CRIMINAL JUSTICE COMMISSION

DOUBLE JEOPARDY

AND

DISCIPLINARY PROCEEDINGS

June 1991

DOUBLE JEOPARDY AND DISCIPLINARY PROCEEDINGS

1. On 14 June 1991, the front page of the Courier Mail carried an article which reported comments allegedly made by the Police Union secretary, Mr Tom Mahon, to the Criminal Justice Commission Parliamentary Committee on the previous day. Amongst other things, the article stated that Mr Mahon accused the Criminal Justice Commission of not applying "normal British justice standards" to police against whom accusations had been made. In particular, Mr Mahon was reported to have said that "police cleared by courts of law had to face 'disciplinary hearings' of the CJC which sometimes resulted in the dismissal of the officer."

2. If the article is an accurate report of Mr Mahon's submission on the point, it may be inferred that his understanding of the law is that an acquittal by a court of a "criminal offence" is a bar to subsequent "disciplinary action" taken on the same facts.

   The relevant part of the article suggests that the Police Union secretary is of the view that if a police officer has been dealt with under the criminal law, it is unlawful for subsequent **disciplinary action** to be taken against the police officer on the same facts. In other words, it is implied that a police officer is subject to **double jeopardy** in having the same facts canvassed at a criminal trial and a disciplinary hearing.

   With respect, that view is misguided and evidences a lack of understanding of the **proper purpose** of disciplinary proceedings.

3. The law recognises a distinction between criminal and disciplinary proceedings. For example, in R. v. WHITE; ex parte BYRNES (1963) 109 C.L.R. 665, the High Court held that an administrative tribunal charged with the duty of dealing with breaches of discipline, does **not** sit as a court of law and that "disciplinary" offences are **not** "criminal" offences. Indeed, it has been stated that the hearing of a "disciplinary" charge is neither a criminal prosecution nor a civil action: see

ATTORNEY GENERAL (VICTORIA) v. RAICH (1978) V.L.R. 301 at 305; R. v. HAMPSHIRE COUNTY COUNCIL, ex parte ELLERTON (1985) 1 W.L.R. 749; and PUBLIC SERVICE BOARD OF NEW SOUTH WALES v. ETHERTON (1985) 1 N.S.W.L.R. 430 at 432.

4. At page 293 of his Report, Fitzgerald QC stated that:

> "The distinction between criminal and disciplinary offences ought to be maintained in relation to the police."

Mr Fitzgerald further stated that **methods** must be devised:

> "... to deal with matters which are the subject of **failed** criminal prosecutions or of **pending** prosecutions."
>
> (Emphasis added)

The method recommended by Fitzgerald was the use of Misconduct Tribunals in their original administrative jurisdiction, making decisions:

> "in relation to the more serious matters of police misconduct which do not result in charge (sic) of criminal offence or, if charges are laid, are **undisposed of** or result in **acquittal.**"
>
> (At page 297)
> (Emphasis added)

At page 294 of the Report, Mr Fitzgerald expressed the view that a police officer is **not** in the same position as an ordinary citizen, because the police officer is bound to uphold the law and actively enforce it. Indeed, a police officer "is employed by the community to do that task". Accordingly, Mr Fitzgerald spoke about:

> "the **enormous problem** created when police officers are **acquitted** of criminal offences, especially serious criminal offences."
>
> (At page 296)
> (Emphasis added)

On the same page of the Report, Mr Fitzgerald further stated:

> "Much has been said, loudly and often, by police, through their unions, about the entitlement of police officers to enjoy the same standing, protection and immunities as do other citizens.
>
> That concept does not, however, justify the conclusion that if a police officer is acquitted in criminal proceedings, all allegations cease to be of any relevance to that officer's continuing in the Force."

5. As previously stated, to suggest that a criminal charge (or finding) is a bar to subsequent proceedings of a disciplinary nature on the same matter (or vice versa), is to **misunderstand** the nature and purpose of police **disciplinary** proceedings.

The object of such proceedings is **not** to punish or to extract retribution, but to **protect the public**, to **maintain proper standards of conduct** by members of the Police Force and to **protect the reputation** of that Force: see the decisions of the Federal Court in HARDCASTLE v. COMMISSIONER OF POLICE [1984] 53 A.L.R. 593 at 597, and the High Court (per Brennan J.) in POLICE SERVICE BOARD v. MORRIS [1984-85] 156 C.L.R. 397 at 411-412.

6. In HARDCASTLE, the appellant was a member of the Australian Federal Police who was charged with five breaches of the relevant police disciplinary regulations, in that he was knowingly concerned in the commission by another police officer of various assaults upon civilians. The relevant disciplinary tribunal, applying the civil standard of proof, made an adverse finding against Hardcastle on each charge, and he then appealed to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for a review of the tribunal's decision. When relief was refused, he appealed to the Full Federal Court.

The Full Federal Court unanimously dismissed the appeals. Amongst other things, it was submitted by counsel for the appellant police officer that the institution of

proceedings in relation to a disciplinary offence, where the conduct relied on amounted to the commission of a criminal offence, (in that case, assault) exposed the police officer to **"double jeopardy"**. Counsel for the appellant relied on an article "Double Jeopardy and Police Disciplinary Proceedings" by Alan E Greaves (Inspector, West Yorkshire Metropolitan Police) 1983 Crim.L.R. 211, which discussed the principle of double jeopardy in relation to the Police Acts 1964 and 1976 of the United Kingdom.

As was stated unanimously by the Federal Court at page 597:

> "There is no room for the application of what is sometimes misleadingly called the principle of double jeopardy in this case. If the appellant were charged with, and convicted of, the same unlawful assaults as are the subject of the disciplinary offences he would not face double jeopardy or be punished twice for the same offence. He would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code of the Australian Federal Police. The two proceedings are essentially different in character and result.
>
> The article 'Double Jeopardy and Police Disciplinary Proceedings' does not assist the submission made on behalf of the appellant because the relevant provisions of the legislation there being considered are not comparable to the relevant provisions of the Complaints Act and the Discipline Regulations."

7. In Re SEIDLER (1986) 1 Qd.R. 486, the applicant was employed by the Cairns Hospitals Board and was charged with stealing a switchboard, the property of the respondent Board. At his trial, the Crown entered a nolle prosequi. Subsequently, the employer Board charged the applicant with two disciplinary offences under the Hospitals Act. Those offences were made out before the Hospitals Board and the applicant appealed to the Hospitals Appeal Board. It was argued for the applicant on appeal that he was entitled to the benefit of the plea of **previous acquittal**. An originating summons seeking a declaration to that effect was filed.

Carter J. dismissed the application. Amongst other things, His Honour said at pages 490-491:

> "In Australia and in England, the appropriate standard of proof in disciplinary actions has been closely examined by the courts, and this standard is regularly applied in practice by disciplinary bodies. The standard of proof is proof on the balance of probabilities possessing as that standard does the required measure of flexibility so that the more serious the allegation the higher the degree of probability that is required .....
>
> The applicant's submission, that disciplinary offences which provide for punishment should be treated as being in the nature of criminal offences, with the resultant higher standard of proof, cannot therefore be accepted .....
>
> **This divergence between standards of proof is a strong ground for denying operation to the double jeopardy principles as applicable to criminal and disciplinary tribunals."**
>
> (Emphasis added)

8. WHAT THEN ARE THE DOUBLE JEOPARDY PRINCIPLES?

The phrase "double jeopardy" is often thought to be associated only with American law because of the Fifth Amendment to the American Constitution which provides that no person:

> "shall be subject for the same offence to be twice put in jeopardy of life and limb".

However, the doctrine of or rule against double jeopardy is **universal** and part of the common law. The doctrine or rule is a fundamental doctrine of **criminal procedure**, to the effect that no person shall be placed in jeopardy twice for the same matter: see BROOME v. CHENOWETH (1946) 73 C.L.R. 583 per Dixon J. at 599.

The rule against double jeopardy **prevents the persecution** of an accused by multiple prosecutions, and the rule is the doctrine behind the plea of **previous acquittal** or **previous conviction.** As was stated by Blackstone in his Commentaries Book IV (1759 edition), at page 329:

> "The plea of autrefois acquit or a former acquittal is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."

Blackstone said that when a man is once fairly found "not guilty" upon any indictment, he may plead such acquittal in bar of any subsequent accusation "for the same crime", and that the plea of autrefois convict or a former conviction depends upon the same principle.

The rule against double jeopardy and the defence given by the pleas of previous acquittal or previous conviction have statutory force in **criminal proceedings** in Queensland: see sections 16 and 17 of the Criminal Code. However, the principle of previous acquittal or previous conviction only applies where:

> "the facts and circumstances that constitute the gist or gravamen of the later charge are in terms, or in effect, **the same** as those constituting the gist or gravamen of the former."
>
> (Emphasis added)

> (see R. v. O'LOUGHLIN ex parte RALPHS (1971) 1 S.A.S.R. 219 per Wells J. at 258, adopted by the Full Court of the Supreme Court of Queensland in COLLINS v. MURRAY ex parte MURRAY (1989) 1 Qd.R. 614 at 617.

As regards **disciplinary** proceedings, the Privy Council has stated that the doctrine of previous conviction and previous acquittal:

> "is applicable to disciplinary proceedings under a statutory code by which any profession is governed"
>
> (see WEE v. LAW SOCIETY OF SINGAPORE (1985) 1 W.L.R. 362 at 368).

Hence, if for example two or more disciplinary proceedings were initiated against a police officer based upon "exactly the same conduct" by that police officer, a finding in the first disciplinary matter would be a complete bar to the other disciplinary proceedings. However, that is the **only** context in which the doctrine is relevant to disciplinary tribunals.

9. DISCIPLINARY ACTION AFTER A CRIMINAL PROCEEDING.

At page 297 of his Report, Fitzgerald QC stated:

> "... There is no justification for deferring investigations or not gathering further evidence just because the misconduct concerned is the subject of criminal proceedings.
>
> The idea that when criminal charges are laid, administrative or disciplinary activity in every case and in every aspect should cease, is misconceived, wasteful, inefficient and fails to recognise that in many cases the verdict, whatever it is and whether or not against an official, will not resolve the issue of misconduct."

With respect, it is submitted that Mr Fitzgerald recognised that there will be **exceptional** cases where disciplinary proceedings should **not** await the outcome of the criminal proceedings. However, as a general rule, it is suggested that criminal proceedings should **precede** disciplinary proceedings. In ALLAN v. COMMISSIONER OF AUSTRALIAN FEDERAL POLICE (1983) 78 F.L.R. 21 at 24-25, it was said that there was:

> "Much to be said for the view that in a disciplinary case where the Commissioner is contemplating both criminal and disciplinary proceedings in respect of the same conduct, the criminal proceedings should be heard and determined before any hearing of the disciplinary proceedings."

Also, in HERRON v. McGREGOR (1986) 6 N.S.W.L.R. 246 at 266, McHugh J.A. said:

> "No doubt it is only proper that, while criminal proceedings are pending, disciplinary proceedings should not be brought on for hearing."

However, in the same paragraph His Honour said that where appropriate, a disciplinary tribunal (in that case a Medical Board) could **suspend** a practitioner while criminal proceedings are pending if, after hearing him, it thinks he is not fit to practice:

> "The rules of natural justice are flexible enough to deal with this situation".

10. Within the context of Disciplinary action **after** a criminal proceeding, I will briefly consider two situations:

(1) disciplinary action on the same facts **after** a police officer is **convicted** of a criminal charge; and

(2) disciplinary action on the same facts **after** a police officer is **acquitted** on a criminal charge.

As regards situation (1), the Canadian case of Re MACDONALD and MARRIOTT (1984) 7 D.L.R. (4th) 697, provides a useful illustration. In that case, a police officer had been convicted of fraud in a criminal court and sought to have subsequent disciplinary proceedings prohibited on the ground that such proceedings

would violate the double jeopardy clause of the Canadian Charter of Rights and Freedoms (similar to section 17 of the Queensland Criminal Code).

The court held that the purpose of the disciplinary proceedings was not to re-try the police officer for the criminal offence, but to determine if the criminal conduct rendered him unfit to perform his police duties.

Section 12 of the relevant Police Disciplinary Regulations read:

> "Any member of a municipal force commits a disciplinary default if he engages in any one or more of the following:
>
> - - - - -
>
> Criminal conduct, that is, if he is found guilty of an indictable offence or an offence punishable on summary conviction under any statute of Canada or any province or territory of Canada which renders him unfit to perform his duties."

In the event of a section 12 disciplinary default being established, the Police Board was empowered to impose one of the punishments prescribed by the Police Discipline Regulations, including a recommendation that the officer be dismissed from the Police Force or required to resign from the Force. The court held that by imposing punishment under that regulation, the Board was **not** punishing the police officer "again" for his fraud conviction, but imposing punishment because that conviction had rendered him unfit to perform his duties.

11. As regards situation (2) – Disciplinary proceedings after **acquittal** – it is noted that both in the United Kingdom and Canada, it is specifically stated that where a member of the Police Force has been **acquitted** of a criminal offence:

> "... he shall not be liable to be charged with any offence against discipline which is in substance the same as the offence of which he has been ... acquitted".
>
> (see section 104(1) of the Police and Criminal Evidence Act (1984) U.K. and Regulation 10(3) of the Canadian Police (Discipline Regulations).

However, **no** such statutory provision exists in Queensland (or in any other Australian State or Territory). Accordingly, is disciplinary action taken against a Queensland police officer, on the same facts, after an acquittal, **unlawful?**

That question was exhaustively examined by Professor Friedland in his textbook "Double Jeopardy", 1969, at pages 319–320:

> "Can disciplinary action be taken for the same offence after an acquittal in the criminal courts? The answer should depend on the degree of proof required before a disciplinary tribunal. If the degree of proof required is significantly less than that in the criminal courts, then the acquittal should probably have no effect, although it would surely influence the decision whether to commence proceedings. On the other hand, if much the same degree of proof is required in each case, then a further hearing for the same cause should be considered a violation of the rule against double jeopardy."

As previously mentioned, in Australia and in England the appropriate standard of proof for disciplinary tribunals is the civil standard and not the criminal standard.

Professor Friedland further stated at pages 320–321:

> "It is somewhat difficult to compare the standard of proof required because the evidentiary rules are not strictly applied before a disciplinary tribunal. However, because the consequences of disbarment or removal from the Medical Register is very serious to the accused, fairness to the accused would require, if not the same degree of proof, then at least a high degree of certainty. If this is so, then **res judicata** should apply and a disciplinary proceeding for an offence for which the accused has already been acquitted should be barred. Most professional disciplinary bodies probably take this view. Nevertheless, the law appears to be otherwise .....

> The fact that a disciplinary tribunal cannot call the acquittal into question should not mean, though, that it cannot try the defendant for part of the conduct constituting the offence. Many examples come to mind: ..... A police officer may be acquitted of assault, yet have breached internal police regulations - see the Toronto Globe and Mail, 1 June 1966, page 2: 'Sidney Brown, President of the Metropolitan Police Association, said last night it was not uncommon for a policeman to be acquitted in court, then charged by the Police Department'".

12. The recent decision of the Queen's Bench Division in SAEED v. INNER LONDON EDUCATION AUTHORITY [1985] Industrial Cases Reports 637, is relevant to this question. In that case, the plaintiff was a school caretaker who had been acquitted in a Magistrates Court, having been charged with assaulting a child at the school. As a result of his acquittal, the plaintiff was entitled to receive - and did in fact receive - a "Certificate of Acquittal" which, by virtue of the relevant statute, released him from "all further or other proceedings, civil or criminal, for the same cause": (section 345 of the Queensland Criminal Code provides for a similar certificate).

After the caretaker was acquitted of the criminal charge, the school authorities brought a charge of misconduct against him under the Staff Disciplinary Code, to which he was subject by reason of his employment. The particulars of the misconduct alleged were **identical** to those which had formed the basis of the previous criminal proceedings. When disciplinary proceedings were commenced, they were adjourned on the plaintiff's application when he sought a declaration that the disciplinary proceedings were unlawful and void, in that they contravened the rule against double jeopardy and would offend against the "Certificate of Acquittal". The court **refused** the declaration on the following grounds:

(1) The rule against double jeopardy was designed to avoid the peril of a person being convicted twice for the same matter in a court of competent jurisdiction and had no application as between civil and criminal

proceedings. Accordingly, since a disciplinary tribunal applied the civil and not the criminal standard of proof and was not a court of competent jurisdiction, the rule did **not** apply so as to invalidate the disciplinary proceedings; and

(2) Because disciplinary proceedings were neither civil nor criminal proceedings, the "Certificate of Acquittal" granted to the plaintiff under the relevant statute would **not** release him from the disciplinary inquiry commenced by his employers.

13. In Re SEIDLER (supra) at pages 491–492, Carter J. explained why sections 16 and 17 of the Queensland Criminal Code are **inapplicable** to subsequent **disciplinary proceedings**. His Honour further stated:

> "For the same reasons, section 45 of the Acts Interpretation Act 1954–1977 would not afford any protection to the applicant in this case: see .... BODNA v. DELLER and PUBLIC SERVICE APPEALS TRIBUNAL [1981] V.L. 183 .... A clear statement of principle appears in the judgement of Cameron J.A., delivering the judgement of the Saskatchewan Court of Appeal in R. v. WIGGLESWORTH (1984) 7 D.L.R. (4th) 361, 365–366:
>
> > 'A single act may have more than one aspect, and it may give rise to more than one legal consequence ..... For example, a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the State; to a judgement for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the State for his crime; to the victim for the damage he caused, and to the Police Force for discipline.'"

14. Accordingly, in appropriate cases, disciplinary proceedings on the same facts **may** be commenced against a Queensland police officer **after** he or she is **acquitted** of a criminal offence.

Whilst the position is otherwise in the United Kingdom and Canada because of specific statutory provisions in those countries, to suggest that in Queensland or any other part of Australia an acquittal is a bar to subsequent disciplinary action on the same facts against a police officer, is to misconceive the law as it applies in this State and in this country.

J S GORDON
Principal Legal Officer
Criminal Justice Commission
27 June 1991