**CHAPTER 19**

**VERDICTS**

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

***Alternative verdicts***

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

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

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

**19.5** The range of alternative verdicts is governed by the Criminal Procedure Codes SI ss 159-174; Ki/Tu ss 157-172.

- A general provision authorises conviction of a 'lesser offence' that forms part of the particulars of the offence charged: SI s 159(1); Ki/Tu s 157(1). This covers conviction of a lesser offence that is an element of the offence charged. It permits, for example, a conviction of manslaughter on a charge of murder, or common assault on a charge of assault causing bodily harm. In addition, proof of a lesser offence permits a conviction of it although it was not charged: SI s 159(2); Ki/Tu s 157(2). This second provision may permit conviction of a lesser offence even if it is not included in the elements of the offence charged.

- On a charge of a completed offence, there can be a conviction of attempting to commit that offence: SI s 160; Ki/Tu s 158. An attempt is not necessarily included in a completed offence because of the requirement that an attempt involve intent to complete the offence: see **13.11**.
- Alternative verdicts for specific offences are detailed in SI ss 161-174; Ki/Tu ss 159-172. There can be a conviction of:
    - infanticide on a charge of murder: SI s 161; Ki/Tu s 159;
    - killing an unborn child on a charge of murder, manslaughter or abortion: SI s 162; Ki/Tu s 160;
    - abortion on a charge of killing an unborn child: SI s 163; Ki/Tu s 161;
    - concealment of birth on a charge of a homicide offence or killing an unborn child; I s 164; Ki/Tu s 162;
    - careless or dangerous driving on a charge of manslaughter; SI s 165; Ki/Tu s 153;
    - various sexual offences on a charge of rape: SI s 166; Ki/Tu s 164;
    - unlawful carnal knowledge on a charge of incest SI s 167; Ki/Tu s 165;
    - various sexual offences on a charge of defilement of a girl: SI s 168-169; Ki/Tu s 166-167;
    - on offence related to breaking and entering property on a charge of another offence related to breaking and entering: SI s 170; Ki/Tu s 168;
    - receiving, embezzlement or obtaining by false pretences on a charge of stealing: SI s 171; Ki/Tu s 169;
    - stealing on a charge of obtaining by false pretences: SI s 172; Ki/Tu s 170;
    - assault with intent to rob on a charge of robbery: SI s 173; Ki/Tu s 171;
    - stealing on a charge of embezzlement: SI s 174; Ki/Tu s 172.

The inclusion of property-related offences is particularly important because of the highly technical relationships between some of these offences and the potential for the wrong charge to be laid: see **8.2**.

**19.6** Where the evidence establishes a greater offence than that which has been charged, there can still be a conviction on the charge. That charge has been proved and it is immaterial that the evidence may also establish some other, more serious offence.

***Double jeopardy***

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

- The concept covers prosecuting a person again after the first prosecution has failed: for example, responding to an acquittal for murder by prosecuting again for murder or for another homicide offence such as manslaughter. A conviction for manslaughter should have been raised as an alternative verdict at the original trial.
- The concept of double jeopardy also covers multiple convictions for the same wrongful conduct, whether at the same trial or at successive trials: for example, convictions of both rape of a child and carnal knowledge of that child. Where two or more such offences are charged together with respect to the same conduct, a conviction on one count will preclude a verdict on any other.

**19.8** Double jeopardy is addressed in provisions of both the Constitutions and the Criminal Procedure Codes.

- The Solomon Islands and Kiribati Constitutions s 10(5) provides:

> No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal of review proceedings relating to the conviction or acquittal.

  The Tuvalu Constitution s 22(8) is in similar terms.
- The Constitutions are supplemented by the Criminal Procedure Codes SI/Ki/Tu s 121, which provides:

> A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of the offence shall not be liable, while such conviction or acquittal has not been reversed or set aside, to be tried again on the same facts for the same offence.

- The Codes s 122 effectively provides that issues of double jeopardy do not rise just because different factual matters are so closely linked that they can be

bundled together as multiple counts within a charge or information:

> A person convicted or acquitted of an offence may afterwards be tried for any other offence with which he or she might have been charged on the former trial under subsection (1) of section 118.

Section 118 is the provision stating that different matters may be tried together when they arise from the same transaction or form part of a series of offences of the same or a similar character: see **17.18**.

**19.10** In their express terms, the provisions of the Criminal Procedure Codes are narrower in scope than those of the Constitutions. They prohibit only a trial again *for the same offence*. The Constitutions refer to trial again 'for that offence *or for any other criminal offence of which he could have been convicted at the trial*'. This expresses the full force of the common law principle. At common law, there are pleas of *autrefois convict* and *autrefois acquit* to prevent repeated prosecutions for the same offence or for offences of which one is an alternative verdict to the other. For example, on a charge of murder, there can be a verdict of not guilty of murder but guilty of manslaughter. If the possibility of a manslaughter verdict was not raised and the verdict is simply not guilty of murder, a manslaughter charge cannot be pursued subsequently. This might also be implied in the Criminal Procedure Codes s 121. In any event, the broad scope of the constitutional provision must be given full force and effect.

**19.11** There is a wider common law principle against double jeopardy that is still relevant because it captures some forms of double jeopardy that do not fall within the Constitutions or the Codes. At common law, two different forms of double jeopardy have been barred.

- First, there is the ground covered by the Constitutions and the Codes. At common law, there are the pleas of *autrefois convict* and *autrefois acquit* to prevent repeated prosecutions for the same offence or for offences of which one is an alternative verdict on a charge of the other.
- In addition, it has been held to be an abuse of process for the prosecution to attempt to re-litigate essentially the same matter, even if the charges concern notionally different matters. In *Kimata v R* [2017] SBHC 120 at [20], it was said:

> No person should be tried twice except by due process of law and risk being punished twice. In the event where a matter has been amply dealt with by the court, the court is barred from re-opening or re-trying the same matter under the pretext of a separate criminal proceedings

when in reality the matter is exactly identical to the other matter. The defence of double jeopardy would apply in such situation to prevent the appellant from being punished twice and unfairly prejudiced in his rights to defend himself.

**19.12** An example of the application of the wider principle against double jeopardy is *Rogers v R* (1994) 181 CLR 251; {1994] HCA 42, where an attempt had been made to evade a ruling that certain confessions were involuntary by laying charges of other offences covered by the same confessional statement. It was held that this was an abuse because it was an attempt to re-litigate the issue of voluntariness which had already been decided. The issue of re-litigation has also arisen in cases where an accused who gave evidence in his or her own defence, denying guilt, was acquitted but was then charged with perjury because of that denial. See *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55, where the High Court of Australia ruled that a perjury charge cannot be pursued because the prosecution would be making a second attempt to win effectively the same case. Perhaps most controversially, the High Court held that a perjury prosecution could not be pursued despite there being fresh evidence to support the charge, regardless of the cogency and weight of that evidence. *Carroll* was cited as authority in *Kimata* at [19].

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