences needed to be brought within the definition either. However, the Society of Public Teachers of Law suggested that the definition might usefully be extended to include *conspiracy* to commit one of the offences already included. In theory this might catch a case where the conspiracy did not reach fruition, and so there could not have been any effect on the integrity of the trial. In such a case, however, it would be impossible to satisfy the separate requirement that, but for the offence, the jury would probably have convicted. The practical point is that, where the conspiracy did lead to actual interference or intimidation, one or more convictions for the conspiracy (as distinct from the full offences) would suffice to trigger the procedure. We accept this suggestion.

5.8 Given our conclusion that judges, magistrates and magistrates' clerks should be included as possible objects of interference or intimidation, there is also a case for including offences of corruption.[5] This would in turn suggest the inclusion of the common law offence of bribery.[6] A judge or magistrate who accepted a bribe would also be guilty of the common law offence of misconduct in public office;[7] but the briber would probably be charged with corruption rather than as a party to the misconduct offence, so it may not be necessary to cater for this possibility.

5.9 **We recommend that, for the purposes of the tainted acquittal procedure, the definition of an "administration of justice offence" should be extended to include**

(1) offences under the Prevention of Corruption Acts 1889–1916, and the common law offence of bribery (or, if and when the recommendations in our report on corruption are implemented, the offences there proposed); and

(2) conspiracy to commit any administration of justice offence.

(Recommendation 11)

[4] Para 6.21.

[5] See the Public Bodies Corrupt Practices Act 1889, and the Prevention of Corruption Acts 1906 and 1916. In Legislating the Criminal Code: Corruption (1998) Law Com No 248 we recommended the replacement of these offences with a more rational scheme.

[6] The bribery of jurors is known as embracery: *Pomfriet v Brownsal* (1600) Cro Eliz 736; 78 ER 968.

[7] *Llewellyn-Jones* [1968] 1 QB 429.

THE NECESSITY FOR A CONVICTION OF AN ADMINISTRATION OF JUSTICE OFFENCE

5.10 At present, the acquittal cannot be set aside unless the person alleged to have interfered with the course of justice has been convicted of doing so. In CP 156, we queried whether this requirement might be relaxed. We posited three options. Option 1 was to retain the present position. Under option 2, the court hearing the application to quash the acquittal would have to be satisfied (to the criminal standard of proof) that someone had in fact committed an administration of justice offence, but it would not be necessary that that person should actually have been convicted. Option 3 was to retain the need for a conviction *except* where it would be impossible to try the person alleged to be guilty of the administration of justice offence (for example because that person was dead, overseas or untraceable), in which case the High Court could quash the conviction if satisfied to the criminal standard that the offence had been committed. We expressed a preference for option 2.[8]

5.11 In the responses, although there was substantial support for option 2, the argument most often adduced in its favour was that it might be impossible to try the alleged culprit. That argument could equally be met by option 3. Some respondents said they would be content with either option. ACPO, however, took up a firmer position in favour of option 2. It argued that the hurdle of a conviction led to significant delays in arranging, applying for and subsequently conducting any retrial of the individual acquitted, and that, given the desirability of ensuring best evidence from witnesses' recollections within a short time scale, and to protect the public, the procedure should not be held up by such a bureaucratic preamble. These considerations might, in certain circumstances, justify reopening the original acquittal even where, given time, a conviction for the administration of justice offence might be obtainable. On the other hand it would still be necessary, under option 2, to satisfy the court hearing the application, to the criminal standard, that an administration of justice offence had been committed. This would inevitably involve a delay, which implicitly is regarded as acceptable. Although the delay involved in satisfying a jury might be a bit longer, the question is whether that additional delay is justified by the enhanced legitimacy gained by requiring a conviction as a trigger for the application, where such a course is feasible, and by avoiding a multiplicity of occasions when the interfered-with witness would have to give evidence on the matter.

5.12 Some respondents argued strongly against option 2. Professor David Feldman thought that it would infringe Article 14(7) of the International Covenant on Civil and Political Rights,[9] and so favoured option 3. The CPS argued that option 2 would involve a full dress rehearsal of a trial of the interferer, which would place great strain on the juror, witness or magistrate, who would have to

[8] Para 6.12.

[9] See para 3.5 above. Professor Feldman argues that the Human Rights Committee's interpretation of this article would prohibit option 2.

give evidence twice. Liberty adopted a similar argument, but from the perspective of the tainted acquittal defendant, for whom the variety of proceedings would constitute a heavy and oppressive burden. This was because the defendant would be subject to the original trial, would have to prepare a third party defence to the application to quash the acquittal, and then a second Crown Court trial. There is a serious danger that the defendant's ability to defend against the charge would be eroded in the same way as can happen through hours and hours of police questioning, the sheer persistence of the state's power sapping resistance. The London Criminal Courts Solicitors' Association described option 2 as ill-conceived, time-consuming, expensive and likely to cause delay. The Association noted that our proposals would involve a lengthy trial process in the High Court to decide a question of fact as to whether a person had committed a serious criminal offence, and that such questions of fact are properly decided by a jury at the Crown Court. It felt that the only possible justifications for changing this would be time and cost, but that option 2 would only make things worse in those areas. Peter Mirfield expressed concern that the judge would have an extraordinarily difficult decision. He was also unsure as to certain procedural questions, and whether the criminal rules of evidence would apply.

5.13 There is a further concern relating to procedure if the conviction requirement is abandoned. English justice is very much based upon adversarial procedures which are not easy to place within the tainted acquittal hearing. The prosecution would be on one side and, in effect, the tainted acquittal defendant would be on the other. The question of interference with the course of justice might in some cases relate to incidents of which that defendant might have no direct knowledge[10] and on which that defendant could give no specific instructions. The alleged interferer might not be present, would not be represented and, being liable to no direct legal consequences from the court's ruling, might have little incentive to refute the allegations. The danger in the lack of a proper adversary for the Crown's application is twofold: it may be unjust, and it may make it very difficult for the court to assess the evidence and arguments and to decide the matter.

5.14 Option 2 raises the spectre of the conviction of the tainted acquittal defendant at the retrial, followed by a later acquittal of the alleged interferer. The tainted acquittal defendant would, absent impropriety in obtaining the tainted acquittal ruling, be most unlikely to have grounds for appeal on the basis that the retrial should not have taken place at all. It is an unattractive possibility that we could see the court's finding that an administration of justice offence had been committed contradicted by a jury, but, nonetheless, a tainted acquittal defendant being convicted as a result of that court's ruling.

5.15 It is conceivable that police and/or prosecutors might be tempted not to pursue those who tamper with the administration of justice where a conviction has already been obtained under the tainted acquittal procedure, for fear of the

[10] There is no requirement that the acquitted defendant should be responsible for, or a party to, the administration of justice offence.

embarrassment were they to be acquitted. This might occasionally arise under option 3 where circumstances had changed and a person had become available to be charged who was thought to be unavailable at the time of the tainted acquittal application. In truth there is no conceptual reason why there should be any embarrassment. Different courts can, legitimately and without embarrassment, come to different conclusions where the parties are different and having heard different evidence. It is, however, important for public confidence in the system that the opportunities for such apparent anomalies to arise be kept to the minimum.

5.16 Another difficult situation would arise if an alleged interferer was acquitted and the Crown *later* applied to the court to quash an acquittal on the grounds of interference. No doubt, if the interference were exactly the same as that which the jury had considered, the court would decline to quash the acquittal, but there might be other evidence of interference that had not been adduced at the trial of the alleged interferer. There is something worrying about creating potential for inconsistent findings on such sensitive matters as criminal offences.

5.17 We have therefore concluded that option 2 should be rejected.

5.18 Option 3 has two difficulties. The first is that it requires a prosecution to be *impossible*. This is too exacting a test, and in our view a more realistic but still exacting test is one which utilises the requirement of reasonable practicability. The second is that the reasons for it being impossible to try the alleged interferer are open-ended. In our view this is too permissive. Acquitted defendants ought in principle to know exactly what circumstances will and will not be regarded as sufficient to enable the prosecution to apply to reopen their acquittal without a prior conviction for an administration of justice offence. We have therefore concluded that, in the absence of a conviction for an administration of justice offence, the procedure should be available only in certain specified circumstances. The intention is that these circumstances should reflect all the reasons why, in practice, a conviction for the administration of justice offence is likely not to be reasonably practicable.

5.19 **We recommend that the tainted acquittal procedure should be available not only where a person has been convicted of the administration of justice offence, but also where the court hearing the application**

(1) is satisfied, to the criminal standard of proof, that an administration of justice offence has been committed, and

(2) is satisfied that

(a) the person who committed it is dead;

(b) it is not reasonably practicable to apprehend that person;

(c) that person is overseas, and it is not reasonably practicable to bring that person within the jurisdiction within a reasonable time; or

(d) it is not reasonably practicable to identify that person.

(Recommendation 12)

THE ADMISSIBILITY OF A FINDING BY THE COURT THAT AN ADMINISTRATION OF JUSTICE OFFENCE HAD OCCURRED

5.20 In CP 156 we proposed that, if the procedure were to be made available despite the absence of a conviction for the administration of justice offence, a finding by the court that such an offence had been committed should not be admissible in any subsequent trial of a person for that offence (or an offence arising out of the same or substantially the same facts as that offence).[11] There was no real opposition to this proposal, and several respondents thought it an essential corollary of any relaxation of the need for a conviction of the administration of justice offence as a precondition of the tainted acquittal procedure. Indeed we think that in principle it should extend to subsequent proceedings for *any* offence, thus including the case where the alleged administration of justice offence is adduced as "similar fact" evidence on a charge of another offence. **We recommend that, where an acquittal is quashed on the grounds that it is tainted although no-one has been convicted of an administration of justice offence in relation to it, the court's finding that an administration of justice offence has been committed should be inadmissible as evidence of that fact in subsequent criminal proceedings for any offence.**

(Recommendation 13)

THE REQUIREMENT THAT THE ACQUITTAL BE SECURED BY THE INTERFERENCE OR INTIMIDATION

5.21 At present the High Court cannot set aside the acquittal unless it "appears … likely that, but for the interference or intimidation, the acquitted person would not have been acquitted". In CP 156 we pointed out that the word "likely" is open to a range of interpretations, and put forward various options for clarifying the degree of probability required.[12]

5.22 There was some support among respondents for a requirement that the court should be satisfied to the criminal standard of proof (that is, satisfied so that it is sure, or "beyond reasonable doubt"). In our view it would scarcely ever be possible for the court to determine with this degree of certainty the purely hypothetical question of what the outcome would have been if the trial had taken a different course. This is much too strict a test.

5.23 There was also some support for retaining the existing test. More respondents, however, were in favour of changing the test to the civil standard, namely the balance of probabilities. We believe that this is the right test, and that if this is what is intended then the existing test is inadequate to convey it without

[11] Para 6.13.

[12] Para 6.17.

ambiguity. **We recommend that the tainted acquittal procedure should be available only where it appears to the court hearing the application that, but for the interference or intimidation, the trial would have been more likely to result in a conviction than in an acquittal.**

(Recommendation 14)

THE INTERESTS OF JUSTICE TEST

5.24 At present one of the conditions that must be satisfied before the High Court can quash an acquittal is that "it does not appear to the court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted".[13] In CP 156 we proposed that the interests of justice test should be the same as the one we had formulated for the new evidence exception which we were proposing, and which we now recommend.[14] The only difference this would make would be to emphasise that the onus is on the prosecution to satisfy the court that a retrial *would* be in the interests of justice, not on the defence to show that it would not. All the respondents agreed with this proposal.

5.25 **We recommend that an acquittal should be liable to be quashed on the grounds that it is tainted only where the court is satisfied that, in all the circumstances of the case, this is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to**

(1) whether a fair trial is likely to be possible;

(2) whether the prosecution has acted with reasonable despatch since evidence of the administration of justice offence was discovered (or would, with due diligence, have been discovered); and

(3) the time that has elapsed since the alleged offence,

together with any other considerations which appear to the court to be relevant.

(Recommendation 15)

ADDITIONAL SAFEGUARDS

5.26 In the context of a new evidence exception, CP 156 suggested certain limitations on the circumstances in which an acquittal could be reopened, over and above those relating directly to the grounds for the application (such as the strength of the evidence) and the "interests of justice" test. The proposed limitations were that the alleged offence would have to be of a certain minimum seriousness; that an acquittal could be quashed once only under the procedure; and that there might perhaps be a time limit, to render finite the period during which an acquitted defendant might fear the reopening of the acquittal. In relation to

[13] Criminal Procedure and Investigations Act 1996, s 55(2).

[14] Para 6.22.

tainted acquittals, we tentatively suggested that the justifications for the double jeopardy rule were the same regardless of the basis of the exception, and so the same additional safeguards might be adopted. We invited views on whether the tainted acquittal procedure did require such additional safeguards.[15] There was a very wide variety of answers. Some respondents argued persuasively that the tainted acquittal procedure is different from a new evidence exception to the double jeopardy rule because the first proceedings were in truth a nullity;[16] that no-one should be able to profit from criminal acts intended to undermine the criminal justice system by striking at its very roots; and that additional safeguards are therefore unnecessary and undesirable. Nevertheless, we consider each possible safeguard in turn.

A seriousness threshold

5.27 There were some responses in favour of a minimum severity of offence below which it would not be worthwhile to seek a reopening. However, more than one experienced judge pointed out that interference goes on at all levels of seriousness. Deliberate attacks on the integrity of the system should not profit anyone, even at the most minor level. If the trial was worth having the first time, but was on that occasion rendered a nullity, it will still be worth holding. The very purpose of the tainted acquittal procedure is to secure *one* fair trial.

A time limit

5.28 The same reasoning applies again. There is no statute of limitations on crime, and no reason to create one.[17] The fact that the interference with the course of justice is not uncovered for many years should not, in our view, be an absolute bar to the reopening of the acquittal, though it may in certain circumstances be relevant to the interests of justice test. In any event, we have decided not to recommend a time limit for the new evidence exception, and the argument for having one in the case of the tainted acquittal procedure seems even weaker.

A limit on the number of times the procedure can be used

5.29 We have recommended that it should only be possible to make one application for a retrial on grounds of new evidence, even if yet more new evidence subsequently emerges.[18] We must now consider whether there should be a similar prohibition on the making of successive applications under the tainted acquittal procedure, and/or on the making of an application under one exception following an application (successful or otherwise) under the other.

[15] Para 6.24.

[16] "Nullity" is used here in a non-technical sense.

[17] Section 56 of the Criminal Procedure and Investigations Act 1996 already makes adequate provision in the tainted acquittal procedure for dealing with summary offences and others which must be prosecuted within a time limit.

[18] See para 4.97 above.

5.30 Where it is not suggested that the trial which resulted in the acquittal was not a proper trial, it would in our view be oppressive to subject the defendant to repeated applications to set the acquittal aside. At this point, the principle of the finality of criminal process should come to the fore. As we have already recommended, therefore, no further application on grounds of new evidence should be permitted where one unsuccessful application has already been made for an acquittal to be quashed on those grounds; nor where an acquittal *is* quashed on those grounds, and the defendant is acquitted *again* at the retrial.

5.31 This reasoning would also suggest that the prosecution should not be permitted to apply for a second retrial on grounds of new evidence where the defendant has been acquitted at a retrial held under the tainted acquittal procedure. However, we do not think that the defendant should be in a better position through being acquitted at a retrial, if the retrial was necessary only because the first acquittal was tainted. In this case we believe that the first (tainted) trial should be ignored, and that one further application on grounds of new evidence should therefore be permitted. Although the defendant will already have undergone three ordeals (the first trial, the application to quash the acquittal, and the retrial), only one of them will have been a properly constituted trial. It should therefore be open to the court to consider whether it would be in the interests of justice for there to be a further trial under the new evidence rubric, in the same way as for any application under this proposed exception to the double jeopardy rule.

5.32 Another case in which we believe that finality should prevail is that in which it *is* suggested that the trial was not a proper trial (that is, an application is made under the tainted acquittal procedure), but the court rejects that suggestion. We conclude that no further application should be permitted, under either exception, where an unsuccessful application has been made for an acquittal to be quashed on the grounds that it is tainted. The defendant has undergone two ordeals and been vindicated on each occasion. A third would be oppressive.

5.33 Where it can be shown that there has not yet been a proper trial at all, however, it is legitimate to ensure that one such trial should take place. This is so irrespective of how many tainted trials may have already taken place. Until there has been a fair trial without intimidation or interference, the Crown must be at liberty to carry on until such a trial has been possible. A further application should therefore be permitted where

(1) an acquittal is quashed on the grounds that it was tainted, the defendant is acquitted again at the retrial, and the prosecution seeks another retrial on the grounds that the second acquittal was *also* tainted;

(2) an acquittal is quashed on grounds of new evidence, the defendant is acquitted again at the retrial, and the prosecution seeks another retrial on the grounds that the second acquittal was tainted; or

(3) an unsuccessful application is made for an acquittal to be quashed on grounds of new evidence, and the prosecution again seeks a retrial, but this time on the grounds that the acquittal was tainted.

There is a difference between the prosecution having to bring forward all its new evidence at the same time, or all its tainted acquittal evidence at the same time, and, in the interests of protecting the integrity of the system, giving the prosecution one chance to bring forward tainted acquittal material whether or not it has already tried to invoke the new evidence procedure. It appears that the tainted acquittal provisions already permit a further application in the first case above, and would permit it in the second and third cases if our recommendations for the new evidence exception were in force. We therefore make no separate recommendation for this purpose.

5.34 **We recommend that**

(1) where an unsuccessful application has been made to quash an acquittal on the grounds that it is tainted, no further application to quash that acquittal (on any grounds) should be permissible; but

(2) where an unsuccessful application has been made to quash an acquittal on grounds of new evidence, it should be possible to make one further application to quash that acquittal on the grounds that it is tainted.

(Recommendation 16)

THE PROCEDURE

5.35 We made it clear in CP 156 that there was a need for some procedural changes to the tainted acquittal mechanism in order to ensure that it was fair and compliant with the ECHR.[19] These proposals were widely supported. It was suggested that if (as we proposed) the hearing were in open court there might be prejudice to the retrial of the acquitted defendant (or to a subsequent trial of the interferer, though under our final recommendations no such trial would be likely to occur). However, reporting restrictions could be imposed if necessary.

5.36 **We recommend that the legislation governing the tainted acquittal procedure be amended so as to provide for**

(1) a hearing of the question whether the acquittal should be quashed;

(2) the hearing to be in open court;

(3) the acquitted person to have a right to be present;

(4) both parties to be legally represented, and legal aid to be available for the acquitted person;

(5) witnesses to be heard and cross-examined on the question whether an administration of justice offence has been committed; and

(6) consideration of transcripts of the first trial, together with witnesses if necessary, in determining whether the acquitted

[19] Para 6.41.

person would not have been acquitted but for the interference or intimidation.

(Recommendation 17)

THE APPROPRIATE COURT

5.37 We are now recommending that it should be the Court of Appeal (rather than the High Court) which has power to quash an acquittal on the grounds of new evidence.[20] It is arguable that the position should be the same in the case of the tainted acquittal procedure. Were we proposing the retention of the tainted acquittal procedure in its present form, we would not think that the argument for parity between the two procedures was particularly strong: they serve different purposes. However, under our recommendations in relation to the tainted acquittal procedure, the court hearing the application may hear evidence, and form a view on matters of fact, in the same way as the court hearing an application on grounds of new evidence. We think that this consideration does constitute a strong argument for parity. If our arguments for new evidence applications to be heard by the Court of Appeal are sound, then they should apply equally to the tainted acquittal jurisdiction too. **We recommend that the court empowered to quash acquittals on the grounds that they are tainted should be the Criminal Division of the Court Appeal.**

(Recommendation 18)

[20] See para 4.93 above.

PART VI
CODIFYING THE DOUBLE JEOPARDY RULE

6.1 In CP 156 we proposed that the rule against double jeopardy and its exceptions should be put into statutory form. Those respondents who commented on this proposal were generally in favour, on the grounds that this would ensure greater clarity and (the CPS noted) compatibility with the ECHR.

6.2 Our proposal was for the codification of *both* the principles that, together, make up the "rule against double jeopardy" – that is, not only

(1) the "autrefois" rule, that a person who has previously been acquitted or convicted of an offence may under no circumstances[1] be prosecuted again for *the same offence*, but also

(2) the principle laid down by the House of Lords in *Connelly v DPP*,[2] that only in special circumstances may a person who has previously been acquitted or convicted of an offence be prosecuted for *any* offence *based on the same or substantially the same facts*.[3]

That, however, was on the basis that the exceptions to the two principles would be identical. Now that we have decided (in the light of the consultation process) to place more emphasis on the value of finality, and to recommend a new evidence exception much narrower than we had originally proposed, the case for consolidating both principles into one seems weaker. We think it clear that the autrefois rule, at least, should be put in statutory form. **We recommend the codification of the autrefois rule and its exceptions.**

(Recommendation 19)

6.3 We return later to the question whether the *Connelly* principle should also be codified.[4]

[1] With the exception of the tainted acquittal procedure.

[2] [1964] AC 1254; see paras 2.16 – 2.19 above.

[3] We also envisaged that, if (contrary to the proposal at para 8.40 of CP 156) the rule in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 were to be retained in some form, that rule too should form part of the codified rule against double jeopardy. We understood *Sambasivam* as deciding that in proceedings for *any* offence the prosecution may not adduce evidence that the defendant was in fact guilty of an offence of which he or she has previously been acquitted. In *Z* [2000] 2 AC 483, however, the House of Lords accepted our arguments against such a rule, and held that no such rule exists. It is therefore unnecessary for us to make any recommendation on the point. See paras 2.22 – 2.28 above.

[4] See paras 6.35 – 6.48 below.

THE CONCEPTS OF ACQUITTAL AND CONVICTION

6.4 The statutory autrefois rule will need to make use of the concepts of acquittal and conviction, because it is only when a person has been acquitted or convicted that the rule will apply. It would be possible simply to use these concepts in the senses in which they are used in the present law. However, in Part IX of CP 156 we considered whether they should be made narrower or wider than they are now.

Postponing the point at which the prosecution can drop the case without losing the right to re-open it

6.5 The CPS has power to discontinue a prosecution without the defendant being acquitted, so that a subsequent prosecution for the same offence is not precluded by the autrefois rule. Once the case is committed for trial, however (or, where the case is sent directly to the Crown Court because it cannot be tried by magistrates, once the indictment is lodged), this power no longer exists. From that point on, the Crown can abandon the case only by formally offering no evidence.[5] If a jury has been sworn, the judge will then direct it to acquit; if not, the judge will direct a verdict of acquittal to be recorded, and by statute that verdict has the same effect as if the defendant had been acquitted by a jury.[6] In either case, therefore, the autrefois rule will apply to prevent the case being reopened.

6.6 In CP 156 we discussed whether the point at which the prosecution may be dropped, without losing it for ever, should be postponed to some later stage. This might be done by extending the CPS's power to discontinue by an administrative procedure, without the need for any judicial determination of the case at all. The CPS argued for such an extension. Alternatively the case might still come to court, but when the Crown offers no evidence the case might be disposed of by an order which does not amount to an acquittal for the purpose of the autrefois rule. Such an order might be similar to that commonly made where the Crown accepts a plea of guilty to a lesser offence than that charged – namely that the count or counts not proceeded with should lie on the file, not to be proceeded with without the consent of the court or the Court of Appeal.

6.7 It is arguable that a defendant has not been in jeopardy until the trial has at least commenced, and that, should proceedings be halted before that time, they should not be regarded as conclusively determined, and it should still be possible to try the defendant. This was the view put forward by the CPS. Our answer can be found in paragraph 9.6 of CP 156:

> In our view, … a defendant is entitled to expect accurate assessment of his or her case, and sound decision-making by the prosecutor, at a reasonably early stage. Committal (or preferment,[7] where there is no

[5] Unless the Attorney-General enters a nolle prosequi, which does not count as an acquittal.

[6] Criminal Justice Act 1967, s 17.

[7] *Sc* of the indictment. (Footnote added)

committal) is the earliest reasonable stage, given the realities of the criminal justice system. The prosecutor must have *some* opportunity to abandon the case without penalty, because the proceedings are usually initiated by the police before the prosecutor sees the file. But the decision whether to commit requires the prosecutor to make a positive decision about the case. It therefore seems reasonable that the protection afforded by the double jeopardy rule should begin at that point.

6.8 In any event it is debatable whether this issue is best regarded as an aspect of double jeopardy at all. The double jeopardy rule is designed to ensure that, once proceedings have been *finally* disposed of, they cannot be resurrected. The rule does not apply if the proceedings come to an end without the defendant being finally pronounced either guilty or not guilty. That must inevitably continue to be the case: it is the essence of the double jeopardy rule. That being so, arguably the real question is *what sort of order should be made* where the Crown wishes to offer no evidence (that is, whether the defendant should have to be acquitted, or whether it should be possible to bring the case to an end without an acquittal) rather than whether the order that *is* made should *count* as an acquittal. This is an important issue,[8] but, in our view, it raises wider questions of criminal procedure, and a report on double jeopardy is not the context in which to tackle it. We therefore make no recommendation.

Acquittal or conviction in another jurisdiction

6.9 At the moment, it seems that the autrefois plea would preclude a second trial in England and Wales after a previous trial in a foreign jurisdiction.[9] We pointed out in CP 156 that in this respect the rule might be relaxed without infringing the ECHR.[10] We offered four possibilities, namely that the rule against double jeopardy should apply where there was a previous acquittal or conviction (1) anywhere; (2) anywhere except in one of a number of countries expressly excluded for this purpose; (3) in an EU state only; or (4) in England and Wales only. Of these, we provisionally proposed option (1).

6.10 Respondents overwhelmingly, and in many cases strongly, agreed. The need for comity was a common theme. P W Ferguson pointed out that Scots law follows option (1). The DTI favoured option (1) because any change would pre-empt Schengen and that would cause problems. The Northern Ireland judiciary felt that the options other than (1) would confuse our various extradition arrangements. Professor David Feldman argued that, although English courts will not enforce foreign courts' criminal judgments in *civil* disputes, there is a

[8] We were sent an interesting judgment on this tricky issue delivered by Judge John Samuels QC in the case of *Johnston (William Martin) and others* (Blackfriars Crown Court, 20 October 2000) for which we are grateful.

[9] *Aughet* (1919) 13 Cr App R 101, confirmed, obiter, in *Treacy v DPP* [1971] AC 537, *per* Lord Diplock. See CP 156, para 9.10.

[10] Protocol 7, Art 4(1) applies only to "proceedings under the jurisdiction of the same State". See para 3.7 above.

different concern in recognising foreign acquittals and convictions for double jeopardy purposes. There was a general view that at the root of this issue is the basic principle that a second trial for the same crime is unjust and oppressive, and that that fact is not changed by the location of the first trial.

6.11 The CPS agreed with this general principle, but favoured a list of countries whose verdicts would bind the English courts (in effect, option 2) because this was the proper way to ensure that only the decisions of competent courts would prevent second trials here. The CPS thought it a matter of policy for the Government, not the courts, to determine which foreign courts were competent. The problem with the CPS's view is that it involves casting general aspersions at governmental level on countries with which we have friendly diplomatic relations, when it would be better to focus on whether a particular trial abroad was so flawed that its verdict need not be considered final by an English court.

6.12 The CPS response does, however, point to a serious concern, because a blanket rule that prior foreign proceedings will *always* preclude an English trial could work manifest injustice. There is a considerable danger in option (1) of having to respect the outcomes of sham trials in corrupt and illegitimate regimes. Take the case of a very wealthy businessman who perpetrates a fraud on thousands of English pensioners, stealing £50 million. He travels to a state where he has for many years cultivated influential connections. He arranges to be tried there for the fraud and is acquitted (or convicted and given an absolute discharge on the grounds that he is an honourable man) because the nation's president ordered it, or because the judge dismissed the case in return for an honorarium. If the businessman returned to England, it may be thought to be an affront to justice were it not possible for him to be tried. Again, if the fraudster were foreign, and were tried in his own state and acquitted because his activities were not criminal under the law of that state, or because they were conducted in England and therefore outside the territorial jurisdiction of the courts of that state, it would be unreasonable to bar English proceedings against him. In another example, a foreign national commits a series of assaults and flees to his own country of citizenship where he is tried and acquitted on the grounds that that state has a policy of acquitting its nationals for offences committed abroad. Surely, he too should be open to prosecution. With certain exceptions, English criminal jurisdiction is territorial, and so applies to offences committed within England and Wales only. Where an English court has jurisdiction over an offence because it was committed here, it would be more than unfortunate if the possibility of trying the suspect were ousted by a show trial somewhere else.

6.13 There may be concern that it would be wrong in principle for English courts to investigate the propriety of proceedings before courts in other jurisdictions. However, this is exactly what English courts are required to do in private international law cases, where they may not recognise judgments delivered by foreign courts in breach of "substantial justice",[11] or by fraud, or where to do so

[11] See *Adams v Cape Industries plc* [1990] Ch 433.

would be against public policy.[12] If it is right in principle for an English court to refuse to recognise a foreign judgment in a civil matter, we think it should be equally acceptable for it to refuse to do so in a criminal matter, where the consequences may be far more serious. English courts are, of course, extremely reluctant to impugn the decisions of foreign courts, and will strain to maintain comity. The power to ignore a foreign verdict would undoubtedly be very sparingly used, but we believe that it is desirable in the interests of justice. This is all the more true as the ECHR would apparently permit English law to refuse to recognise *any* foreign verdicts for the purposes of the domestic double jeopardy rule. There is also a close analogy with the tainted acquittal procedure in denying finality to foreign proceedings which were fundamentally defective.

6.14 We do not think that it would be sufficient, however, simply to give the courts a power to disregard foreign verdicts where they think it appropriate, with no indication of the considerations to which they should have regard in deciding whether to do so. For this purpose a useful precedent is provided by Article 20(3) of the Rome Statute of the International Criminal Court. This allows a second trial, despite a prior one on the same facts, where the first trial was in a different jurisdiction and was designed to shield the suspect from prosecution elsewhere, or was not independent, impartial or consistent with an intent to bring the perpetrator to justice. In the light of the overwhelming international consensus on this point, we think it would be appropriate to adopt similar criteria in English law.

6.15 **We recommend that the autrefois rule should apply wherever the previous acquittal or conviction occurred, but an English court should be permitted to disregard an acquittal or conviction in another jurisdiction where it is satisfied that it is in the interests of justice to do so; and, in determining whether it is so satisfied, the court should be required to have regard to whether it appears that the foreign proceedings**

(1) were held for the purpose of shielding the defendant from criminal responsibility for offences within the jurisdiction of the English court,

(2) were not conducted independently or impartially in accordance with the minimum requirements of due process and fairness, or

(3) were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the defendant to justice,

together with any other considerations which appear to the court to be relevant.

(Recommendation 20)

6.16 There is a further, and quite different, situation in which it may be justifiable to allow a prosecution in England and Wales despite a prior acquittal in another

[12] See *Jaffey on the Conflict of Laws* (1997) pp 166–170; *Habib Bank v Mian Aftab Ahmed*, *The Times* 2 November 2000, *per* Carnwath J.

country: namely where the defendant was acquitted on the ground that the alleged offence, if committed, was committed outside the jurisdiction of the foreign court. In this case there is no question of impugning the integrity of the foreign proceedings. Where a foreign court dismisses a case on the basis that the foreign legal system has insufficient interest in or connection with the alleged offence, we think it should still be open to the English courts to proceed against the defendant. Indeed (assuming that the offence *is* alleged to have been committed within the territorial jurisdiction of the *English* courts), it may be said that the very basis on which the foreign court has dismissed the case is that the matter is one for the English courts, and it would be illogical for an English court to decline to hear the case on the basis that a foreign court thought it should be heard by an English court.

6.17 This difficulty would not arise if, under the relevant foreign law, the foreign court's dismissal of the case were not a final determination but a preliminary decision as to admissibility. In that case there would be no final determination of the case, and therefore no possibility of an autrefois plea. If, on the other hand, the foreign ruling were a final one according to the foreign law, that *would* activate the autrefois rule, and prevent an English court from trying the case. We do not think it would be satisfactory that the applicability of the autrefois rule should depend whether, under the particular foreign law in question, the court's decision on the issue of jurisdiction was regarded as final. English law must have its own position on whether want of jurisdiction is final, and cannot answer that differently according to the country in which the abortive proceedings were taken. We therefore believe that a ruling of lack of jurisdiction by a foreign court should not count as a final determination of the proceedings for the purposes of the autrefois rule. We note that, according to *Archbold*, only a verdict of a foreign court *of competent jurisdiction* will activate the autrefois rule.[13] Presumably, therefore, an acquittal for want of jurisdiction cannot have that effect, even under the present law.

6.18 The conclusion that the foreign court does not have "jurisdiction" to try an offence allegedly committed outside the foreign country may be reached in one of two ways. The first is that the court literally has no jurisdiction to try the case at all. The second is that the court does have jurisdiction to try the case, because it accepts jurisdiction in respect of the defendant such as on the basis of his or her presence within the jurisdiction, but the defendant is not guilty as charged because, as a matter of substantive criminal law, the conduct complained of is not an offence under the law of the country in question if it occurs outside the boundaries of that country. English law adopts the second analysis.[14] There may well be countries whose law would adopt the first. We believe, however, that it should make no difference which analysis the foreign law adopts. In *neither* case should there be any bar to subsequent proceedings in the English courts.

[13] *Archbold 2001*, para 4–130.

[14] *Treacy v DPP* [1971] AC 537, 559, *per* Lord Diplock; *DPP v Stonehouse* [1978] AC 55, 90, *per* Lord Keith.

6.19 There may be circumstances in which it would be inappropriate to try a defendant who has been prosecuted abroad but acquitted for want of jurisdiction: for example, the defendant may have spent several years on remand awaiting the foreign court's decision. In such a case, however, it would be open to the English court to stay the proceedings as an abuse of process.

6.20 **We recommend that an acquittal by a foreign court should not be regarded as an acquittal for the purposes of the autrefois rule if it appears to have been based solely on the fact that the alleged offence, if committed, was committed outside the territorial jurisdiction of that court.**

(Recommendation 21)

6.21 The last issue to be addressed in this section is whether the double jeopardy protection granted by virtue of a foreign acquittal should be subject to the same *exceptions* as an acquittal in England and Wales. It would be exceptionally difficult to apply the tainted acquittal procedure to foreign proceedings, and we believe that this possibility should therefore be discarded (except insofar as a foreign verdict could be ignored under the considerations discussed above). Our proposed new exception for fresh evidence in murder cases, however, would apply to acquittals in any jurisdiction, because it would be inconsistent to give a foreign verdict greater finality than one of our own. **We recommend that the tainted acquittal procedure should not apply to acquittals outside England and Wales.**

(Recommendation 22)

Extending the concept of an acquittal

6.22 In CP 156, we set out the main ways in which criminal proceedings can end without the defendant being convicted and sentenced, but without a final acquittal, with the result that the defendant can be prosecuted again for the same offence – namely:

(1) the discharge of the jury, without a verdict being obtained;

(2) the quashing of an indictment following a motion to quash;[15]

(3) the discharge of the defendant at the conclusion of committal proceedings;[16]

(4) the dismissal of an information on the non-appearance of the prosecutor;[17]

(5) the dismissal of an information which is too faulty for the defendant to have been in jeopardy on it;[18]

[15] *Newland* [1988] QB 402.

[16] *R v Manchester City Stipendiary Magistrate, ex p Snelson* [1977] 1 WLR 911.

[17] *R v Bennet and Bond, ex p Bennet* (1908) 72 JP 362.

[18] *Dabhade* [1993] QB 329.

(6) the discontinuance of proceedings under section 23 or 23A of the Prosecution of Offences Act 1985;

(7) the withdrawal of a charge in the magistrates' court before the defendant has pleaded to it;[19]

(8) the entering of a nolle prosequi;[20] and

(9) an order that a count (or an indictment) lie on the file, not to be proceeded with without the consent of the court or the Court of Appeal.[21]

6.23 The question we posed was whether any of these situations should count as a final acquittal or conviction so as to activate the double jeopardy rule in the future. Few respondents expressed views on this question but the clear majority were against any change. In none of these situations does there appear to be a strong case for protecting the defendant against subsequent prosecution. One respondent suggested that where a jury fails to agree, this should count as an acquittal; but, as we pointed out in CP 156,[22] this would mean that in order to secure immunity from further prosecution a defendant would only need to persuade three jurors out of twelve to hold out against a conviction. The Stipendiary Magistrates' Council suggested that adjournments sine die should be treated as acquittals; but, if a magistrates' court wishes to close a case finally, it can dismiss the information. A decision to adjourn indicates an intention that the matter is *not* to be regarded as permanently closed. We recommend no change in this respect.

Conviction without sentence

6.24 In CP 156 we pointed out that, according to the Privy Council's decision in *Richards*,[23] for the purposes of the autrefois rule there is no conviction until sentence is passed.[24] We argued that, where for some reason sentence cannot be passed by the trial judge (for example, because the judge dies, becomes ill or resigns), the situation is analogous to the case where the jury cannot agree, and that the autrefois rule should not apply, so that the defendant can be retried and (if convicted again) sentenced. However, the Stipendiary Magistrates' Council pointed out that where such exceptional circumstances arise in a magistrates' court, sentence may be passed by a differently constituted bench. It is difficult to see why the position should be different in the Crown Court.

6.25 The only authority to the contrary of which we are aware is an obiter dictum in *Richards*. Giving the judgment of their Lordships, Lord Bridge of Harwich said:

[19] *R v Grays JJ, ex p Low* [1990] QB 54.

[20] *Ridpath* (1713) 10 Mod 152.

[21] We also included a tenth case, namely the taking of an offence into consideration when sentencing for another offence. As to this, see paras 6.29 – 6.33 below.

[22] Para 9.18.

[23] [1993] AC 217.

[24] Para 9.20.

> Where a defendant is tried before judge and jury, both have their roles to play and together they constitute the court of trial. If, in any case following trial and conviction by the jury, the judge were to die before passing sentence, there would be no court seized of the case by which sentence could be passed. The defendant, it seems to their Lordships, would in those circumstances have to be rearraigned before another court and if he again pleaded not guilty would have to be retried.[25]

6.26 This reasoning does not accord with everyday practice in the Crown Court. We are aware of many occasions where, for good reasons of convenience and justice, a defendant may be sentenced by a judge other than the one who presided when the defendant pleaded guilty or was found guilty – for example where there are successive trials before different judges, perhaps at different venues, but it is sensible for the defendant to be sentenced on the same occasion for all outstanding matters by the judge presiding over the last trial in time. We can see no reason why the position should be any different where the judge dies after conviction but before sentence. If this is right then Lord Bridge's argument does not amount to a good reason for withholding the protection of the autrefois rule until sentence is passed.

6.27 It is noticeable that the case of *Richards* is not cited in either of the standard textbooks[26] as authority for the proposition stated. Indeed, neither of them even deals with the question of the death of the judge between verdict and sentence.[27] We believe that the dictum is at variance with the principle that a defendant should if possible be sentenced in respect of all outstanding matters at once, and with the fact that it is common for a defendant to be convicted at one trial but sentenced by the judge who hears a second trial. There is no reason, in law or in principle, why a convicted defendant should have to go through another trial on the same issue.

6.28 **We recommend that, for the purposes of the autrefois rule, a conviction should be defined as including the giving of a verdict of guilty by a jury or a finding by a magistrates' court that an information is proved, whether or not sentence is passed.**

(Recommendation 23)

Offences taken into consideration

6.29 Where a defendant is convicted, and asks for other offences to be taken into consideration ("TIC") in sentencing, for the purposes of the autrefois rule there is no conviction for those other offences. A few respondents (including Liberty

[25] [1993] AC 217, 226.

[26] *Archbold* and *Blackstone*.

[27] It is also interesting that counsel for the defendant, who unsuccessfully argued that sentence could be passed by another judge without the need for a retrial, was Peter Thornton QC of the English bar; his opponent was the DPP for Jamaica who, it may be assumed, was unable to assist the court on practice in England.

and the Stipendiary Magistrates' Council) argued that a subsequent prosecution for those offences ought to be barred by the autrefois rule. Indeed Steyn J (as he then was) has described the present rule as "extraordinary".[28]

6.30 We agree. The autrefois rule applies in a situation in which the prosecution offers no evidence. This may be for reasons which may be practical only, and do not involve the prosecution resiling from its belief in the guilt of the defendant. On the other hand the defendant, when asking for other offences to be dealt with as TICs, has to sign a form and confirm in court that he or she admits these offences even though never formally charged with them. Thus, the defendant goes further in acknowledging the rightness of the outcome than the prosecution need do in offering no evidence. It would be anomalous, therefore, were that outcome to be regarded as less final, for double jeopardy purposes, than where the prosecution offers no evidence.

6.31 Moreover, it is conceivable that TICs might constitute convictions for the purposes of the ECHR rule against double jeopardy. The Strasbourg Court has said (albeit in the context of Article 5, rather than Article 4 of Protocol 7) that

> the word "conviction" … has to be understood as signifying both a "finding of guilt" after "it has been established in accordance with the law that there has been an offence" and the imposition of a penalty or other measure involving deprivation of liberty.[29]

TICs involve a finding of guilt (by the defendant's admission) in accordance with law (there is a clear procedure) in respect of which a penalty is imposed (in that it is taken into consideration in the sentence). If TICs are within this definition and the definition is applicable to double jeopardy cases, any retrial of an offence previously the subject of a TIC would be a breach of the ECHR except where, virtually inconceivably, the trial took place on the permitted grounds of fundamental defect or new evidence.

6.32 We therefore conclude that TICs should in general be treated as convictions for the purposes of the autrefois rule. There is, however, one situation in which this would produce an unsatisfactory outcome. That is where a person has been convicted of an offence and on sentence asks for other offences to be TICed. If the conviction is quashed on appeal, it would seem wrong that the prosecution should be barred from proceeding in respect of the TICs. It is most unlikely that this would amount to double jeopardy for ECHR purposes because the TICs would not be a *final* disposal of the offences in question until the defendant's appeal in respect of the conviction was disposed of.

6.33 **We recommend that, for the purposes of the autrefois rule, a conviction should be defined as including the taking of an offence into consideration**

[28] *Howard* (1991) 92 Cr App R 223, 227. See also *Nicholson* (1948) 32 Cr App R 127.

[29] *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 454. See also *B v Austria* (1991) 13 EHRR 20 for confirmation and further analysis of this definition.

in sentencing a person for another offence, unless the conviction for the latter offence is quashed on appeal.

(Recommendation 24)

Foreign proceedings

6.34 It may be that in some other jurisdictions the termination of proceedings in some of the circumstances listed at paragraph 6.22 above would be regarded, under the foreign law in question, as a final acquittal. Where this is so, our understanding is that the autrefois rule would preclude any attempt to prosecute the matter in England and Wales, even though a termination of English proceedings in similar circumstances would not count as a final acquittal in English law. We make no recommendation for any change in this respect. A defendant who has once secured what counts as a final acquittal under the law of the country where it occurs is in general entitled to assume that that is the end of the matter (subject to the exceptions recognised by the ECHR). It should not be possible to circumvent the rule against double jeopardy by taking further proceedings in another country. Our recommendation in relation to acquittals for want of jurisdiction[30] is an exception to this principle, justified by the peculiar characteristics of such an acquittal.

THE *CONNELLY* PRINCIPLE

6.35 In Part II, we explained that the protection against double jeopardy afforded by the autrefois rule is complemented by the wider and more flexible principle laid down by the House of Lords in *Connelly v DPP*[31] and confirmed by the Court of Appeal in *Beedie*,[32] namely that a person who has previously been acquitted or convicted of an offence may not be prosecuted for *any* offence *based on the same or substantially the same facts* unless there are special circumstances[33] (which it seems may include the emergence of new evidence).[34]

6.36 In CP 156 we concluded that the autrefois and *Connelly* rules should be restated as a single statutory rule against double jeopardy. The same exceptions (including our proposed exception for new evidence) would apply to both. This seemed to be logical in the light of our proposals that the new evidence exception

[30] See para 6.20 above.

[31] [1964] AC 1254.

[32] [1998] QB 356.

[33] This principle appears to subsume the older and narrower rule in *Elrington* (1861) 1 B & S 688; 121 ER 170, that a person who has been acquitted or convicted of an offence may not later be charged with a *more serious* offence arising out of the same facts: see para 2.20 above. However, neither *Elrington* nor *Connelly* precludes a second prosecution for a more serious offence where the facts constituting that offence were not in existence at the time of the earlier acquittal or conviction, eg where D is convicted of assault and the victim subsequently dies from the injuries sustained.

[34] *Attorney-General for Gibraltar v Leoni*, Criminal Appeal No 4 of 1998, judgment given 19 March 1999, unreported; see para 2.18 above.

should have a relatively wide reach. Indeed we relied on the apparent existence of a new evidence exception to the rule in *Connelly* as an argument of principle in support for a new evidence exception to the autrefois rule.

6.37 Our proposal attracted a lot of support, but there were significant voices in dissent – notably the CPS, which pointed out the difficulties where indictments had been severed, or where the prosecution had knowingly adopted two indictments and the defence had acquiesced in the first trial on such an indictment and had not applied for joinder.

6.38 Our provisional proposal, moreover, was for the reach of the new evidence exception to be widely drawn. We now accept, in the light of the response to CP 156, that we underestimated the importance of the autrefois rule by focusing solely on the effect on the individual, whereas there is a community interest in the individual not being subject to or at risk of oppression by the state making repeated attempts to convict on the same facts. As we have explained, this has persuaded us to recommend that the new evidence exception to the autrefois rule should have only a very limited reach.

6.39 The combination of these two factors has caused us to look again at *Connelly*. Plainly, if there is already a "special circumstance" exception to the *Connelly* principle which may encompass new evidence (though it is not clear how firmly established that exception is), then including the *Connelly* principle in a single statutory rule against double jeopardy which has a new evidence exception with a very limited reach would significantly change the balance of that rule as between prosecution and defence.

6.40 Having re-examined the *Connelly* principle, we have been reminded that it was not originally intended to be confined to situations of "double jeopardy" per se (that is, successive prosecutions based on the same or substantially the same facts), but concerned the wider question of the conscionability of successive prosecutions being brought where the charges could all have been dealt with in the one trial. In his speech in *Connelly* (which was treated in *Beedie* as forming the ratio of the House of Lords' decision) Lord Devlin argued that a prosecution should be stayed, in the absence of special circumstances, if the offence charged is one which could have been included in an indictment previously preferred against the same defendant. It was oppressive to bring two successive prosecutions where the matters alleged could have been dealt with in one. Counts may be joined in the same indictment if they "are founded on the same facts", or if they "form or are a part of a series of offences of the same or similar character".[35] It is clear that, as stated by Lord Devlin, the principle concerns the rules for joinder, and applies to both limbs. It is worth quoting a sizeable section of his speech:

[35] Indictment Rules 1971, r 9, which is substantially the same as its predecessor, Indictment Rules 1915, r 3.

> As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3[36] where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special circumstance. Under section 5(3) of the Act a judge has a complete discretion to order separate trials of offences charged in one indictment. It must, therefore, follow that where the case is one in which, if the offences in the second indictment had been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. A fortiori, where the accused has himself obtained an order for a separate trial under section 5(3). Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within rule 3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantages that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by Glyn-Jones J in *R v Smith*.[37]

6.41 Lord Devlin clearly intended that his principle should apply not only where the second prosecution relates to essentially the same conduct (that is, where it would involve double jeopardy) but also where it relates to completely different conduct which could have been included in the same indictment. In CP 156 we pointed out that Lord Devlin's formulation of the principle would preclude a prosecution for burglary in July which could have been combined with an earlier charge of burglary in June; but we added: "Even if the rule is really this wide (which seems doubtful) this sort of case is not an example of double jeopardy, and we do not deal with it in this paper."[38]

[36] This refers to Indictment Rules 1915, r 3; see n 35 above. (footnote added)

[37] [1958] 1 WLR 312. A High Court judge sitting at first instance preferred a voluntary bill to effect the joinder of two separate indictments. It is not clear from the report whose application it was that the two be joined. (Footnote added)

[38] Para 2.21, n 43.

6.42 We are still in doubt as to the true width of the principle. Our doubts are based on the fact that the principle itself lay dormant for 20 years before being resurrected in *Beedie* – it had been thought that the true ratio of *Connelly* lay in the other speeches. *Beedie* itself was a double jeopardy case, and the judgment does not indicate that the court saw the principle as extending beyond double jeopardy. We are not aware of a single case *not* involving double jeopardy in which Lord Devlin's principle has been applied. We have not considered whether it *ought* to apply to such cases. We did not consult on the point. In these circumstances we clearly cannot recommend, in a report on double jeopardy, the codification of a rule which is applicable to cases not involving double jeopardy, which (though there is high authority for it) has never to our knowledge been applied, and which, if widely applied, might well cause great difficulty for prosecutors.

6.43 It follows that we cannot recommend codifying the whole of the *Connelly* principle. At most we could recommend codifying that part of it which concerns double jeopardy, namely the principle that a prosecution should be stayed (in the absence of special circumstances) if it is *based on the same or substantially the same facts* as a charge of which the defendant has previously been acquitted or convicted. We have, however, concluded that we should make no such recommendation, for two reasons.

6.44 First, we cannot simply disregard the fact that Lord Devlin's principle, which *Beedie* treats as stating the present law, was in fact a general principle against the unjustifiable proliferation of proceedings, and not solely a rule against double jeopardy. Although its role as a safeguard against double jeopardy is now recognised, whereas its wider implications are not, we think it would be inappropriate to codify that part which has so far received recognition while leaving the remainder to be developed (or ignored) by the courts. What is needed is a proper examination of the merits and drawbacks of Lord Devlin's principle, in the terms in which he stated it. Until such an examination is carried out, we think it would be wrong to anticipate it by legislating on one aspect of the principle.

6.45 Secondly, we are in any event not entirely convinced that Lord Devlin's principle is sufficiently flexible to do justice in every case to which it would apply. This may be illustrated by the well-known case of Kevin Maxwell and others. Kevin Maxwell and three other defendants were acquitted in 1996 on charges of conspiracy to defraud the trustees and beneficiaries of the Maxwell Group's pension scheme by dealing with shares belonging to the pension fund in a way which created such a risk of loss as to be dishonest. The Crown then sought to prosecute Kevin Maxwell and other defendants for conspiracy to defraud various *banks* by giving them, as security for certain loans, shares owned by a subsidiary of the Maxwell Group. The Crown's case, as explained by counsel in resisting an application to stay these counts,[39] was that the defendants had agreed

[39] There was disagreement between counsel as to whether this had always been the Crown's case on these counts, or whether it was presented in this way as a deliberate device for the

to induce the banks to accept these shares as security by falsely asserting that the borrower was the beneficial owner of the shares. It was no part of the Crown's case that the acceptance of the shares as security involved an unacceptable risk to the banks through the illiquidity of the group. These counts had been severed from the original indictment in order to keep the length and complexity of the first trial within manageable bounds. However, Buckley J ruled that they should be stayed as an abuse of process.[40]

6.46 In reaching this decision Buckley J did not purport to apply the principle laid down by Lord Devlin in *Connelly*: it was not until *Beedie* was decided in 1998 that that principle was accepted as an accurate statement of the law, even in relation to double jeopardy. Instead, he appears to have dealt with the case under the ordinary principles of abuse of process, exercising a large degree of judicial discretion. In particular, he took into account various factors in addition to the similarity between the new counts and those already disposed of, such as the publicity to which the defendants had been subjected, the distress which they and their families had already suffered, and the fact that the first trial had ended in all the defendants being acquitted. It is possible that, by focusing *only* on whether the new counts arose out of substantially the same facts and whether, if so, there were "special circumstances" justifying the second trial, Lord Devlin's principle might have made it harder for Buckley J to reach what he regarded as a just conclusion. Arguably the courts should have more room for manoeuvre in such cases than the *Connelly* principle allows.

6.47 That is not to say that the *Connelly* principle should be abandoned, and such cases left to the general law of abuse of process. Such a change would involve a substantial reduction in the protection against double jeopardy that the *Connelly* principle presently affords. This is because under the *Connelly* principle the prosecution is required to show that the proceedings are justified, whereas under the abuse of process regime the burden is on the defendant to show that the proceedings are *not* justified. Rather, we suspect that a balance needs to be struck between abandoning the principle altogether and retaining it as it stands. We believe, however, that the striking of this balance would be more appropriately done within the context of an examination of the law of abuse of process than in a report on double jeopardy.

6.48 One possible argument for seeking to codify the double jeopardy aspect of the *Connelly* principle is that it arguably represents the requirements of the ECHR. Unfortunately it is impossible to be sure what the ECHR does require, given that the two decided cases are directly contradictory. *Gradinger v Austria*[41] suggests that a second prosecution for a different offence "based on the same conduct" is

purpose of defeating the application to stay the proceedings, by artificially playing down the similarity between the two sets of charges.

[40] Unreported ruling, 19 September 1996.

[41] A328-C (1995); see para 3.11 above.

a breach of Article 4 of Protocol 7; *Oliveira v Switzerland*[42] suggests that it is not, and that Article 4 therefore provides no greater protection than the autrefois rule. If *Oliveira* is right, the *Connelly* principle is not needed in order to ensure compliance. Even if *Gradinger* is right, the criterion of whether the second charge is "based on the same conduct" appears to be essentially the same as Lord Devlin's "substantially the same facts". It is therefore open to the courts to ensure compliance in the same way that they have until now, namely by applying either the *Connelly* principle or the general law of abuse of process. We do not believe that the possibility of courts ignoring the *Connelly* principle in such a way as to infringe Article 4 (even assuming that Article 4 goes as far as *Gradinger* suggests) is sufficient reason for us to recommend its codification. We therefore make no such recommendation.

[42] 1998-V p 1990; see para 3.13 above.

PART VII
PROSECUTION APPEALS AGAINST JUDGES' RULINGS

7.1 We now turn to the subject matter of CP 158, where we discussed the possibility of introducing more extensive rights of appeal for the prosecution against rulings in the Crown Court.

7.2 We received 71 responses. The broad thrust of the provisional proposals in CP 158 enjoyed a high degree of support. It is particularly noticeable that the judiciary, by far the largest category of respondents, was overwhelmingly in favour, by 20 to four. The strength of support from academics (six to one) is also striking. All the prosecutors and police respondents were in favour. The only category to show significant opposition was that composed of professional organisations and interest groups, five out of seven of which opposed extending prosecution appeals into the trial.[1] Those who wholeheartedly opposed our proposals did so on the bases: that there was no demonstrable need, or that any such extension would cause unconscionable delay, or that appeals would be instigated out of hurt pride, or that we should trust the judges.

7.3 Of the substantive proposals, only two gave rise to any significant level of specific dissent. They were: our proposal not to extend the rights of appeal presently given under the preparatory hearing regimes to enable appeals against non-terminating rulings under the pre-trial hearing regime; and our proposal that there be no prosecution appeal against a successful submission of no case to answer at the conclusion of the prosecution case, whether under limb one or two of *Galbraith*.[2] Other than that, there were a number of interesting points of detail made in respect of most of the specific proposals. We deal, in the course of this part, with those which we believe would, if adopted, improve our proposals.

HOW MUCH WOULD PROSECUTION APPEALS BE USED?

7.4 Part I of CP 158 concluded by our inviting views on "whether the prosecution rights of appeal discussed in this paper, if enacted, would be used to a significant extent."[3] We had in the preceding paragraphs set out our approach, on the basis of which we concluded that it seemed to us likely that significant use would be made of any extended rights of appeal. We said:

> It seems inherently plausible that there are a significant number of cases in which the judge makes an error of law which disadvantages

[1] Those against were the Justices' Clerks' Society, the North Eastern Circuit, the Bar Council/Criminal Bar Association (joint response), the Criminal Law Group of the Society of Labour Lawyers and JUSTICE. The Criminal Law Committee of the Law Society was in favour.

[2] See para 7.50 below.

[3] Para 1.26.

> the prosecution to the extent that there is an acquittal where there would otherwise have been a finding of guilt. In 1998, out of 10,761 convictions after pleas of not guilty[4] in the Crown Court,[5] there were 2,099 applications for leave to appeal against conviction, of which 714 were granted.[6] Of the 693 appeals heard in 1998, 290 were ultimately successful, in whole or part.[7] In most of these cases, although by no means all,[8] the Court of Appeal will have found that the trial judge made some error, and that that error was sufficiently serious to render the conviction unsafe. It would seem proper to assume that the number of occasions on which similar errors occur to the detriment of the prosecution is at least of a similar order of magnitude. No doubt there would not be a similar number of successful appeals – the incidence of the burden of proof, and the test to be applied by the Court of Appeal in appeals against conviction, are such that one would expect very many more appeals against conviction to be successful than appeals against acquittal. Nevertheless, in the light of these statistics it would be surprising if the number of acquittals that would fall to be quashed would be insignificant, were any such procedure available. It seems to us likely that significant use would be made of prosecution rights of appeal, and we proceed on that basis.[9]

7.5 About ten respondents[10] thought that little use would be made of rights of appeal against acquittals arising from terminating rulings made during the prosecution case. One was Lord Woolf CJ, who thought that "there are likely to be more prosecution appeals than Attorney-General's references. However, the number is most unlikely to be other than a very minor part of the Court of Appeal's present workload". Seven or eight (including two police forces and Customs and Excise) agreed with our assessment that the numbers would be significant. ACPO thought it was important that such rights should *not* be used sparingly, and that the Attorney-General was being over-cautious in his Tom Sargant lecture.[11]

7.6 There was no correlation between these judgments and the views of the respondents on whether there *should* be any extension of prosecution rights of appeal. Of those who opposed any such extension, some thought that extended rights of appeal would be seldom used and that this was a reason for not creating

[4] Generally, there is no real prospect of a successful appeal against conviction where the defendant has pleaded guilty, except where the judge has made a ruling the effect of which is to deprive the defendant of a defence in law: see *Chalkley* [1998] QB 848.

[5] Lord Chancellor's Department, Judicial Statistics: Annual Report (1998) Cm 4371, p 66, table 6.11.

[6] *Ibid*, p 12, table 1.7.

[7] *Ibid*, table 1.8.

[8] A comparatively small number of appeals are based on new evidence, or some irregularity not attributable to the judge, such as improper contact with the jury.

[9] CP 158, para 1.25.

[10] Possibly only eight: in a couple of cases the respondent's meaning was not entirely clear.

[11] See para 1.8 above.

them, because no need for such extension had been shown. Others, on the other hand, thought that the new rights *would* be frequently used and that such use would be evidence of pressure being brought to bear on prosecutors by disgruntled complainants, investigators and, in some cases, the press, to make extensive use of the new rights. They saw the consequence of this as substantial delay in finality of the particular proceedings, and a knock-on delay in hearing other defendants' appeals against conviction or sentence.

7.7 Of those who supported extension of the prosecution's rights of appeal, some thought the new rights would be used infrequently, and cited this as an argument that extension would not cause undue disruption to the system or significant commensurate delay. Others thought that the new rights *would* be often used, and that this would evidence the need for them.

7.8 Our analogy with the statistics on *defence* appeals was subject to some criticism. It was pointed out that, amongst the successful appeals against conviction, there would be a number of cases in which the appeal was based on new evidence or a misdirection to the jury. Such bases of appeal were not, it was said, analogous to the kind of erroneous ruling which was the subject of our proposals. Thus, extrapolation from the number of successful defence appeals against conviction was not a reliable guide to the likely frequency of erroneous rulings which would be caught by an extended prosecution right of appeal.

7.9 We can see some force in this argument and that it would be a mistake to place too much reliance upon our statistical approach in what is essentially a matter of speculation. In our view, having reflected on the points made by respondents on this question, our best guess is that, whilst there would be occasions when an extended prosecution right of appeal against an acquittal arising out of a terminating ruling would be exercised, it is unlikely to be anywhere near as often as defence appeals against conviction. The defence's rights of appeal would still be far more extensive than those of the Crown.

7.10 Two respondents, each of them Lords Justices of Appeal, questioned the relevance of posing such a question at all. The issue was said to be what powers are to be made available to the Crown, not the frequency with which those powers would be exercised. We have some sympathy with this approach. Whilst there would be no point in legislating what would be a dead letter because the power was never used, once the judgment is that it would be used to some extent, the question of *how often* it would be used ceases to be of much significance beside the question of principle whether the Crown *should* have such a facility. It is, in our judgment, sufficient to conclude that, inevitably, judges will, from time to time, make mistakes which will result in prosecutions being terminated where in fact the defendant is guilty. The question then is, as one respondent put it, "whether it is unfair to an accused to deprive him of the adventitious fruits of an error of the court". Our view remains that this must be judged by whether the injustice caused by the error of the court may be corrected without doing undue harm to the other values which underpin the system by, for example, increasing delay in obtaining finality of proceedings, or

putting a person who may, after all, be not guilty at further risk of conviction having once been acquitted.

7.11 What we do know is that there has been a small number of highly publicised cases involving murder, rape, and serious drugs offences which have highlighted the desirability of there being a prosecution right of appeal so as to enable the correctness of the judge's ruling to be tested. It is also the case that the abuse of process jurisdiction is being developed by the courts so that the occasions when a case will be stayed by a ruling of a judge will, in all likelihood, increase. The absence of a right of appeal, on a point of law, against a verdict for one side only is an anomaly within our system, which otherwise provides the loser in litigation, whether claimant or defendant, with the facility of a higher court giving a second opinion on questions of law. Extending the availability of a prosecution right of appeal would provide such a facility and would avoid placing the final responsibility for aborting the trial upon the first instance trial judge. The CPS expressed it in this way:

> Although the right would be rarely exercised, the occasions on which it would be used would be significant – affecting the conduct of important cases or the decision of important points of law. The very existence of the right will, we believe, improve the quality of judicial rulings at trials and thereby keep its use to a minimum.

We believe that this is a useful and authoritative statement of the likely extent to which such a right would be put.

THE PRINCIPLES AFFECTING THE AVAILABILITY OF A PROSECUTION APPEAL

7.12 In Part III of CP 158 we tried to identify the main principles and aims which have a bearing on the question whether it would be fair to extend the prosecution's existing rights of appeal. We distinguished two aims of the criminal justice system. One such aim, which we called *accuracy of outcome*, is to ensure, as far as possible, that those who are guilty are convicted and that those who are not guilty are acquitted. On the other hand, we pointed out, there is also a *process aim* in ensuring that the system shows respect for the fundamental rights and freedoms of the individual. Accuracy of outcome can benefit either the prosecution or the defendant, depending on whether the defendant is guilty or innocent. By contrast, process aims by their nature work only in favour of the defendant. They arise out of the relationship between the citizen and the state, and regulate what the state can properly do to the citizen. They reflect society's valuation of the citizen's autonomy and entitlement to be treated with dignity and respect.[12]

[12] What we term accuracy of outcome and process aims appear elsewhere as *competing* justifications for procedural rights: see the discussion in P P Craig, *Administrative Law* (4th ed 1999) pp 402–403. Process values (or aims) were identified in R Summers, "Evaluating and Improving Legal Processes – a plea for 'process values'" (1974) 60 Cornell LR 1. Other important texts are J Mashaw, *Due Process in the Administrative State* (1985) and F Michaelman, "Formal and Associational Aims in Procedural Due Process"

7.13 In general, the existence of prosecution rights of appeal may be expected to militate in favour of accurate outcomes, because an accurate outcome is more likely to be achieved if the law is correctly applied than if it is not. On the other hand, the existence of such rights may arguably detract from the process aims of the system. In CP 158 we provisionally concluded that the proper approach to the question whether to grant the prosecution a particular right of appeal was

(1) to identify the extent (if any) to which that right of appeal would enhance or detract from the aim of ensuring accuracy of outcome;

(2) to identify the extent (if any) to which it would detract from process aims; and,

(3) by balancing these factors, to come to a conclusion whether the trial process would thus be rendered unfair.[13]

7.14 This approach found favour with the large majority of respondents. Some, however, were critical. In particular there were those who criticised the concept of seeking to achieve a balance between contending sides. They said that in doing so we were inappropriately adopting the language of games playing in a serious context. They pointed out that the public all too often has the impression that a criminal trial is a procedural game played by lawyers to achieve a result which has no bearing on the underlying merits. By way of contrast, one Lord Justice of Appeal expressed the view that the principal justification for the prosecution having no way to upset an acquittal based on an erroneous ruling of law seemed to have more to do with sport than with justice.

7.15 Others found unsatisfactory the dichotomy between prosecution and defence, and pointed out that there are other interests involved, including the complainant (who may also be a witness), or other witnesses, who may have a different perspective from that of the prosecution. In particular it was pointed out that the complainant and some witnesses' participation in the trial may give rise to "process values" reflected, for example, in some of the arrangements for their giving evidence. It was also pointed out that the complainant, whilst having an interest in an accurate outcome, may also have an independent interest in having the complaint "go the distance" (that is, be judged by a jury), the defendant having been obliged to elect whether to give evidence and, if so, having that evidence tested. Such an interest would be affected by a premature ending of the trial and is worthy of regard as a process value, alongside that of the

in Pennock and Chapman (eds) *Due Process* (1977) p 126. D J Galligan favours what we call accuracy of outcome, and in *Due Process and Fair Procedures* (1996) pp 75–82 attacks the coherence of what he describes as the "dignitarian" alternative. The argument is essentially about the theoretical priority of one or other of the two possible justifications. Our use of the distinction is theoretically simpler and does not require us to enter that debate. Terminology differs: Summers uses "good result efficacy" and "process values", Michaelman uses "formal" and "nonformal", Galligan uses "outcome related" and "non-outcome related", and Craig uses "instrumental" and "non-instrumental".

[13] Para 3.21.

defendant in not being subject to delay in determination of the issue, or being placed at risk for a second time.

7.16 One respondent called into question our positing the approach in terms of "fairness". He couched his support for our main proposals, differentiating between rulings which do and do not bring the trial to an end ("terminating" and "non-terminating" rulings), in terms of: (i) the practical implications of constant interruptions of the trial and (ii) the inconsistency of the rule that the prosecution cannot appeal an acquittal whereas the defence may contest a conviction.

7.17 A number of respondents agreed with us that delay was a major factor affecting the defendant which should be taken into account. So too was the question whether, if the prosecution is to have a right of appeal against an acquittal arising from a terminating preliminary ruling, the defence should equally have a right to appeal a *refusal* to make a preliminary ruling which, if made, would have terminated the prosecution.

7.18 In our judgment our approach as set out in CP 158, which was approved by the large majority of respondents who addressed the issue, is broadly correct. We have concluded that, whether or not this description finds universal favour, a trial is a forum in which it is sought to do justice between the different, often incompatible, interests of the various participants. We agree, however, that the participants whose interests have to be accommodated are not limited to the prosecution, representing the public interest, and the defendant, but may also include the complainant insofar as that person may have a different perspective from that of the prosecution. The concept of "balancing" those competing interests is, nonetheless, in our judgment entirely appropriate.

7.19 The concept of the "fairness" of the trial now has a particular meaning by virtue of the ECHR, which, in conjunction with the Human Rights Act 1998, imposes on our legislature and our courts an obligation to ensure that our rules and procedures are capable of achieving, and in their application do achieve, a "fair" trial for the defendant.[14] Our rules of procedure need not replicate the ECHR concept of fairness, as long as they meet its minimum requirements. In judging what recommendations to make in this report, we must have regard to these obligations to achieve fairness in the trial for the defendant. We agree, however, that our recommendations for change should be judged by reference to what would be "in the interests of justice", as well as what would achieve "fairness" to the defendant in the strictly ECHR sense.

[14] Article 6 gives the defendant a right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The requirements of a fair trial in ECHR terms are the subject of a substantial body of jurisprudence. For a useful summary, see John Wadham and Helen Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (1999).

WHICH RULINGS SHOULD GIVE RISE TO A PROSECUTION RIGHT OF APPEAL?

Rulings made in advance of the trial

Our provisional proposals and the response on consultation

7.20 In Part V of CP 158 we explained that there are two different kinds of hearing in which rulings may be made in advance of the trial proper, namely preparatory hearings and pre-trial hearings. Preparatory hearings may be held only in certain kinds of case and only for purposes of trial management. Rulings made at them are appealable by either side. Pre-trial hearings are freely available, but rulings made at them are not appealable (except as a ground of appeal by the defence in the event of a conviction).

7.21 The assumption which underpins the preparatory hearing regime is that the rulings made will not normally have the effect of bringing the proceedings to an end, because they can only be made for the purposes of the better management of the trial. An application to stay the proceedings as an abuse of process, for example, falls outside the ambit of a preparatory hearing;[15] so does an application to quash the indictment.[16] If such an application is successful, therefore, the prosecution has no right of appeal. In the terminology we used in CP 158, rulings made at preparatory hearings are usually "non-terminating" rulings. If, however, the ruling does fall within the statutory purposes of the preparatory hearing, it is subject to appeal, even if, in the absence of an appeal, it would, in fact, have brought the proceedings to an end (a "terminating" ruling). In *R*[17] the judge had rejected the defence's submissions that the proceedings should be stayed as an abuse of process *and/or* that crucial evidence should be excluded under section 78 of the Police and Criminal Evidence Act 1984. The defence was unable to appeal against the former ruling; but the latter was a ruling on a "question as to the admissibility of evidence", and was therefore open to appeal. It follows that, had that ruling gone the other way, the *prosecution* would have been able to appeal against it even though the effect of it would have been to terminate the case.

7.22 Rulings made at pre-trial hearings may be terminating or non-terminating. There is no requirement that such hearings be held only for purposes of trial management. We considered in CP 158 whether there should be a right of appeal against an acquittal arising from a terminating ruling made during the trial itself. We concluded that there should. From that conclusion it followed logically that there should be a right of appeal against an acquittal arising from a terminating ruling made *before* the trial, whether made at a preparatory or a pre-trial hearing. We also considered in CP 158, however, whether there should be a prosecution right of appeal against all *non*-terminating rulings made before the trial, not only (as at present) where they are made at a preparatory hearing, but also where they are made at a pre-trial hearing. We provisionally rejected this idea on the ground

[15] *Gunawardena* (1990) 91 Cr App R 55.

[16] *Hedworth* [1997] 1 Cr App R 421.

[17] *The Independent* 10 April 2000.

that it would make for excessive delay and disruption, given the frequency with which pre-trial hearings are held on what is scheduled to be the first day of the trial.

7.23 We provisionally concluded, therefore, that

(1) the present preparatory hearing regimes, under which either side may appeal a ruling in advance of the start of the trial before the jury, constitute elements of a fair trial procedure;[18] but

(2) there is no sound basis for extending the rights of appeal under the preparatory hearing regimes to non-terminating rulings made under the pre-trial hearing regime;[19] and

(3) there should be a prosecution right of appeal against a ruling made before the start of the trial proper (and not covered by the existing right of appeal against a ruling at a preparatory hearing), but only where the ruling is a terminating one.[20]

7.24 There were no dissentients to proposals (1) and (3). Certain respondents suggested, however, that if there was to be a prosecution right of appeal against an acquittal arising from a pre-trial terminating ruling then equality of arms required that there be a corresponding defence right of appeal against a *refusal* of an application for such a ruling. The point was made that if the judge had erroneously refused such an application it was a total waste of resources, time and effort for the defendant then to have to go through a long trial and, if convicted, only at that stage to have the right to appeal the conviction. We consider this below.[21]

7.25 Of the respondents who dealt specifically with our conclusion that no right of appeal should be introduced against *non*-terminating rulings at pre-trial hearings, two thirds agreed but one third did not. Some thought that there should be a system which encourages prosecution and defence to identify issues for determination before the trial. Others could not see the logic of limiting the operation of the preparatory hearing regime and thought that any ruling, whether terminating or non-terminating, should be susceptible to appeal if made in advance of the trial. Others were of the view that the interests of justice were no less harmed where, as the result of an erroneous ruling, the prosecution case was emasculated, leading to an acquittal, than where the impact of the ruling was such as to persuade the prosecutor to drop the case. The difference between the two types of case might be marginal, and reasonable prosecutors might, as a matter of judgment, differ as to which was the right course.

[18] Para 5.16.

[19] Para 5.24.

[20] Para 5.29.

[21] Para 7.41 below.

7.26 One respondent thought that non-terminating rulings on the way in which children, or other vulnerable witnesses, might give evidence presented a clear example of the inequity of denying the prosecution an appeal where such decisions were made otherwise than at a preparatory hearing.

7.27 One respondent, a retired Lord Justice of Appeal, suggested that the problem was that preparatory hearings in non-fraud cases were limited to cases of length and complexity. This meant that very serious cases, which were neither long nor complex, would not fall within the preparatory hearing regime, with the consequence that erroneous non-terminating rulings would not be susceptible to appeal. He suggested that if the seriousness of a fraud case was sufficient justification for a preparatory hearing, there was no reason why it should not be sufficient in non-fraud cases too.

7.28 We received information from Scotland that the prosecution there has the right to appeal a decision of a trial judge at a preliminary hearing on any question of relevancy or competency, subject to leave of the trial judge. Further, there is a catch-all power for the trial judge to consider any point which could be resolved with advantage before trial, with the prosecution having a similar right of appeal with leave. As a matter of practice, however, we were informed that Scottish courts are loth to determine questions of the admissibility of evidence in advance of the start of the trial. Their approach is to regard such applications as academic, unrealistic, or unfair to the Crown, because they are judged in vacuo and require the Crown to anticipate pessimistically the nature of the evidence it will be able to lead at the trial. Further, a ruling on such a matter is binding on the trial judge and cannot be reopened.

Our conclusions

7.29 The preparatory regime is apparently acceptable. It involves, as a fundamental consequence, that a ruling made in advance of the trial may be appealed, whereas the same ruling made during the trial cannot. Thus, we conclude that there is no objection in principle to an arrangement under which the same ruling, made at different stages of the proceedings, may be either susceptible or not susceptible to appeal by virtue only of the stage at which it is made.

7.30 The problems on which we focused in rejecting a right of appeal against non-terminating rulings made at pre-trial hearings were those of inconvenience, delay and disruption, given the large number of cases in which such rulings are routinely and properly sought immediately before the start of the trial. We can see no good reason to change that view. By parity of reasoning we also reject the suggestion made by some respondents that the defence should have an immediate right of appeal against a refusal to make a terminating ruling at a pre-trial hearing (as distinct from a refusal to make such a ruling at a preparatory hearing). That does not mean, however, that there is any reason in principle not to give either side a right of appeal against a non-terminating or a terminating ruling made at a hearing in advance of trial, *provided* that that hearing is part of a structure under which the delay to the trial and inconvenience to the participants

is kept to a minimum. In our view the preparatory hearing procedure satisfies these requirements.

7.31 As we pointed out in CP 158, the recent enlargement of the power to order a preparatory hearing has a significant potential. It may be used by either side and either side may appeal rulings made at such hearings. The case of *Z*[22](now known as *Edwards*), where the House of Lords held that in a trial for rape the Crown could adduce evidence of previous alleged rapes of which the defendant had been acquitted, is a good example of how such a procedure can serve the interests of justice. As we pointed out in CP 158, the present criteria in non-fraud cases of length and complexity as the trigger for a preparatory hearing may be a moveable feast. We would be surprised if *Edwards* was thought by many to be an obvious candidate for inclusion on the ground of either length or complexity. On the other hand it was certainly a case of great seriousness, and the issue was sufficiently fundamental to the presentation of the case that there can be little argument that it was a suitable case for consideration at a preparatory hearing, with the prospect of an interlocutory appeal by either side against the ruling. We also note that there have been reported cases of successful appeals, by the prosecution and the defence respectively, against interlocutory rulings on points of law in what appear at first blush to have been otherwise straightforward cases of indecent assault[23] and rape.[24] In neither of these cases does it appear that the question whether the court had jurisdiction to hold a preparatory hearing was raised. Had it been raised, we should be surprised were these cases to have satisfied the current test of length or complexity.

7.32 Furthermore, we can see no reason why preparatory hearings should be limited to considering matters which relate solely to the management of the trial and should not, in addition, be hearings at which issues such as severance, joinder of counts, or applications to quash the indictment or to stay proceedings on the grounds of abuse of process may be determined, with each side having a right of appeal from decisions made.

7.33 Likewise, we can see no good reason for the present distinction between fraud cases, where a preparatory hearing may be held if the case is of such seriousness or complexity that substantial benefits are likely to accrue from such a hearing, and other cases, where such a hearing may be held only if the trial is likely to be long or complex enough to warrant it. We consider that there should be jurisdiction to hold preparatory hearings, with rights of appeal for either party, whenever the case is of such seriousness that substantial benefits are likely to accrue from a preparatory hearing, regardless of whether the trial is likely in addition to be long or complex.

7.34 **We recommend that**

[22] [2000] 2 AC 483.

[23] *K*, *The Times* 7 November 2000.

[24] *A*, unreported, 15 January 2001.

(1) the preparatory hearing regime, in both fraud and non-fraud cases, should be extended to include rulings on potentially terminating matters such as severance, joinder of counts, or defendants' applications to quash the indictment or to stay the proceedings on the grounds of abuse of process; and

(2) in non-fraud cases, the criterion of seriousness should be added to the list of matters which will enable a preparatory hearing to be held.

(Recommendation 25)

7.35 Such recommendations would, in our judgment, rationalise the present anomalous position, and would encourage the parties to apply their minds at an early stage to the issues which may advantageously be determined in advance of the trial and from rulings on which either side may appeal.

7.36 One respondent suggested that the failure of a defendant to appeal an adverse ruling made at a preparatory hearing should preclude the defendant from raising the correctness of that ruling on appeal against conviction, unless it would be contrary to the interests of justice to deny the defendant an appeal against conviction on that ground. This suggestion would impact on the defendant's existing and possible future rights of appeal and falls outside our terms of reference. Accordingly we make no recommendation on it. It may be thought to have some merit and to be worthy of consideration for inclusion in a measure which extends the rights of appeal of both sides by expanding the scope of the preparatory hearing. It might be said that such a rule would encourage unnecessary interlocutory appeals. We do not think it would. Such appeals would only be against rulings where the first instance judge has decided that substantial benefits would accrue from having the issue dealt with at a preparatory hearing. That advantage must be enhanced by making sure that the ruling is correct, provided the existing procedures for expediting such appeals from preparatory hearing rulings are applied properly.

Non-terminating rulings in the course of the trial

7.37 In CP 158 we provisionally concluded that the prosecution should not be given a right to appeal against a non-terminating ruling made during the course of a trial.

7.38 The vast majority of respondents who addressed this conclusion agreed with it. Suffice it to say that, save for one respondent, no serious argument was put up to counter our reasoning – namely that an appeal against a non-terminating ruling during the trial would be wholly impracticable, would throw the system into chaos and would be contrary to long established principle. The one argument against our conclusion was that the disincentives to abandoning a trial part way through, in order to pursue an appeal against a non-terminating ruling, were such that the prosecution would only do so for very good reason. In our view that places far too much reliance on the judgment of the prosecution, and would

result in individual prosecutors routinely being placed under intolerable pressure by those who perceived that their interests had been damaged by such a ruling.

7.39 Accordingly we make no recommendation for a prosecution right of appeal against a non-terminating ruling made during the course of a trial.

Terminating rulings during the prosecution case

7.40 In CP 158 we provisionally concluded that a prosecution right of appeal against a terminating ruling made during the course of a trial is capable of being fair.[25] We accordingly proposed that, subject to certain procedural safeguards, there should be a prosecution right of appeal against a terminating ruling made during the trial up to the conclusion of the prosecution evidence.[26]

7.41 The proposal was supported by the vast majority of those who specifically addressed it. Of those who opposed it, the Criminal Bar Association and the Bar Council said that the only fair way for the prosecution to have such a right of appeal was to give the defence a corresponding right of appeal against refusal of an application for such a ruling. As that could not be done within the trial, the only way to give the prosecution the right of appeal against such rulings was to extend the preparatory hearing regime. We remain unpersuaded by that view for the reason given in CP 158, namely that the defence right of appeal is most properly and conveniently exercised at the end of the trial after conviction. It may, of course, include, as a ground of appeal, the refusal of the trial judge to make a terminating ruling. A defence right of appeal during the trial would lead to the delay and disruption to which we referred in CP 158. There is effective and practical parity in that, if the defendant is convicted, then the general right of defence appeal against conviction includes an appeal against the refusal of an application for a terminating ruling. Thus both sides have an appeal against the ruling at the conclusion of the trial, whenever that may be.

7.42 Two other respondents said that rulings on the admissibility of evidence, or on identification evidence, often involved the trial judge forming a view of oral evidence given by witnesses whom the Court of Appeal would not have seen. This is certainly true. The point is, however, that the jury will not have seen that evidence either, as it will have been given in the voir dire. Thus the judge is not at that stage carrying out a quasi-jury role, so there would be no question of an appeal against such a decision impinging on the fact-finders' role. Moreover, the admission of evidence after a voir dire is a well established basis for a defence appeal against conviction, and there are long established principles which guide the Court of Appeal on when, and on what basis, it may overturn a decision taken as a matter of discretion by a trial judge after hearing evidence. We do not regard the fact that it may be disinclined to allow appeals against acquittals arising from certain types of terminating ruling, absent the most startling of

[25] Para 4.18.

[26] Para 6.7.

circumstances, as a reason for not giving a right of appeal which may, in an appropriate case, succeed.

7.43 A number of respondents raised an interesting procedural point, namely: what happens where an indictment contains a number of counts, a terminating ruling is made in respect of one, or some, but not all, and the prosecution there and then expresses its intention to appeal against the acquittals on those counts but also to continue with the remaining counts. Our conclusion is that this presents no difficulty. The trial of the remaining counts will proceed as at present, with verdicts being brought in. At the hearing of the prosecution appeal against the acquittals, the fact that there has been a trial and a verdict in respect of some of the counts will have to be considered by the Court of Appeal in addressing the "interests of justice" test. We can distinguish three types of case.

(1) Two or more counts on the indictment arise out of the same facts, and one or some are terminated but the other(s) remain. If the trial proceeds to a verdict on the remaining count(s) any further trial of the terminated count may be barred by the operation of the rule in *Connelly v DPP*. [27]

(2) Where the count remaining is a strict, but lesser, alternative to the one which has been terminated (for example, a count of theft where the terminated count is one of robbery) and can be proceeded with, then the *Connelly* principle may operate to prevent a further trial on the more serious count even if it was wrongly dismissed at the first trial.

(3) Alternatively, if the count left on the indictment were a *more* serious alternative than that which had been terminated and was the subject of prosecution appeal (for example, a count of wounding with intent where the terminated count is one of maliciously inflicting grievous bodily harm) the autrefois rule may operate as a bar to any further trial of the lesser, terminated count. This would be equally so whether the defendant was acquitted or convicted of the more serious count. It is highly unlikely that such a sequence of events would arise but, if it did, that would be the outcome.

7.44 In the first two circumstances described above, it is quite possible that the Court of Appeal would recognise an exception to the rule in *Connelly*, by analogy with the exceptions already recognised in Lord Devlin's speech in that case. In order to avoid any possible *Connelly*/double jeopardy trap, the prosecution might wish, at the time of the ruling and when announcing its intention to seek leave to appeal, to apply to have the first jury discharged without the alternative count proceeding to a verdict. The trial judge would then have to make a ruling on that application. If the judge were to refuse that application at the behest of the defence then, prima facie, any consideration by the Court of Appeal of the impact of the rule in *Connelly* on the question whether a retrial of the terminated count would be in the interests of justice would take into account the fact that the Crown had made that application and the court, at the behest of the defence, had

[27] [1964] AC 1254; see paras 2.16 – 2.19 above.

refused it. In those circumstances we would be surprised were the Court of Appeal to rule that there could never be a further trial by way of an exception to the rule in *Connelly*.

7.45 It is just conceivable (though highly unlikely) that there might be a case where the prosecution might decide to treat the court's refusal to discharge the jury as a terminating ruling, by offering no further evidence on the remaining counts. The ensuing acquittal might then be capable of appeal by the prosecution, though we doubt whether the Court of Appeal would be sympathetic to the prosecution taking such a course.

7.46 The fact that in such cases nice judgments may have to be made, respectively, by prosecution, defence and the trial judge does not, in our judgment, undermine the merit of the proposal. It is unlikely that any such questions would arise where the joinder of the counts was on the basis that they comprised a series of the same or similar offences, as distinct from arising out of the same facts.

7.47 It would follow, as a matter of good practice, that an appeal by the prosecution in respect of counts which had been terminated should not be heard until after the conclusion of the trial of the remaining counts. That might well be an occasion for a successful application for extension of the time limits for a hearing of the appeal.[28]

7.48 We anticipate no problems where there are trials of co-defendants, one of whom is discharged, but where the trial of the remainder continues, save that, as in the previous paragraph, we can see the case for an extension of the time for hearing the appeal until after the conclusion of the case concerning the remaining defendant(s).

7.49 **We recommend that the prosecution should have a right of appeal against an acquittal arising from a terminating ruling made during the trial up to the conclusion of the prosecution evidence.**

(Recommendation 26)

Rulings of no case to answer

7.50 At the close of the prosecution's case, it is open to the defence to make a submission that there is no case to answer. If the judge agrees, the jury is directed to acquit immediately. The criteria to be applied by the judge in ruling on such a submission were laid down by the Court of Appeal in *Galbraith*.[29] It was there said that the judge should stop the case if

[28] See paras 7.130 – 7.135 below.

[29] [1981] 1 WLR 1039.

(1) there is no evidence that the alleged offence was committed by the defendant,[30] or

(2) the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it.

7.51 These are known as the two "limbs" of *Galbraith*. Limb one is a pure point of law. Limb two involves the judge coming to a conclusion on the evidence. In explaining the ambit of the second limb the Court of Appeal distinguished a case falling within that limb from a case where

> the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty …

In such a case the judge should leave the case to the jury.

7.52 In CP 158 we argued that the existence of a prosecution right of appeal against a successful submission of no case would put the defence in an invidious position. The dilemma for the defence would be that if it makes a submission of no case, and is successful, there is a danger that the prosecution will appeal and there will be a retrial, which might go worse for the defence than the original trial. There might therefore be a disincentive to the making of a submission, even if it might succeed. We thought it wrong that such a disincentive should be created. We therefore provisionally concluded that there should be no right of appeal by the prosecution against a ruling of no case to answer made at the conclusion of the prosecution case.[31] This was by far the most controversial of our provisional proposals. Respondents were more or less equally divided on it.

7.53 The main lines of argument put forward by those who opposed our proposal were as follows.

7.54 If there is to be a right for the prosecution to appeal an acquittal arising from an erroneous terminating ruling made during the prosecution case, it is irrational to refuse such a right against an acquittal arising from an erroneous terminating ruling made within minutes of the end of the prosecution case. Where the ruling is, in truth, based on an assessment of the strength of the evidence, the screen of having to obtain leave to appeal would prevent appeals by the prosecution in all save the most exceptional cases.

7.55 There is ample precedent for such a right of appeal in the procedure requiring magistrates to state a case at the behest of the prosecution. This is often in the

[30] This includes the case where there is evidence of some elements of the offence, but no evidence of one or more other essential elements.

[31] Para 6.20.

context of a ruling of no case at the conclusion of the prosecution evidence. The tests being applied by the magistrates at that stage are the same. The defence power to make a submission of no case is the same. The tactical prejudice that we perceived as arising for defendants, if the Crown were given such a right in the Crown Court, does not appear to have arisen as a notable problem at the magistrates' court level.

7.56 A successful submission of no case, erroneously acceded to, deprives the jury of a proper opportunity to judge the case, diminishes the legitimacy of the resulting acquittal, may appear to interested persons and the public to be the product of bizarre technicality, and damages public confidence in the system.

7.57 The possibility of an appeal against an acquittal arising from an erroneous ruling of no case would help to "keep the judges honest". A senior trial judge with Court of Appeal experience argued that "It is a temptation for a weak judge with a difficult case to rule against there being a case to answer. That, I believe, is significant."

7.58 Some respondents doubted the cogency of our assertion that the defence would be impaled on the horns of an intolerable dilemma, in that it would have to choose between making a submission of no case (with the risk of a retrial following a successful appeal against the judge's acceptance of that submission) and allowing the case to go to the jury (with the risk of a conviction offering no grounds for appeal). Some thought the way to remove this dilemma was to impose a duty on the trial judge to consider at the close of every case whether or not the Crown had made out a case, even if the defence had not raised the issue. One thought that there should be a *duty* upon the defence to raise it.

7.59 A few respondents opposed our proposal only insofar as it applied to the first limb of *Galbraith*, that is where the question was whether there was no evidence that the crime had been committed by the defendant. One High Court judge put it this way:

> The first type,[32] by far the commonest, is … where a judge decides that as a matter of evidence the prosecution have not produced sufficient to justify a conviction. The second class[33] is a decision that the evidence adduced, even if believed, does not disclose the offence in law. There should be no right of appeal against the first category … though judges must be careful not to usurp the jury's function there are many occasions when the trial judge's decision to withdraw the case is based on his view that the crucial witnesses for the prosecution are so obviously unreliable that it would be unsafe to permit the trial to continue and the defendant to remain in jeopardy. However for the second type of decision … based on matters of law rather than the judge's discretion … in my opinion there should be a right of appeal, and, if the appeal succeeds, a retrial.

[32] That is, the second limb of *Galbraith*. (Footnote added)

[33] That is, the first limb of *Galbraith*. (Footnote added)

7.60 The CPS summarised its opposition to our proposal in the following way:

> … in reality (i) The right to appeal would discourage unmeritorious submissions whether before, during, or at the close of the prosecution case.
>
> (ii) The prosecution would never be able to mount an appeal based upon a *Galbraith* assessment of the credibility of the evidence which the Court of Appeal had not heard but only upon erroneous rulings of law, eg as to the legal nature of an element of crime …
>
> (iii) The mere existence of the right would serve to improve the quality of such rulings and, in cases where the judge had clearly erred in law, to clarify the law.
>
> It is unacceptable to right thinking people that defendants should be acquitted of serious offences because of a mistake by a judge as to the law.

Our conclusions on appeals from rulings of no case to answer

7.61 We have concluded that we should amend our proposals to take account of some of these arguments. In particular we agree that there is no logical distinction between a terminating ruling of law made during the prosecution case and one made at its conclusion.

7.62 We also accept that there may be a temptation for trial judges too readily to accept defence submissions where they know that their reasoning will not be susceptible to scrutiny by the Court of Appeal. In any event the discipline of possible appeal to the Court of Appeal would serve to concentrate minds and improve both the quality of decision taken and its expression.

7.63 If a case is to fail on a legal argument it is better for public confidence in the system of criminal justice that it be susceptible to the second opinion of a higher court than that it be unappealable.

7.64 We also agree that the case stated procedure in the magistrates' court is a template, at least for a prosecution appeal on a point of law, and that there is no evidence that defendants labour under a disadvantage in pursuing a submission of no case at that level because of it.

7.65 On the other hand we do not accept the arguments which seek to diminish the dilemma for the defence which we described. The fact that the defence has other difficult choices to make is not a sufficient argument for adding to that burden. Arguments were presented which suggested that there is no particular disadvantage to a defendant in being required either (i) to make a submission and to face a retrial after an appeal; or (ii) to forgo a submission and give evidence for fear that an appealed ruling of no case would deprive the defendant of the chance of an acquittal by a jury in a trial which is going well. We reject those arguments. They fail to take any, or any sufficient, account of the fact that trials are organic unpredictable events, each one of which has its own momentum, or feel, deriving from the particular interplay of its cast of characters

on a particular occasion. The progress made by the defence in one trial may well not be repeated at a retrial. It is a truism, recognised by most experienced practitioners, that the high point of the defence case is invariably at the close of the prosecution case. This is quite apart from the obvious fact that at a retrial witnesses will have had a dry run, tactics will have been revealed and weaknesses in the prosecution case will have been spotted and possibly plugged.

7.66 In our view, it is possible to reconcile these different arguments in a principled way.

7.67 There is no doubt that the two limbs identified in *Galbraith* are distinct. The first limb concerns a question of law, and there is no logical reason why the prosecution should not have a right of appeal against an acquittal arising from such a terminating decision if it is to have a right of appeal against acquittals arising from other terminating rulings made in the course of its case.

7.68 On the other hand, the second limb of *Galbraith* does not involve a point of law at all. Rather, the judge is required to perform a quasi-jury role. Without usurping the role of the jury, the judge has to assess the strength of the prosecution case. If the judge is of the view that, taking that case at its highest, no jury properly directed could properly convict, the judge's duty is to protect the defendant from any further risk by removing the case from the jury.

7.69 There is no more reason to give the prosecution a right of appeal against such a decision than there is to give it a right of appeal against an acquittal by a jury. We are heartened in this conclusion by the CPS's view that such an appeal would be inconceivable.

7.70 In CP 158 we expressed the opinion that it would be difficult in practice to distinguish the two limbs of *Galbraith* and that it might lead to bizarre positions being taken up in argument by, respectively, the prosecution and defence.[34] On reflection we believe that we were over-pessimistic on this score. The limbs are distinct. Whilst submissions are often made under both limbs and the arguments may merge, the tests are sufficiently distinct so that we are confident that trial judges will be able sufficiently to separate them in their own minds, and in their reasons for their decisions, to enable the parties and the Court of Appeal to see whether the ruling is one of law under limb one, susceptible to appeal, or one of no case on the basis of limb two, not susceptible to appeal. Where the ruling is on *both* bases, in practice there would, of course, be no appeal.

7.71 There was a suggestion that the trial judge might be required to certify under which limb of *Galbraith* the ruling is made. We do not think there would be any need for such a formal procedure. We recommend below that the prosecution must at the trial indicate its intention to seek leave to appeal.[35] If it does so then there is the opportunity, if either side so requests, for the trial judge, on the

[34] Paras 6.18 – 6.19.

[35] Para 7.114 below.

record, to indicate, if it is not clear, under which limb the ruling is made. We can see no reason to suppose that this would be required in many cases, nor, where it was necessary, can we see any judge refusing to do so if asked.

7.72 The defence dilemma which we described in CP 158 is one which will arise almost invariably where the submission to be made is on the basis of limb two, and so would not be affected by the existence of a prosecution right of appeal against an acquittal arising from a limb one ruling. If and to the extent that there were such a dilemma in the case of a limb one ruling, we now believe that the balance is in favour of the prosecution having the right of appeal. If the defence has decided to try to persuade the judge to dismiss the case on a legal basis which turns out to be wrong, it can have no cause to complain if on appeal it is denied the benefit of an error of law which it by its own arguments has induced.

7.73 It follows from the above analysis that we do not recommend any prosecution right of appeal where the case is one of identification and it is withdrawn from the jury because the quality of the identifying evidence is poor, such as where it depends solely on a "fleeting glance".[36] The judge in such a case is as much exercising a quasi-jury function as in applying *Galbraith* limb two. Such a decision is, of course, separate from any decision on the *admissibility* of identification evidence made during the course of the prosecution case which, whilst it may have been made after hearing evidence on the voir dire, does not involve the judge assuming the role of the jury in assessing the prosecution case on the basis of evidence which the jury has heard.

7.74 **We recommend that the prosecution should have a right of appeal against an acquittal arising from a ruling of no case to answer made at the conclusion of the prosecution evidence, but only where that ruling is made on a point of law under the first limb of *Galbraith*.**

(Recommendation 27)

Terminating rulings on disclosure after the close of the prosecution case

7.75 In CP 158 we identified one situation in which a terminating ruling might be made *after* the close of the prosecution evidence and the determination of any submission that there is no case to answer, namely where the ruling is for the disclosure of relevant material in the hands of the prosecution. The general rule is that such material should be disclosed to the defence, but the Crown can apply to the judge (who will hear only the Crown, in private) for a ruling that disclosure need not be made where it would not be in the public interest (such as where it would reveal the name of an informer).[37] Such rulings are generally made before the end of the prosecution case. The judge is under a duty to keep

[36] See *Turnbull* [1977] QB 224.

[37] Criminal Procedure and Investigations Act 1996, ss 3(6), 7(5), 8(5) and 9(8); Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997 No 698) rr 2–3.

such rulings under continuous review,[38] however, and it is possible that the defence evidence might shed new light on the circumstances, such as to make the judge reconsider the position and order disclosure. If the Crown is not willing to make disclosure, the proceedings will come to an end and the defendant will be discharged. In CP 158 we invited views on whether there should be a special rule in relation to such late rulings, but expressed the provisional view that they are unlikely to be common enough to justify such a rule.[39]

7.76 Twenty-one respondents addressed this issue. Ten were in favour of a special rule and ten against. One merely noted that such rulings were very rare as disclosure issues invariably emerged during cross-examination of prosecution witnesses. On the other hand, Customs and Excise were of the view there should be such a special rule, and stated that their National Investigation Service were aware of a number of cases where potentially terminating rulings had been made on disclosure during the course of the defence case. They suggested that the absence of such a special rule might lead to the defence attempting to delay rulings on disclosure for tactical reasons. One High Court judge suggested that the prosecution should be given the right to discontinue proceedings during the defence case where the alternative was to provide disclosure. We recognise the force of this point and it is a matter worthy of consideration. It falls outside our terms of reference, however, and so we make no formal recommendation upon it.

7.77 With the exception of Customs and Excise, the preponderance of opinion was that such issues scarcely ever arise at such a late stage. We are not persuaded, therefore, that a case has been made out for the creation of a singular exception to the general rule which we propose. Accordingly, we make no recommendation for such an exception. Were it to become apparent that defendants, or their advisers, were, for tactical reasons, withholding issues so that rulings on disclosure had to be made after the end of the prosecution case, then we can see no reason why the issue should not be revisited.

Misdirections to the jury

7.78 In CP 158 we provisionally concluded that there should be no right of appeal by the prosecution against a jury's verdict of not guilty, even where there has been a misdirection by the trial judge which may have favoured the defence.[40] There was virtually no opposition to this conclusion, and none from any practitioner or judge. We therefore can see no reason to depart from it. We make no recommendation for any prosecution right of appeal against misdirections to the jury, or acquittals resulting from them.

[38] Criminal Procedure and Investigations Act 1996, s 15(3).

[39] Para 6.9.

[40] Para 6.26.

THE OFFENCES TO WHICH THE NEW RIGHT OF APPEAL SHOULD APPLY

7.79 We have concluded that it would not be *unfair to defendants* to give the prosecution a right of appeal against acquittals arising from terminating rulings made in the course of the trial. This conclusion applies irrespective of the nature of the offence charged. It does not follow, however, that the introduction of such a right of appeal would be equally *desirable* irrespective of the nature of the charge. Offences tried on indictment range from the very serious to the comparatively minor. In the latter kind of case, it is arguable that the costs and delays inherent in an appeal, even if not rendering the appeal unfair, would nevertheless be out of proportion to the public interest in securing a conviction. In CP 158 we argued that only in the more serious cases is there a pressing need for reform, because it is in those cases that the public interest is most damaged by the erroneous termination of proceedings.

7.80 We therefore provisionally proposed that the new right of appeal should be available only where, had the defendant been convicted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the ground that it was unduly lenient.[41] This power applies to offences triable only on indictment, and such other offences or descriptions of case as may be specified by order. This order-making power has been used to apply the provisions to the smuggling of drugs and indecent or obscene material; the production, cultivation or supply of controlled drugs; indecent assault; unlawful sexual intercourse with a girl under 16; incitement of a girl under 16 to have incestuous sexual intercourse; gross indecency with a child under 14; threats to kill; cruelty to a child; and serious fraud cases.[42]

7.81 The large majority of respondents who dealt with this proposal (including the CPS) approved it. There were nine who opposed. All save two were in favour of no limit to the offences for which the prosecution could appeal. Those who favoured no limit did so for a variety of reasons. One was a perception that victims of any crime should have the same right to have errors of law corrected in the case which directly affected them. A variation on that theme was that otherwise there would develop a two-tier system of justice. Another line of attack was that the concept of limiting the reach of appeal was Treasury-driven and should be disregarded. Another said that the sole determinant of which cases to pursue on appeal should be the CPS, who had to have regard to the public interest and could be trusted so to do. In our judgment, whilst these are respectable arguments in theory, in practice they are unsustainable. As it stands the criminal law is hierarchical, based on perceptions of seriousness applied by various decision-takers. Like it or not, there are not only resource implications but, as we emphasised in CP 158, delay implications which would impact on defendants and victims in cases beyond the instant one.

[41] Para 7.9.

[42] Criminal Justice Act 1988 (Reviews of Sentencing) Order 1994 (SI 1994 No 119); Criminal Justice Act 1988 (Reviews of Sentencing) Order 1995 (SI 1995 No 10); Criminal Justice Act 1988 (Reviews of Sentencing) Order 2000 (SI 2000 No 1924).

7.82 The other argument was that the limit should be fixed at offences which carry a certain maximum sentence. One suggestion was of 14 years or more. This was on the basis that by restricting it to a particular level of seriousness there was the possibility of parity with our proposals on double jeopardy. That, of course, would not arise under our final recommendations for double jeopardy.[43] It was pointed out by the respondent advancing this argument that the present regime for prosecution appeal against sentence has a different rationale so as to affect the offences included within its reach. They will tend to be offences where there is a perceived problem in sentencing. The different considerations for inclusion of offences in a list giving rise to a prosecution appeal against a directed acquittal need not produce the same list of offences.

7.83 The other suggestion was to limit the right of appeal to offences where there was a maximum sentence of five years or more but that, within those offences, only serious instances should be capable of appeal. The prosecuting authority should determine what cases were sufficiently serious to justify an appeal. The rationale for this suggestion was that a number of frauds which are not categorised as "serious" for the purpose of trial management are, nonetheless, in colloquial terms, "serious" and affect large numbers of individuals. These cases by their nature can give rise to a number of technical legal arguments and rulings, some of which may be terminating and arise during trial. Under our scheme the prosecution would not have the right to appeal in these cases. We have some sympathy for this argument. We believe, however, that the solution to the problem lies in part with the enhanced preparatory hearing regime which we have recommended,[44] and in the Home Secretary's power to add to the list of offences to which the rights of appeal apply, if it were thought necessary or desirable.

7.84 We remain of the view that our proposal is the best available. It has the advantage of certainty and consistency with the other significant prosecution right of appeal at the end of a trial. Further it is flexible as, if a need arises, the Minister can act to bring a certain category of case within the regime.

7.85 **We recommend that the new right of appeal should be available only where, had the defendant been convicted of the offence (or any of the offences) of which he or she is acquitted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the grounds that it was unduly lenient.**

(Recommendation 28)

THE CRITERIA FOR THE NEW RIGHT OF APPEAL

7.86 We argued in CP 158 that, even if the Court of Appeal concluded that the judge's ruling was wrong, it would be wrong for a prosecution appeal to result in a retrial without the court first considering whether, in all the circumstances of

[43] See para 4.42 above.

[44] See para 7.34 above.

the case, a retrial was in the interests of justice. For example, something may have happened between the time that the original trial was terminated and the appeal hearing that substantially undercuts the prosecution case, such that the Court of Appeal considers that there is now no prima facie case; or the health of the defendant might have deteriorated to such an extent that further prosecution was no longer in the interests of justice, after the delay necessitated by the appeal. Allowing the Court of Appeal to decline to order a retrial in such circumstances would provide the court with the means to do justice in unusual and unforeseeable cases.

7.87 We went on:

> Yet another possible reason for refusing a retrial is that, although the ruling was wrong, the prosecution's decision to offer no or no further evidence in the light of that ruling was questionable. It is possible that a prosecutor may decide on that course of action not because the ruling makes the prosecution case unsustainable but because it offers an opportunity to terminate a trial which, for whatever reason, is perceived as going badly and is therefore likely to fail – thus preserving the chance of a retrial, after a successful appeal, before a different judge and jury, and where the mishaps of the first trial may be avoided. In other words, the decision may have been dictated by tactics in circumstances where, but for the right of appeal, the prosecution would not have been terminated. We doubt that this situation would often arise. Nevertheless, we think prosecutors should be discouraged from regarding an appeal as an easy option, offering the opportunity to treat an erroneous, damaging, but not fatal ruling as a pretext for aborting a trial which is going badly in the hope of securing a retrial.[45]

7.88 We provisionally proposed that

(1) the sole criterion to be applied by the Court of Appeal in determining an appeal against a terminating ruling should be whether, in all the circumstances of the case, it is in the interests of justice that the acquittal should be quashed and a retrial ordered; but

(2) in determining whether that criterion is satisfied, the court should be required to consider, together with any other factors that it may consider to be relevant,

  (a) whether the ruling appealed against was correct, and

  (b) where the trial was terminated by a decision of the prosecution to offer no or no further evidence, whether that decision was one which was open to a competent and conscientious prosecutor.[46]

7.89 There was general support for the first proposal. One senior judge took the view that the sole criterion should be whether the ruling was correct. If it was not, the

[45] Para 7.29.

[46] Para 7.33.

appeal should succeed. The Justices Clerks' Society thought that the question should be whether the proceedings overall would be fair were there to be a retrial. Another group of practitioners thought that the test should be whether the ruling was wrong as a matter of law, or whether the exercise of discretion was unlawful in the *Wednesbury* sense.

7.90 In our view the question whether the judge erred should be no more conclusively determinative of an appeal by the prosecution than it is on an appeal by the defendant, where the test is whether the conviction is unsafe.

7.91 On the "fairness" point we are aware that the Court of Appeal has twice in recent weeks dealt with the relationship between the domestic concept of "unsafe" and the ECHR requirement for fair proceedings[47] and that the House of Lords has approved the approach of the Court of Appeal in the latter of these two cases.[48] It has done so in a way which, whilst not expressly equating the two, accepts that in virtually every case a conclusion that the first trial was unfair will result in the conclusion that the verdict is unsafe. Equally we have no doubt that the Court of Appeal would conclude that if a retrial would make the proceedings unfair then it could not be in the interests of justice for there to be one. To that extent the concepts, though not identical, are for all practical purposes likely to be coextensive. We believe, nonetheless, that in a jurisdiction where the interests of prosecution and defence are at play the language used to guide the court ought to be neutral and not expressly refer to the interests of one party only, even though fairness of the proceedings to the defendant must be achieved.

7.92 A number of respondents expressed misgivings about our proposal that the court should merely make an order on the outcome of the appeal, without making it clear whether or not the judge's ruling had been wrong. A number of respondents touched on our concern for the invidious position of the defendant where the appeal was refused on the general test, but the decision reported was that the defendant had been the beneficiary of an erroneous ruling which had resulted in an directed acquittal. One suggestion for overcoming this was that the court should specifically be empowered to restrict reporting of the decision to dismiss the appeal to that fact. Any further reporting of the case should not reveal the identity of the defendant. This would have the same effect, in terms of reporting the case for purposes of precedent, as the practice of identifying preparatory hearing appeals by reference to a letter, such as *R v Z*.

7.93 We can see some merit in that argument. We agree that, whatever the formal decision may say, the Court of Appeal in giving its reasons will be obliged to state its reasoning, and, if this means that it dismissed the appeal notwithstanding that the judge's terminating ruling was wrong in law, then that will become apparent. This may be invidious for the defendant whose acquittal has, after all, been upheld. It seems to us, however, that to adopt the proposal referred to above

[47] *Francom and Latif*, *The Times* 24 October 2000; *Togher*, *The Times* 21 November 2000. See para 7.19, n 14 above.

[48] *Forbes* [2001] 2 WLR 1.

would unduly restrict freedom of speech in reporting public hearings. The order of the court will be that the appeal is dismissed so that the acquittal stands. This is a legally unambiguous statement. An acquittal by a jury, or the quashing of a conviction by the Court of Appeal, is never a declaration of the defendant's innocence. It is only ever a statement that the prosecution has not satisfied the jury of the defendant's guilt to the requisite standard, or that the jury's finding of guilt was unsafe. Whether anyone wishes to make a comment which goes behind the verdict or the order of the Court of Appeal is a matter for them, subject to the laws of defamation. We can see no reason why the successful respondent to a prosecution appeal should be in any different a position to any other acquitted defendant.

7.94 On the other hand we think there is force in the objection that an erroneous ruling is not merely (as we suggested) a relevant factor in determining whether a retrial would be in the interests of justice, but an essential prerequisite to the ordering of a retrial. It is inconceivable that the court might order a retrial despite concluding that the ruling was correct, and it is not our intention that there should be jurisdiction to do so. In our view the power to order a retrial should arise only if the Court of Appeal concludes that the ruling was wrong. This is not inconsistent with our view that the court should make no *formal order* other than to allow or dismiss the appeal. It simply involves giving express recognition to the practical reality that the court will first consider whether the ruling was right, and only if it concludes that the ruling was wrong will it go on to consider where the interests of justice lie.

The prosecutor's decision to treat the ruling as terminating

7.95 On our proposal that, where it was the prosecution's decision to offer no or no further evidence in the light of the ruling, the Court of Appeal should consider whether this decision was appropriate, there was more dissent. This raises the question how the Court of Appeal should deal with a case where the ruling has become a terminating one, not because it was intrinsically so, but because the prosecution chose to make it so by offering no evidence. We had, for good reasons, proposed that there should be no prosecution appeal against non-terminating rulings. We defined terminating rulings in such a way that it gave the prosecution the power, to an extent, to define what rulings were terminating rulings. Our concern, which found expression in this proposal, was that there may be occasions when the prosecution decided to throw in its hand where its case had become difficult but not impossible. If it did so then it would, by that means, gain a right of appeal. It would, in effect, have the power to grant itself a right of appeal, subject to obtaining leave, whenever it felt that the ruling was wrong and it would like the opportunity to test it on appeal.

7.96 We did not intend to suggest that prosecution counsel would, in bad faith, take a decision to offer no further evidence in order to gain a prospect of an appeal against an unhelpful ruling where the prosecution could have gone on, albeit to an extent handicapped. (Some of our respondents did suggest that this was a possibility which such a requirement would discourage.)

7.97 However, it was noticeable how vehement was certain of the opposition to our suggesting that there should be no appeal against *non*-terminating rulings during trial, and/or no extension of appeal against non-terminating rulings in advance of the trial. In particular, it was strongly pointed out that much injustice might be caused by an erroneous or perverse ruling on a matter of admissibility of evidence or the form of evidence which, whilst not leaving the prosecution's case so hopeless that it had to be abandoned, nonetheless left it significantly weakened, so that an acquittal may properly be said to have been attributable to that erroneous or perverse ruling. It is in those situations that we perceive prosecution counsel may have to make a difficult decision, and may come under pressure, from those who understandably feel strongly about the ruling and its impact, to drop the case and appeal. The temptation placed before counsel would be to opt to live to fight another day, by embarking on a route leading to an appeal, rather than carry on from a position of weakness.

7.98 It seemed to us right that the Court of Appeal should not be in the position of having one part of its jurisdiction determined by the subjective judgment of one of the parties, and that there should be some mechanism for enabling it to limit its jurisdiction so as to ensure that it heard only cases it was proper for it to hear. This would at the same time give prosecuting counsel a basis for resisting pressure to take a marginal decision for unsound reasons. Our proposed mechanism was to make it part of the "interests of justice" test for the court to consider whether the decision of the prosecution to deny the defendant the continuation of the trial, and to run the risk of a retrial, was a responsible one. The test we fixed on was the same as is already applied in cases where the conduct of the prosecution is being judged on its application for an extension of the custody time limits.

7.99 One supplementary suggestion was that the trial judge should have to issue a certificate that the ruling was a terminating one. This would not determine the decision of the Court of Appeal, but would be a matter to be taken into account by it. It is true that the trial judge will have a feel for the way the trial has gone, and will have some knowledge of the evidence which is yet to come. In that case it may be said that the judge is in a position to make an educated assessment whether the ruling has made the prosecution's case so weak that a decision to offer no further evidence satisfies the test we proposed. In most cases we should have thought this would give little problem. There is, however, a raft of knowledge in respect of a trial that is denied the judge, and which the prosecution cannot be expected to reveal. This may include the nervousness of the remaining witnesses and the impact on them of the decision to be appealed against. There may also be matters of which both counsel are aware but of which the judge is properly ignorant. Thus, whilst it is an attractive idea, we think, in practice, it would advance the argument little. In the cases where it is obvious that the ruling was effectively fatal to the Crown case there is no advantage in the trial judge being required to state the obvious. The procedure would only have relevance in cases where the trial judge might be surprised at the decision of the Crown to throw in its hand and might, either in advance of or after the directed acquittal, indicate a disinclination to provide such a certificate. This would place

prosecuting counsel in an impossible position. Counsel would either have to reverse the decision to offer no further evidence, having revealed to the defence a lack of confidence in continuing with the case, or persuade the judge to issue the certificate by revealing matters in court which it may be improper or undesirable to reveal, or hinting to the judge that there are matters within counsel's knowledge which cannot be revealed but which have informed the decision. This would, in turn, leave the judge in an invidious position of being privy to matters which should not be disclosed, or passing judgment on the reliability of particular counsel by either accepting or rejecting what counsel says on these matters. In short we conclude that the question whether the case should be stopped is a matter of judgment for counsel at the trial, and is not a matter for consideration by the trial judge.

7.100 The CPS took objection to our proposal and strongly objected to the suggestion that prosecuting counsel might, for tactical reasons, offer no evidence in a case other than one in which the ruling was in fact fatal to the Crown's case. It set out a series of reasons in terms of its experience and practical considerations why, quite apart from the duty imposed on prosecutors to have impartial regard to the public interest, such a suggestion was unthinkable. We repeat that we do not in any way seek to suggest that prosecuting counsel or the CPS would be a party to any decision taken other than in good faith. However, that does not mean that the Court of Appeal, in considering the interests of justice, need be bound in every case to accept as sound the judgment of the prosecution to offer no further evidence where the prosecution has, thereby, deprived the defendant of a full trial and is seeking a retrial as a consequence.

7.101 The CPS did not suggest that this should be the case, but offered an alternative formulation:

> In a case where the trial was terminated by a decision of the prosecution to offer no further evidence, the Court of Appeal in considering the question whether it would be in the interests of justice to quash the acquittal and order a retrial where the ruling was wrong should have regard to whether:
>
> (a) there was insufficient evidence remaining at trial after the ruling to provide a prima facie case against the defendant; or
>
> (b) in a case of a ruling on disclosure, the public interest in prosecuting the case was outweighed by the public interest in protecting the material ordered to be disclosed.

7.102 We assume that in the former case the material upon which that judgment would be made by the Court of Appeal would be the transcript of the evidence already given and the statements of available witnesses yet to be called. In the latter case the material for the Court of Appeal would have to be from those responsible for taking the decision to offer no further evidence.

7.103 We note that in making this suggestion the CPS is accepting that the decision of the prosecution to offer no further evidence should be made the subject of scrutiny by the Court of Appeal. We think the suggested criteria are helpful. If it

is suggested at the hearing of the appeal that the prosecutor ought not to have treated the ruling as a terminating one, the court may well approach this question in the first instance by asking whether there was still a case to answer. If there was not, it follows inevitably that the prosecutor's action in dropping the case must have been justified. The CPS's second criterion rightly focuses on the question which the Crown will have had to consider in the light of an order for disclosure, namely whether the public interest in the protection of the material was outweighed by the public interest in proceeding with the case. We agree that this is an appropriate question for the Court of Appeal to address in considering whether to allow the appeal. This is different from the question whether the public interest in the protection of the material was outweighed by the *defendant's* interest in disclosure. This latter question will have been considered by the trial judge in deciding whether to order disclosure, and will be considered by the Court of Appeal in deciding whether that order was rightly made.

7.104 On the other hand, we do not think the CPS's criteria give sufficient indication of the approach to be adopted by the Court of Appeal where, despite the ruling, there *was* still a case to answer. It might be construed as implying that in those circumstances the prosecutor ought *always* to proceed, however unlikely it now appears to be that the jury will in fact convict. We would not accept that this is necessarily the case. In our view it should be open to the Court of Appeal to hold that the prosecutor acted correctly in dropping the case, and therefore (if the ruling was wrong) that a retrial would be in the interests of justice, even if there was still a case to answer. For this reason we regard the CPS's criteria as a useful supplement to, but not a substitute for, the criteron we originally proposed.

7.105 **We recommend that**

(1) the Court of Appeal should have power to allow an appeal against an acquittal arising from a terminating ruling only if

(a) the ruling was wrong in law, and

(b) in all the circumstances of the case, it appears to the court that a retrial would be in the interests of justice; and

(2) where the trial was terminated by a decision of the prosecution to offer no or no further evidence as a consequence of the ruling, the court should, in determining whether a retrial would be in the interests of justice, be required to have regard to

(a) whether there was sufficient evidence remaining at trial after the ruling to provide a prima facie case against the defendant;

(b) in the case of a ruling on disclosure, whether the public interest in prosecuting the case was outweighed by the public interest in protecting the material ordered to be disclosed; and

(c) whether the decision to offer no or no further evidence was one which was open to a competent and conscientious prosecutor,

together with any other considerations which appear to the court to be relevant.

(Recommendation 29)

LEAVE AND CONSENT REQUIREMENTS

7.106 In CP 158 we provisionally proposed that there should be a leave requirement, in the same form as for existing rights of appeal to the Court of Appeal, in respect of prosecution appeals.[49] There was no opposition to this proposal. **We recommend that the new right of appeal should be exercisable subject to the same leave requirements as the existing right of appeal against conviction, namely with the leave of the Court of Appeal or a certificate from the trial judge that the case is fit for appeal.**

(Recommendation 30)

7.107 We provisionally considered that it would be neither necessary nor desirable to introduce a further check on the exercise by the prosecution of its rights of appeal, such as a requirement for the Attorney-General's consent or that of the Director of Public Prosecutions (though we invited views on whether, where the consent of any person was needed to initiate the prosecution, that person's consent should be required before the prosecution could appeal against a ruling).[50] There was virtually no dissent to this proposal. One respondent suggested a full panoply of certificates including one from the trial judge. In our view the delays which such a system would involve would overwhelm any advantage gained beyond screening by requiring leave. We make no recommendation for any further requirement of consent to the exercise of the new right of appeal.

TIME LIMITS FOR APPLICATIONS FOR LEAVE

7.108 In CP 158 we suggested that, whilst there was no reason to disturb the present time limits on appeals from preparatory hearings, appeals against terminating rulings *not* made at preparatory hearings were more analogous to appeals against the grant of bail, where an immediate decision has to be taken.[51] We therefore provisionally proposed that

(1) in respect of appeals arising from a preparatory hearing, the requirements for notice of an application for leave to appeal should be as they are in the current law; but

[49] Para 7.10.

[50] Para 7.13.

[51] Bail (Amendment) Act 1993, s 1(4).

(2) in respect of other appeals against terminating rulings, the prosecution should be required

(a) to indicate at the hearing itself that it is minded to appeal against the ruling; and

(b) within seven days of the ruling, to serve a full notice of application for leave to appeal on the trial judge and/or the Court of Appeal.[52]

7.109 On the first proposal there was no specific dissent, and we make no recommendation for any change in this respect.

7.110 On the second proposal there was no dissent on the suggested structure of an immediate indication of intent followed by a swift filing of an application for leave.

7.111 One respondent questioned whether it was right for the application for leave to be served on the trial judge, and suggested that the current practice should be followed, namely that the notice of application for leave is served at the trial court for it to forward to the Court of Appeal together with the trial papers. It was said that this saves time before the single judge has to deal with the application. We accept that point and recommend accordingly.

7.112 On time limits for the application for leave, there were only two dissentients. The Legal Committee of District Judges (Magistrates' Courts) thought that seven days might be too long, bearing in mind that the acquitted person might have been remanded in custody in the meantime. On the other hand the CPS thought 14 days would be more appropriate. In our view seven days is the least time to allow for drafting and serving a full application for leave to appeal which is consistent with practicality. We believe that it should be practicable in the vast majority of cases for the prosecution to decide to pursue an appeal and to draft and serve the application for leave within that time. The arguments will already have been formulated at trial. Those sought to be advanced on appeal should be capable of being speedily reduced to an appropriate form. It is important to invest the whole procedure with a sense of urgency. Delay in dealing with a person who has been acquitted is an important downside to the existence of the procedure. The prosecution, being the beneficiary, must be expected to act so as to reduce that delay to the minimum.

7.113 We have considered a suggestion made by a respondent that seven days be regarded as the norm, but that the trial judge should have the power to extend the time on application made at trial by the Crown. Such an application to extend time would not cause any delay in itself as it would be made at the trial at the same time as the intention to seek leave was announced. The trial judge would be in the best position to assess whether it would be impractical to expect the Crown to draft a full application within seven days. The question whether the defendant would be in custody or on bail pending the outcome of the appeal

[52] Para 7.16.

would have to be a specific matter which the court must take into account in considering such an application. That would be entirely appropriate as the trial judge would be deciding whether to grant bail on that occasion. We believe that this would introduce a useful flexibility in the procedure which would not cause undue delay.

7.114 **We recommend that, where the prosecution seeks to appeal against an acquittal arising from a terminating ruling made otherwise than at a preparatory hearing, it should be required**

(1) to indicate at the hearing itself that it is minded to appeal against the acquittal, and

(2) either

(a) on that occasion, to obtain a certificate from the trial judge that the case is fit for appeal, or

(b) within seven days of the acquittal (or such extended time as the trial judge may on that occasion grant), to serve a full notice of application for leave to appeal at the trial court for forwarding to the Court of Appeal.

(Recommendation 31)

DETENTION PENDING APPEAL

7.115 In CP 158 we argued that, where the defendant has not previously been admitted to bail, and the reasons for refusing bail continue (or new ones have arisen), it would be unsatisfactory for the defendant automatically to have bail whilst a prosecution appeal is pending against the directed acquittal. This is the more so as we envisage that the outcome of any successful prosecution appeal would be a retrial. Were it otherwise, the procedure for prosecution appeals followed by a retrial could be readily thwarted by a defendant absconding or intimidating witnesses who may well be required to give evidence in any retrial, should the prosecution succeed. We therefore provisionally proposed that, pending the hearing of a prosecution appeal,

(1) the court should have the power to detain the defendant;[53] but

(2) the defendant should have the right to bail on the same basis as other unconvicted defendants.[54]

7.116 On the first proposal there was some outright dissent, and some misgivings were expressed. The dissent was on the basis that further detention of a defendant who had been once acquitted, albeit possibly on a legal technicality which was being challenged, would be contrary to fairness. We recognise the moral force of this argument. The question is whether there are *no* circumstances in which a person in this position ought not to be granted bail. We think it would not be

[53] Para 7.18.

[54] Para 7.19.

difficult to envisage circumstances in which the risk of absconding, or of interfering with witnesses, is so great that the grant of bail would severely jeopardise the prospect of a proper retrial.

7.117 Some respondents queried whether detention in such circumstances would comply with Article 5 of the ECHR, and the Law Society of Scotland asserted that it would not. We consider that it is capable of falling under Article 5(1)(b), "in order to secure the fulfilment of any obligation prescribed by law" – namely the obligation to attend any future hearing in the Court of Appeal, or retrial, and to abstain from interfering with the course of justice – and/or Article 5(1)(c) (the detention of a person for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence) in combination with Article 5(3). The fact that the acquittal is subject to a pending appeal would, in our view, mean that it was not a *final* acquittal, and it therefore would not preclude the defendant being brought before the Court of Appeal on reasonable suspicion of having committed an offence. The CPS would not be pursuing the appeal were its criteria for continuing with the prosecution not satisfied – that is, if there were no longer a realistic prospect of a conviction.

7.118 One respondent pointed out that there is no power to detain a person who has been released when the Attorney-General refers the sentence to the Court of Appeal on the ground that it is unduly lenient. This is so, but the situations are by no means analogous.

7.119 First, although the Attorney-General has referred some cases where a non-custodial or suspended sentence has been passed, many such references have concerned the length of the custodial sentence passed, in which case the defendant will have been in custody throughout the appeal process. Under our scheme the acquitted defendant will almost always be free to leave court unless in custody for some other matter. The prosecution will have announced at the trial its intention to seek leave to appeal and the question of detention will be considered there and then, so there will be no question of the defendant being once released and then redetained pending the appeal. The apparent inequity of redetaining a person who has once been released must, we surmise, have had some influence on the decision not to include any power of detention pending a prosecution appeal against the sentence of a person who has been released.

7.120 Second, the issue on an appeal against sentence is limited. Whilst a person might be detained after the appeal having already been released from a sentence, or having initially received a non-custodial sentence, that is not a threat of a change in circumstances as fundamental as there being the prospect of a retrial at which an acquittal is at risk.

7.121 Third, where it is possible that there will be a retrial, interference with witnesses may arise as a separate or additional problem. Thus, whilst we do not shrink from saying that detention after acquittal pending an appeal would be relatively rare and would have to be justified by strong reasons, nonetheless we are not persuaded that the power to detain may not be necessary in the interests of justice.

7.122 The second limb of our proposal, that the defendant should have the right to bail on the same basis as other unconvicted defendants, attracted no dissent.

7.123 During the period between the acquittal, at which the prosecution has announced its intention to appeal, and the service of a notice of application for leave, there will be no appeal or application pending. We can see no reason in principle why the court should not have power to detain an acquitted defendant during such period.

7.124 It is implicit in our whole approach that rights of appeal from the Court of Appeal to the House of Lords should be analogous to those rights of further appeal that presently exist. Either side may seek and obtain leave from the Court of Appeal to appeal to the House of Lords. The defendant will only do so in circumstances in which he or she has ceased to be an acquitted person and has become a defendant awaiting retrial. Thus the Court of Appeal may detain the defendant as such notwithstanding any further appeal. Where the prosecution appeal has failed, however, the Court of Appeal has no free-standing power to detain. We can see the logic of the Court of Appeal having power to detain if it has given leave to the prosecution to appeal to the House of Lords or if an application for leave is pending, whether by way of application to the Court of Appeal or petition to the House of Lords. By analogy with the case of detention by the trial court pending the service of notice of application for leave to appeal, we can foresee circumstances in which the Court of Appeal has refused leave but the prosecution is considering whether to petition the House of Lords for leave. During that period, which almost inevitably will be short, there will be no appeal or application pending. We can see no reason in principle why the Court of Appeal should not have power to detain an acquitted defendant whilst the prosecution considers its position, though inevitably it would have to consider long and hard before doing so, and it is inconceivable that any such detention would be for any significant length of time.

7.125 **We recommend that, pending the final outcome of a prosecution appeal or the making of any application for leave or the lodging of a petition for leave to appeal,**

(1) the court should have the power to detain the defendant; but

(2) the defendant should have the right to bail on the same basis as other unconvicted defendants.

(Recommendation 32)

Custody time limits

7.126 In CP 158 we provisionally proposed that there should be a time limit in all cases where the defendant is remanded in custody, to run between the conclusion of the trial and the conclusion of the appellate process before the Court of Appeal. We invited views on what the time limit should be, but provisionally suggested

something of the order of two months.[55] We also proposed, however, that the Court of Appeal should have power to extend the custody time limit for the hearing of the appeal if the prosecution had exercised due diligence in promoting the hearing of the appeal, *and* there was a good and sufficient reason to extend the limit in the interests of justice.[56]

7.127 There was no dissent on the principle of the first proposal and scarcely any on the principle of the second. Such opposition as there was came from the Law Society, but was the corollary of its opposition to there being any power to detain pending a prosecution appeal.

7.128 On the specific time limit proposed, there was surprisingly little dissent. One respondent thought the time was too long. One thought it too optimistic, and one, the Law Society, proposed 28 days as an alternative. In our view the two month period achieves a degree of urgency without sacrificing what is practicable. If longer is required then it should be applied for under the extension regime.

7.129 **We recommend that**

(1) where the defendant is remanded in custody pending a prosecution appeal against an acquittal arising from a terminating ruling, there should be a custody time limit of two months from the conclusion of the trial until the conclusion of the appeal before the Court of Appeal; but

(2) the Court of Appeal should have power to extend that time limit, at any time before it expires, if satisfied that

(a) the prosecution has exercised due diligence in promoting the hearing of the appeal, and

(b) there is a good and sufficient reason to extend the limit in the interests of justice.

(Recommendation 33)

FURTHER TIME LIMITS

A general time limit on the hearing of the appeal

7.130 In CP 158 we invited views on whether, in addition to a custody time limit, there should be a time limit within which all prosecution appeals must be heard, whether or not the defendant is in custody.[57] There was general agreement in principle to this suggestion, with a few notable exceptions. Some of that support cited the requirement of a hearing within a reasonable time under Article 6 of

[55] Para 7.22.

[56] Para 7.24.

[57] Para 7.25.

the ECHR. On the other hand dissentients felt that that requirement would itself give sufficient protection when applied by the domestic courts.

7.131 There were few respondents who ventured a specific period. Those who did varied between 56 days and four months. One respondent pointed to the machinery for "fast tracking" appeals, particularly those from rulings at preparatory hearings, though there is no formal time limit for the hearing of such appeals.

7.132 Our view is that there should be a specific, presumptive, time limit for the conclusion of prosecution appeals in the Court of Appeal against acquittals arising from terminating rulings. We do not believe we are equipped to identify what it should be, in the absence of any emerging consensus from our respondents. Any such limit must achieve what is practicable, but also reflect the sense of urgency which ought properly to be given to appeals where the defendant has already been acquitted.

7.133 Further, we can see that there should be power to extend such a time limit on the same basis as presently applies to custody time limits. There is no reason why the defence should not be given the power to seek an extension of the time limit on the same basis as the prosecution. Prima facie it is in the interests of an acquitted defendant not to protract the matter, but there may be circumstances where the defence does, legitimately, need more time, for example to prepare its case or secure the services of a particular counsel who, perhaps, was counsel at the trial.

7.134 We have also considered whether to recommend any specific regime of time limits for appeals to the House of Lords. The case of *Z*[58] went to the House of Lords. The trial judge's ruling was made on 11 October 1999. The Court of Appeal heard argument on 22 November and gave its decision on 3 December. The House of Lords heard argument on 31 January 2000 but its decision was not given until 22 June. The trial was completed on 21 September 2000. Throughout that period the defendant had been in custody. He was convicted and received a life sentence, so the delay did not impinge on the length of his time in custody. We are loth to recommend a statutory maximum time for the hearing of appeals to the House of Lords. They are few and far between and, no doubt, those responsible for listing have well in mind the particular urgency of the various cases with which they have to deal.

7.135 **We recommend that**

(1) there should be a statutory time limit within which prosecution appeals against acquittals arising from terminating rulings must be concluded by the Court of Appeal, the length of that time limit to be determined after consultation with the relevant parties, including the Registrar of the Criminal Division of the Court of Appeal; but

[58] [2000] 2 AC 483.

(2) the Court of Appeal should have power to extend that time limit, at any time before it expires, if satisfied that

(a) the prosecution has exercised due diligence in promoting the hearing of the appeal, and

(b) there is a good and sufficient reason to extend the limit in the interests of justice.

(Recommendation 34)

A time limit for the start of the retrial

7.136 In CP 158 we provisionally proposed that there should be a time limit of two months for the defendant to be arraigned on a new indictment, if the Court of Appeal orders a retrial. We invited views on whether the parallel existing provisions relating to retrials following the quashing of convictions work well.[59]

7.137 There was virtually no dissent from this proposal. The Law Society thought two months was too long and that this situation was not one which was parallel to a retrial ordered after a successful appeal against a conviction.

7.138 In our view our proposal has the advantages of giving effect to urgency and practicality. Further it has the virtue of consistency with other provisions where retrial is ordered after an appeal. We believe that there is a parallel in that in each case the defendant is to be subject to the risk of a retrial, and the need to minimise delay in the final outcome is no different. **We recommend that, where the Court of Appeal orders a retrial on an appeal by the prosecution against an acquittal arising from a terminating ruling, there should be a time limit of two months after which the defendant may not be arraigned on the new indictment without the leave of the Court of Appeal.**

(Recommendation 35)

7.139 We have had our attention drawn by one respondent to an apparent problem which affects those presently awaiting retrial after a successful appeal against conviction. Those affected have become defendants rather than convicted persons and are liable to be detained as such pending trial, subject to their right to bail. That detention, however, is not subject to any custody time limit because, once the first trial has commenced, no further custody time limit can apply. It may be, therefore, that they will be detained awaiting retrial for a much longer period than the custody time limit would have permitted had they been awaiting a first trial. Under our recommendations a person whose acquittal has been quashed has similarly become a defendant awaiting trial. Such a defendant would similarly be potentially subject to detention without the protection of the custody time limit regime. We do not think it appropriate to make a recommendation on this point because it goes wider than the subject matter of

[59] Para 7.26.

this report. However, we raise for consideration whether a new custody time limit should arise at the conclusion of an appeal, whether by defence or prosecution, at which a retrial is ordered, such period to run from the order for a retrial until the start of the retrial. Such a new regime would apply to retrials ordered under the present arrangements as well as under our recommendations.

REPORTING RESTRICTIONS

7.140 In CP 158 we provisionally proposed that there should be an automatic ban on the reporting of an appeal until either the appeal is dismissed, or, if it is allowed, the retrial has finished, but that the Court of Appeal should have power to vary the order.[60]

7.141 There was scarcely any dissent from these proposals. One or two respondents felt that there might be difficulties with the right to freedom of expression under Article 10 of the ECHR. We were, however, referred to the case of *BBC Scotland v UK*[61] in which the European Commission of Human Rights decided that, in an analogous case, the interference with the Article 10 right was justified under Article 10(2) as necessary in a democratic society for maintaining the authority and impartiality of the judiciary. Accordingly we are satisfied that such a restriction would be ECHR compliant.

7.142 The question was raised whether there was a need for a specific power in the court to restrict reporting. We believe there is. Powers to restrict reporting of public hearings are contained in a series of specific statutes, each dealing with a specific prohibition as justified to Parliament. In our view there is ample justification for such restrictions, and it is better that it be specifically legislated than that it be exercised by virtue of an inherent power.

7.143 **We recommend that**

(1) there should be a prohibition on the reporting of an appeal against an acquittal arising from a terminating ruling until the appeal is finally dismissed or any retrial has finished; but

(2) the Court of Appeal should have power to make an order disapplying or varying that prohibition if

(a) the defendant does not object to the making of such an order, or

(b) having heard representations from the defendant, the court is satisfied that it is in the interests of justice to make it.

(Recommendation 36)

[60] Para 7.34.

[61] (1998) 25 EHRR CD 179.

PART VIII
OUR RECOMMENDATIONS

NEW EVIDENCE AND THE DOUBLE JEOPARDY RULE

1. We recommend that the rule against double jeopardy should be subject to an exception in certain cases where new evidence is discovered after an acquittal, but only where the offence of which the defendant was acquitted was murder, genocide consisting in the killing of any person, or (if and when the recommendations in our report on involuntary manslaughter are implemented) reckless killing.[1]

Retrospective effect

2. We recommend that the new exception should apply equally to acquittals which have already taken place before the exception comes into force.[2]

What new evidence will trigger the exception?

3. We recommend that

   (1) the new exception should be available only where the court is satisfied that the new evidence

      (a) appears to be reliable; and

      (b) when viewed in context, appears at that stage to be compelling;

   (2) the context in which the court views the new evidence for this purpose should comprise the issues that arose at trial, whether or not a matter of dispute between the prosecution and the defence;

   (3) the court should be permitted to have regard to the evidence adduced at trial solely for the purpose of identifying those issues and assessing the impact of the new evidence in the light of them; and

   (4) the new evidence should be regarded as compelling if, in the opinion of the court, it makes it highly probable that the defendant is guilty.[3]

The interests of justice

4. We recommend that a retrial should be allowed on grounds of new evidence only where the court is satisfied that, in all the circumstances of the case, it is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to

   (1) whether a fair trial is likely to be possible;

[1] Para 4.42.

[2] Para 4.56.

[3] Para 4.69.

(2) whether it is likely that the new evidence would have been available at the first trial if the investigation had been conducted with due diligence;

(3) whether the prosecution has acted with reasonable despatch since

(a) the new evidence was discovered (or would, with due diligence, have been discovered), or

(b) the new exception came into force, whichever is the later;

and

(4) the time that has elapsed since the alleged offence,

together with any other considerations which appear to the court to be relevant.[4]

The appropriate court

5. We recommend that the court empowered to quash an acquittal on grounds of new evidence should be the Criminal Division of the Court of Appeal, and that there should be no right of appeal against that court's decision.[5]

Evidence which was inadmissible at the first trial

6. We recommend that it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law.[6]

Successive retrials, and successive applications for retrials

7. We recommend that

(1) where an acquittal is quashed on grounds of new evidence, and the defendant is acquitted at the retrial, no application to quash that later acquittal on grounds of new evidence should be permitted;

(2) where an unsuccessful application is made to quash an acquittal on grounds of new evidence, no further application to quash that acquittal on grounds of new evidence should be permitted;

(3) where a person is acquitted at a retrial held on some other ground, it should be possible to make one application to quash that acquittal on grounds of new evidence, but the fact that the acquittal occurred at a retrial should be one of the factors to which the court should be required to have regard in determining whether a further retrial would be in the interests of justice.[7]

[4] Para 4.90.

[5] Para 4.93.

[6] Para 4.94.

[7] Para 4.97.

Consent to the making of an application

8. We recommend that it should be necessary to obtain the consent of the Director of Public Prosecutions, in person, before making an application for an acquittal to be quashed on grounds of new evidence.[8]

Reporting restrictions

9. We recommend that

   (1) there should be a prohibition on the reporting of the hearing of an application for a retrial on grounds of new evidence until the application is dismissed or any retrial has finished; but

   (2) the Court of Appeal should have power to make an order disapplying or varying that prohibition if

      (a) the defendant does not object to the making of such an order, or

      (b) having heard representations from the defendant, the court is satisfied that it is in the interests of justice to make it.[9]

THE TAINTED ACQUITTAL PROCEDURE

The objects of the interference or intimidation

10. We recommend that the tainted acquittal procedure should be extended so as to apply where the administration of justice offence involves interference with or intimidation of a judge, magistrate or magistrates' clerk.[10]

The definition of "administration of justice offence"

11. We recommend that, for the purposes of the tainted acquittal procedure, the definition of an "administration of justice offence" should be extended to include

   (1) offences under the Prevention of Corruption Acts 1889–1916, and the common law offence of bribery (or, if and when the recommendations in our report on corruption are implemented, the offences there proposed); and

   (2) conspiracy to commit any administration of justice offence.[11]

The necessity for a conviction of an administration of justice offence

12. We recommend that the tainted acquittal procedure should be available not only where a person has been convicted of the administration of justice offence, but also where the court hearing the application

[8] Para 4.99.

[9] Para 4.103.

[10] Para 5.5.

[11] Para 5.9.

(1) is satisfied, to the criminal standard of proof, that an administration of justice offence has been committed, and

(2) is satisfied that

(a) the person who committed it is dead;

(b) it is not reasonably practicable to apprehend that person;

(c) that person is overseas, and it is not reasonably practicable to bring that person within the jurisdiction within a reasonable time; or

(d) it is not reasonably practicable to identify that person.[12]

13. We recommend that, where an acquittal is quashed on the grounds that it is tainted although no-one has been convicted of an administration of justice offence in relation to it, the court's finding that an administration of justice offence has been committed should be inadmissible as evidence of that fact in subsequent criminal proceedings for any offence.[13]

The requirement that the acquittal be secured by the interference or intimidation

14. We recommend that the tainted acquittal procedure should be available only where it appears to the court hearing the application that, but for the interference or intimidation, the trial would have been more likely to result in a conviction than in an acquittal.[14]

The interests of justice test

15. We recommend that an acquittal should be liable to be quashed on the grounds that it is tainted only where the court is satisfied that, in all the circumstances of the case, this is in the interests of justice; and that, in determining whether it is so satisfied, the court should be required to have regard to

(1) whether a fair trial is likely to be possible;

(2) whether the prosecution has acted with reasonable despatch since evidence of the administration of justice offence was discovered (or would, with due diligence, have been discovered); and

(3) the time that has elapsed since the alleged offence,

together with any other considerations which appear to the court to be relevant.[15]

[12] Para 5.19.

[13] Para 5.20.

[14] Para 5.23.

[15] Para 5.25.

A limit on the number of times the procedure can be used

16. We recommend that

    (1) where an unsuccessful application has been made to quash an acquittal on the grounds that it is tainted, no further application to quash that acquittal (on any grounds) should be permissible; but

    (2) where an unsuccessful application has been made to quash an acquittal on grounds of new evidence, it should be possible to make one further application to quash that acquittal on the grounds that it is tainted.[16]

The procedure

17. We recommend that the legislation governing the tainted acquittal procedure be amended so as to provide for

    (1) a hearing of the question whether the acquittal should be quashed;

    (2) the hearing to be in open court;

    (3) the acquitted person to have a right to be present;

    (4) both parties to be legally represented, and legal aid to be available for the acquitted person;

    (5) witnesses to be heard and cross-examined on the question whether an administration of justice offence has been committed; and

    (6) consideration of transcripts of the first trial, together with witnesses if necessary, in determining whether the acquitted person would not have been acquitted but for the interference or intimidation.[17]

The appropriate court

18. We recommend that the court empowered to quash acquittals on the grounds that they are tainted should be the Criminal Division of the Court Appeal.[18]

CODIFYING THE DOUBLE JEOPARDY RULE

19. We recommend the codification of the autrefois rule and its exceptions.[19]

Acquittal or conviction in another jurisdiction

20. We recommend that the autrefois rule should apply wherever the previous acquittal or conviction occurred, but an English court should be permitted to disregard an acquittal or conviction in another jurisdiction where it is satisfied that it is in the interests of justice to do so; and, in determining whether it is so

[16] Para 5.34.

[17] Para 5.36.

[18] Para 5.37.

[19] Para 6.2.

satisfied, the court should be required to have regard to whether it appears that the foreign proceedings

(1) were held for the purpose of shielding the defendant from criminal responsibility for offences within the jurisdiction of the English court,

(2) were not conducted independently or impartially in accordance with the minimum requirements of due process and fairness, or

(3) were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the defendant to justice,

together with any other considerations which appear to the court to be relevant.[20]

21. We recommend that an acquittal by a foreign court should not be regarded as an acquittal for the purposes of the autrefois rule if it appears to have been based solely on the fact that the alleged offence, if committed, was committed outside the territorial jurisdiction of that court.[21]

22. We recommend that the tainted acquittal procedure should not apply to acquittals outside England and Wales.[22]

Conviction without sentence

23. We recommend that, for the purposes of the autrefois rule, a conviction should be defined as including the giving of a verdict of guilty by a jury or a finding by a magistrates' court that an information is proved, whether or not sentence is passed.[23]

Offences taken into consideration

24. We recommend that, for the purposes of the autrefois rule, a conviction should be defined as including the taking of an offence into consideration in sentencing a person for another offence, unless the conviction for the latter offence is quashed on appeal.[24]

PROSECUTION APPEALS AGAINST JUDGES' RULINGS

Preparatory hearings

25. We recommend that

(1) the preparatory hearing regime, in both fraud and non-fraud cases, should be extended to include rulings on potentially terminating matters such as severance, joinder of counts, or defendants' applications to quash

[20] Para 6.15.

[21] Para 6.20.

[22] Para 6.21.

[23] Para 6.28.

[24] Para 6.33.

the indictment or to stay the proceedings on the grounds of abuse of process; and

(2) in non-fraud cases, the criterion of seriousness should be added to the list of matters which will enable a preparatory hearing to be held.[25]

Terminating rulings during the prosecution case

26. We recommend that the prosecution should have a right of appeal against an acquittal arising from a terminating ruling made during the trial up to the conclusion of the prosecution evidence.[26]

Rulings of no case to answer

27. We recommend that the prosecution should have a right of appeal against an acquittal arising from a ruling of no case to answer made at the conclusion of the prosecution evidence, but only where that ruling is made on a point of law under the first limb of *Galbraith*.[27]

The offences to which the new right of appeal should apply

28. We recommend that the new right of appeal should be available only where, had the defendant been convicted of the offence (or any of the offences) of which he or she is acquitted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the grounds that it was unduly lenient.[28]

The criteria for the new right of appeal

29. We recommend that

(1) the Court of Appeal should have power to allow an appeal against an acquittal arising from a terminating ruling only if

(a) the ruling was wrong in law, and

(b) in all the circumstances of the case, it appears to the court that a retrial would be in the interests of justice; and

(2) where the trial was terminated by a decision of the prosecution to offer no or no further evidence as a consequence of the ruling, the court should, in determining whether a retrial would be in the interests of justice, be required to have regard to

(a) whether there was sufficient evidence remaining at trial after the ruling to provide a prima facie case against the defendant;

[25] Para 7.34.

[26] Para 7.49.

[27] Para 7.74.

[28] Para 7.85.

(b) in the case of a ruling on disclosure, whether the public interest in prosecuting the case was outweighed by the public interest in protecting the material ordered to be disclosed; and

(c) whether the decision to offer no or no further evidence was one which was open to a competent and conscientious prosecutor,

together with any other considerations which appear to the court to be relevant.[29]

Leave and consent requirements

30. We recommend that the new right of appeal should be exercisable subject to the same leave requirements as the existing right of appeal against conviction, namely with the leave of the Court of Appeal or a certificate from the trial judge that the case is fit for appeal.[30]

Time limits for applications for leave

31. We recommend that, where the prosecution seeks to appeal against an acquittal arising from a terminating ruling made otherwise than at a preparatory hearing, it should be required

(1) to indicate at the hearing itself that it is minded to appeal against the acquittal, and

(2) either

(a) on that occasion, to obtain a certificate from the trial judge that the case is fit for appeal, or

(b) within seven days of the acquittal (or such extended time as the trial judge may on that occasion grant), to serve a full notice of application for leave to appeal at the trial court for forwarding to the Court of Appeal.[31]

Detention pending appeal

32. We recommend that, pending the final outcome of a prosecution appeal or the making of any application for leave or the lodging of a petition for leave to appeal,

(1) the court should have the power to detain the defendant; but

(2) the defendant should have the right to bail on the same basis as other unconvicted defendants.[32]

33. We recommend that

[29] Para 7.105.

[30] Para 7.106.

[31] Para 7.114.

[32] Para 7.125.

(1) where the defendant is remanded in custody pending a prosecution appeal against an acquittal arising from a terminating ruling, there should be a custody time limit of two months from the conclusion of the trial until the conclusion of the appeal before the Court of Appeal; but

(2) the Court of Appeal should have power to extend that time limit, at any time before it expires, if satisfied that

(a) the prosecution has exercised due diligence in promoting the hearing of the appeal, and

(b) there is a good and sufficient reason to extend the limit in the interests of justice.[33]

Further time limits

34. We recommend that

(1) there should be a statutory time limit within which prosecution appeals against acquittals arising from terminating rulings must be concluded by the Court of Appeal, the length of that time limit to be determined after consultation with the relevant parties, including the Registrar of the Criminal Division of the Court of Appeal; but

(2) the Court of Appeal should have power to extend that time limit, at any time before it expires, if satisfied that

(a) the prosecution has exercised due diligence in promoting the hearing of the appeal, and

(b) there is a good and sufficient reason to extend the limit in the interests of justice.[34]

35. We recommend that, where the Court of Appeal orders a retrial on an appeal by the prosecution against an acquittal arising from a terminating ruling, there should be a time limit of two months after which the defendant may not be arraigned on the new indictment without the leave of the Court of Appeal.[35]

Reporting restrictions

36. We recommend that

(1) there should be a prohibition on the reporting of an appeal against an acquittal arising from a terminating ruling until the appeal is finally dismissed or any retrial has finished; but

(2) the Court of Appeal should have power to make an order disapplying or varying that prohibition if

(a) the defendant does not object to the making of such an order, or

[33] Para 7.129.

[34] Para 7.135.

[35] Para 7.138.

(b) having heard representations from the defendant, the court is satisfied that it is in the interests of justice to make it.[36]

(*Signed*) ROBERT CARNWATH, *Chairman*
HUGH BEALE
CHARLES HARPUM
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*
24 January 2001

[36] Para 7.143.

APPENDIX A

PERSONS AND ORGANISATIONS WHO COMMENTED ON DOUBLE JEOPARDY (1999) CONSULTATION PAPER NO 156

Judges and judicial bodies

Lord Bingham, then Lord Chief Justice of England and Wales
Mr Justice Buckley
Council of HM Circuit Court Judges (Criminal Sub-Committee)
Judge Denison QC, Common Serjeant of London
Lord Davidson
Judge Sir Rhys Davies QC, Honorary Recorder of Manchester
Judge Dyer
Mr Justice Garland
Sir Iain Glidewell
Judge Hyam, Recorder of London
Lord Justice Longmore
Sheriff I D MacPhail QC
Sir William Macpherson of Cluny
Joint Council of HM Stipendiary Magistrates (Legal Committee)
The Northern Ireland judiciary
Judge Pitchers
Mr Justice Poole
Judge Rivlin QC
Judge Rodwell QC
Lord Justice Rose
Judge Wait

Government departments and public bodies

Association of Chief Police Officers of England, Wales and Northern Ireland
Commission for Racial Equality
Crown Agent, Edinburgh
Crown Prosecution Service
HM Customs and Excise
Office of the Solicitor, Department of Health and Department of Social Security
Department of Trade and Industry
Foreign and Commonwealth Office
Office of the Judge Advocate General
Kent County Constabulary
Metropolitan Police Service
Northern Ireland Human Rights Commission
Northern Ireland Office
Police Federation of England and Wales
Police Superintendents' Association of England and Wales
Royal Ulster Constabulary
South Wales Police
Serious Fraud Office

Practitioners

Charles G Blake
Lord Carlile of Berriew QC (9-12 Bell Yard)
Jan Davies (Reading Solicitors' Chambers)
Anthony Edwards (T V Edwards)
P W Ferguson (Advocates' Library, Parliament House, Edinburgh)
Lord Goldsmith QC (Fountain Court Chambers)
Bruce Houlder QC (6 King's Bench Walk)
Michael Mansfield QC (Tooks Court Chambers)
Norman Marsh QC
Jeremy Roberts QC (9 Gough Square)
Kuldip Singh QC (5 Paper Buildings)
George Staple QC (Clifford Chance)
Sarah Woodhead (Howes Percival)
One confidential response

Professional organisations

Association of Police Lawyers
Criminal Bar Association
Faculty of Advocates (Advocates' Criminal Law Group)
General Council of the Bar (Law Reform Committee)
Institute of Legal Executives
Justices' Clerks' Society
The Law Society of England and Wales (Criminal Law Committee)
The Law Society of Scotland (Criminal Law Committee)
London Criminal Courts Solicitors' Association
North Eastern Circuit
Society of Labour Lawyers
Wales and Chester Circuit
Western Circuit

Academics

Professor Andrew Choo (Brunel University)
Professor Ian Dennis (University College, London)
Gavin Dingwall (University of Wales, Aberystwyth)
Professor Emeritus D W Elliott (University of Newcastle)
David Faulkner (Centre for Criminological Research, University of Oxford)
Professor David Feldman (University of Birmingham)
Professor Mark Freedland (St John's College, Oxford)
Professor Michael Hirst (De Montfort University)
Jeremy Horder (Worcester College, Oxford)
Leonard Jason-Lloyd (Coventry University)
Professor Jenny McEwan (University of Exeter)
Peter Mirfield (Jesus College, Oxford)
Phil Parry (University of Hertfordshire)
D N P Radlett (Mid Kent College)
Paul Roberts (University of Nottingham)
Anita Sharda (Equal Opportunities Officer, University of Hertfordshire)

Professor Sir John Smith CBE QC FBA (University of Nottingham)
Professor J R Spencer (Selwyn College, Cambridge)
Professor Colin Tapper (Magdalen College, Oxford)
Professor Clive Walker (University of Leeds) (response of Society of Public Teachers of Law, Criminal Justice Panel)
Professor Michael Zander QC (London School of Economics)

Interest groups

British Irish Rights Watch
JUSTICE
Liberty
National Association for the Care and Resettlement of Offenders
Victim Support

Members of the public

David Delaney
G E Haines
Doreen Lawrence
L H Lewy
William Luck
Ann and Charles Ming
T G Oswald
The Rt Rev Dr John Sentamu, Bishop for Stepney

APPENDIX B

PERSONS AND ORGANISATIONS WHO COMMENTED ON PROSECUTION APPEALS AGAINST JUDGES' RULINGS (2000) CONSULTATION PAPER NO 158

Judges and judicial bodies

Lord Justice Brooke
Mr Justice Buckley
Lord Justice Buxton
Mr Justice Coghlin
Mr Justice Curtis
Lord Davidson
Judge Sir Rhys Davies QC, Honorary Recorder of Manchester
Judge D Elgan Edwards DL, Honorary Recorder of Chester
District Judge Anthony Evans, District Judges' (Magistrates' Courts) Legal Committee
Mr Justice Garland
Sir Iain Glidewell
Mr Justice Jackson
Mr Justice Johnson
Sir William Macpherson of Cluny
Judge Moss
Lord Justice Otton
Lord Phillips of Worth Matravers, Master of the Rolls
Judge Pitman
Mr Justice Poole
District Judge Eleri Rees
Lord Rodger of Earlsferry, Lord President
Judge Rodwell QC
Mr Justice Rougier
Judge Samuels QC
Lord Justice Schiemann
Lord Justice Sedley
Mr Justice Silber
Mr Justice Turner
Lord Woolf, Lord Chief Justice of England and Wales

Government departments and public bodies

Association of Chief Police Officers of England, Wales and Northern Ireland
Crown Agent, Edinburgh
Crown Prosecution Service
HM Customs and Excise
Office of the Solicitor, Department of Health and Department of Social Security
Department of Trade and Industry
Financial Services Authority
Foreign and Commonwealth Office

Health and Safety Executive
Inland Revenue
Office of the Judge Advocate General
Police Federation of England and Wales
Police Superintendents' Association of England and Wales
Royal Ulster Constabulary
Serious Fraud Office
South Wales Police
Lord Williams of Mostyn QC, Attorney-General
Zimbabwe Law Development Commission

Practitioners

Charles G Blake
Sir Louis Blom-Cooper QC
Anthony Edwards (T V Edwards)
P W Ferguson (Advocates' Library, Parliament House, Edinburgh)
George Staple QC (Clifford Chance)

Professional organisations

General Council of the Bar and Criminal Bar Association (joint response)
Inner London Justices' Clerks' Legal Forum
Justices' Clerks' Society
The Law Society of England and Wales (Criminal Law Committee)
The Law Society of Scotland (Criminal Law Committee)
North Eastern Circuit
Society of Labour Lawyers

Academics

Professor Ian Dennis (University College, London)
Professor R A Duff (University of Stirling)
Professor Emeritus D W Elliott (University of Newcastle)
Alisdair Gillespie (University of Teesside)
Professor Rosemary Pattenden (University of East Anglia)
Paul Roberts (University of Nottingham)
Professor J R Spencer (Selwyn College, Cambridge)
Professor Clive Walker (University of Leeds) (response of Society of Public Teachers of Law, Criminal Justice Panel)

Interest groups

JUSTICE

Members of the public

T Cook
Philip Cooke

New Law Journal (editorial)