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MAGCO LEGAL LESSONS NO. 33

LEGAL TOPIC: DOUBLE JEOPARDY

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The double jeopardy rule is commonly utilised in criminal proceedings and industrial relations matters. Per this rule, a person who has been acquitted of an offence should not be tried again in respect of the same offence. In this article, we will explore the meaning and effect of the double jeopardy rule, and will provide a holistic view of the same by examining its exceptions.

The double jeopardy rule has been applied in the Courts for centuries. Recognition of this was had by the Court of Appeal of Trinidad and Tobago in the matter of **Crim App. No. of 2006 The State v. Maraj-Naraynsingh and Ramasir**:

> "Over two hundred years ago, the Attorney General in the **Duchess of Kingston's Case (1776) 20 How. St. Tr. 355 at 527** summarized the common law position when he said, "whenever and by whatever means there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops". This general principle of law is often referred to as the double jeopardy rule - that a person who has been acquitted on a criminal charge should not be tried again in respect of the same offence."

The rule is the embodiment of the principle that no person ought to be punished more than once for a single offence. The Courts hold this rule in high regard and scrupulously guard it. These statements echo the voices of the Judges of the Court of Appeal of Trinidad and Tobago as seen in **Cr.A. No. 89 of 1998 The State v. Brad Boyce**:

> "[9] The expression 'double jeopardy' is not always used with a single meaning … sometimes it is used to encompass what is said to be a wider principle that no one should be 'punished again for the same matter' (see **Wemyss v Hopkins (1875) LR 10 QB 378 at 381** per Blackburn J.). Further, 'double jeopardy' is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.
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> [10] If there is a single rationale for the rule or rules that are described as the rule against double jeopardy, it is that described by Black J. in **Green v US (1957) 355 US 184** at 187-188: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that **the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'**
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> …
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> These authorities serve to demonstrate how jealously the Courts have guarded the personal freedom of the individual and show that the rule against double jeopardy was a fundamental part of the criminal justice process as it existed at the commencement of the Constitution."

The governing principles of the rule were explored in the matter of **CA No. 60 of 2007 Steve Ferguson and Anor. v. The AG of T&T and Anor** as follows:

> "[69] The term 'double jeopardy', both as a 'generality' and as used in the 2003 English Extradition Act is taken to include both the plea in bar and the long-

established jurisdiction of the English Court to stay proceedings as an abuse of process (See observations of Mr. Justice Lloyd Jones in (**Maxwell King v U.S.A. [2006] EWHC 3033 (Admin) (07 December 2**). In this case the observations of Auld L. J. in **Fofana and Belise v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux France [2006] EWHC 744 (Admin)** were cited. He summarised the principles as follows:

> 'In summary the authorities establish two circumstances in English Law that offend the principle of double jeopardy.
> **(1) Following an acquittal or conviction for an offence which is the same in fact and law-autrefois acquit or convict;**
> **(2) Following a trial for any offence which was founded on "the same or substantially the same facts", where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place.**'"

Further, in **Crim. App. No. 32 of 2013 Paul Seerattan v. The State**, the Court observed the application of the double jeopardy principle where an accused person in criminal proceedings was acquitted of a charge. According to the Court, a person who was acquitted of a criminal charge in proceedings should not have to defend himself against the same charge in subsequent criminal proceedings. The Court expressed:

> "[36] It is important to again delve into the common law history. An acquittal was once considered sacrosanct in that, in criminal proceedings a person ought not to have to defend himself twice against the same allegation of criminal wrongdoing. This principle, known as the rule against "double-jeopardy" is stringently guarded. In **Sambasivan v. Public Prosecutor of Malaya [1950] A.C. 458** Lord McDermott in delivering the judgment of the Board, stated as follows at page 479:
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> > 'The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that

> the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.'"

However, the double jeopardy rule is not limited to criminal proceedings. In industrial relations matters, aggrieved workers may rely on the rule to prevent their employers from punishing them for offences more than once. Therefore, where an employer disciplines an employee for an offence, the employer may be prevented from subjecting the worker to further disciplinary action for the same offence, per the rule of double jeopardy. This was explored by the Industrial Court of Trinidad and Tobago in **TD No. 323 of 2011 NATU v. Top Décor Limited**:

> "The second issue pertains to the matter of double jeopardy. In this instance, the Court seeks guidance in **TD 370/97 between Banking and General Workers Union and the Unit Trust Corporation of Trinidad and Tobago** at page 34 of the judgment the Learned Member His Honour Mr. Addison Khan stated:
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> > 'There can be no doubt, therefore, that, in accordance with equity, good conscience and the principles of good industrial relations practice, the Corporation was unable to punish the worker again for such alleged misconduct. **Just as it is a principle of the criminal law that a person may not be punished twice for the same criminal offence, it is also a principle of good industrial relations practice that a worker may not be punished twice for the same offence.** Having already taken disciplinary action against the worker by suspending him from his employment for two weeks, the Corporation was effectively estopped from taking further disciplinary action against him for the same offence or offences which it is alleged that he committed….'"

Like many other legal rules and principles, the double jeopardy rule has exceptions that would prevent it from applying. There are two notable exceptions to the rule and they are as follows:

1. Where a Defendant faces prosecution for a criminal offence, is acquitted, and is subjected to subsequent prosecution, evidence may be introduced in the said subsequent prosecution if it shows or tends to show that the Defendant was in fact guilty of that offence which he had been previously acquitted; and
2. Where the imposition of a penalty follows new misconduct or the receipt of new information on the old misconduct, the double jeopardy rule would not apply.

The first exception was outlined in the Court of Appeal matter of **Crim. App. No. 54 of 2008 Kester Benjamin v. The State** as follows:

> "In his judgment (at page 500) Lord Hutton cited with approval a dictum of Chanell J in the case of **R vs. Ollis (1900) 2 QB 758 at p. 782**:
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> > 'the fact that a jury had acquitted would neither detract from the weight of the evidence nor in any way affect its admissibility, for the prisoner would not be tried again for the offence of which he had been acquitted, but for a different offence, in respect of which the evidence given in the former case, or some of it would be relevant.'
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> Lord Hutton went on to give his own conclusion (at page 504) that **provided a defendant is not placed in double jeopardy, evidence which is relevant to a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was in fact guilty of an offence of which he had earlier been acquitted.**"

The first exception was further outlined in **Crim. App. No. 32 of 2013 Paul Seerattan v. The State** wherein it was stated as follows:

> "[37] However, in **R v. Z [2000] 2 A.C. 483**, the tide turned when an acquittal was used to establish previous bad character. **Past acquittals can now be used to establish previous bad character**. The defendant was acquitted on three previous charges of rape and convicted of one, the prosecutor sought to call the four previous complainants to give evidence of the defendant's conduct towards them

> in order to negate his defence of consent. The House of Lords held that the principle of double jeopardy prevented a defendant from being prosecuted for an offence on the same facts or substantially the same facts as in a previous prosecution. **However, the relevant evidence was not inadmissible merely because it showed or tended to show that the defendant had in fact been guilty of a previous offence of which he had been acquitted, and that, since the evidence of the 4 previous complainants was proposed to be deduced not to show that the defendant had been guilty on the previous occasions but to show by similar facts, his guilt of the offence for which he is being tried, the principle of double jeopardy was not infringed** and the evidence was subject to the judge's discretion to exclude it after weighing its prejudicial effect against its probative value under Section 78 of Police and Criminal Evidence Act, UK (PACE) 1984."

Therefore, it would be permissible for the prosecution to introduce evidence during criminal proceedings to show that the Defendant was guilty of a separate offence of which he had been acquitted in previous criminal proceedings.

Regarding the second exception, namely that the double jeopardy rule would not apply where the imposition of a penalty follows new misconduct or the receipt of new information on old misconduct, this exception was outlined in the Industrial Court matter of **TD No. 106 of 2004 National Union of Government and Federated Workers v. Burmac Limited**:

> "During the hearing of the dispute the Union asked the Court to find that the closure of the matter by the Sales Manager and subsequent re-opening by the General Manager constituted double jeopardy. (This argument did not form part of the Union's written Evidence and Arguments and no amendment was sought to include this ground.) On the double jeopardy rule Brown and Beatty's text, Canadian Labour Arbitration (3rd ed., loose-leaf Aurora: Canada Law Book, August 1996) states at paragraph 7:4240:
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> > 'It is generally accepted that an employer may not impose more than one penalty for the same offence. Arbitrators have taken the position that when a

> responsible member of management, possessing the requisite authority, metes out a sanction for certain misconduct and specifically so advises the employee, it is not proper for higher levels of management, on being advised of events, to subsequently substitute a more severe penalty. **However, the rule would not be offended by a suspension which was imposed pending the final resolution of the matter and which was ultimately followed by the discharge of the employee involved.**'
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> …
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> The suspension letter while citing the invoices discovered by the Sales Manager also raised additional information regarding the submission of invoices, other than his own, that the Worker had submitted on a previous occasion as well as the receipt of a cheque for US $150.00. Dicta in the case of AGT LTD. v. I.B.E.W, supra, is to the effect **that where the imposition of a penalty follows new misconduct or the receipt of new information on the original misconduct, the situation would fall outside of the double jeopardy rule**. We hold that the Worker's suspension which encompasses misconduct not addressed previously by the Sales Manager falls outside of the 'double jeopardy' rule."

Therefore, it may be permissible for an employer to temporarily suspend an employee for misconduct pending investigations into the said misconduct and then dismiss the employee after the investigations are completed, provided that the principles of good industrial relations practices are adhered to. Additionally, an employer can further penalize an employee for misconduct where the employee continues the said misconduct after being so penalised or where the employer receives new information on the original misconduct.

Indeed, the double jeopardy rule serves as a necessary safeguard for Defendants in criminal proceedings and employees in industrial relations proceedings as it generally prevents them from being punished more than once for a single offence. The rule serves as an example of the values of fairness and justice that the Courts strive to uphold and to act in accordance with those values in all circumstances. However, the rule is not without its exceptions as outlined hereinabove, and the Courts would take them into account when making fair decisions.

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