

Principles of Double Jeopardy in India: A Judicial Diagnosis

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1. INTRODUCTION

Double jeopardy is a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction. In common law countries, a defendant may enter a preemptory plea of *autrefois acquit* or *autrefois convict* (*autrefois* means "in the past" in French), meaning the defendant has been acquitted or convicted of the same offence and hence that they cannot be retried under the principle of Double Jeopardy.¹

If this issue is raised, evidence will be placed before the court, which will normally rule as a preliminary matter whether the plea is substantiated; if it is, the projected trial will be prevented from proceeding. In some countries, including Canada, Mexico and the United States, the guarantee against being "twice put in jeopardy" is a constitutional right. In other countries, the protection is afforded by statute.²

A partial protection against double jeopardy is a Fundamental Right guaranteed under Article 20 (2) of the Constitution of India, which states, "No person shall be prosecuted and punished for the same offence more than once". This provision enshrines the concept of *autrefois convict*, that no one convicted of an offence can be tried or punished a second time. However it

does not extend to *autrefois acquit*, and so if a person is acquitted of a crime, he can be retried. In India, protection against *autrefois acquit* is a statutory right, not a fundamental one. Such protection is provided by provisions of the Code of Criminal Procedure rather than by the Constitution.³

1.1 Meaning of Double Jeopardy

The word "Jeopardy" refers to the "danger" of conviction that an accused person is subjected to when one trial for an criminal offence.⁴

The act of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted. This means that if a person is prosecuted or convicted ones cannot be punished again for that criminal act. And if a person is indicated again for the same offence in the court then he has the plea of Double Jeopardy as a valid defense.⁵

Black's law dictionary defines Double Jeopardy as – "A second prosecution after a first trial for the same offense." Double Jeopardy follows the principle of

³ Ibid.

⁴ Double Jeopardy – Can an accused be actually punished twice for same offence in India By – Advocate Shipra Arora, Assistant Professor in Department of Law at NIMT Vidhi Evam Kanun Sansthan, available on <http://nimt.ac.in/double-jeopardy-can-an-accused-be-actually-punished-twice-for-same-offence-in-india/>, last visited on dated 06.12.2014 at about 6 P.M

⁵ Id.

¹ Double Jeopardy, Wikipedia, available on http://en.wikipedia.org/wiki/Double_jeopardy, last visited on dated 06.12.2014 at about 1.25 P.M

² Id.

“*Nemo Debet Bis Puniri Pro Uno Delicto*” which means no man ought to be punished twice for one offense.⁶

1.2 Jurisprudential angle of Double Jeopardy⁷

Using H. L. A. Hart’s theory, it can be argued that article 20(2) of Indian constitution is a secondary rule that empowers the primary rule under section 300 of Cr.PC. Article 20(2) enumerates the standard requirement and it allows the creation and it empowers subsequent rule on its descriptive lines. Tough, it is not always necessary that a secondary rule has to be very descriptive in nature, often primary rules are vague and obscure but they set the standard that allows the primary rule to evolve. Having said that, based on Hart’s theory of primary and secondary rules, it is the article 20(2) of constitution of India that allows and empowers Section 300 of Cr.PC.

Double Jeopardy law in India essentially protects a person from multiple punishments or successive prosecution based on same facts of a case where the elements of multiple prosecutions are similar to those for which the accused has already been prosecuted or has been acquitted by the court. Going by the basic principle of law, a new charge cannot be framed against a person under section 300 of Cr.PC based on same facts. It is essentially the duty of police who files the charge sheet to ensure that all the charges are framed against a accused properly, also it is a responsibility of the magistrate to ensure that the charge sheet has been filed without an error.

It creates extra burden on both i.e. *accused and the state machinery* if the charges are not framed cautiously, as it sometimes leads to the double victimization of an accused and on the other side, it also creates problem for state to prosecute a person as it should be.

2. HISTORICAL SOURCE OF THE CONCEPT OF DOUBLE JEOPARDY⁸

It has been said that the history of double jeopardy is the history of criminal procedure. The rule is thought to have its origins in the controversy between Henry II and Archbishop Thomas a Becket that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King’s courts because such further punishment would violate the maxim (*nimo bis in idipsum*) *no man ought to be punished twice for the same offence*. This maxim stemmed from St Jerome’s commentary in AD 391 on the prophet Nahum: “For God judges not twice for the same offence”. The rule later found expression in the common pleas “autrefois convict” and “autrefois acquit”. Based on the concept of merger, autrefois convict was a plea that the prisoner had already been tried for and convicted of the same offence. “The object sought to be achieved ... was avoidance of curial imposition of a sentence in punishment of conduct which had previously been the subject of curial imposition of a sentence in punishment”. Based in estoppel, autrefois acquit was a plea that the prisoner had

⁶ Double jeopardy and the law in India, Naveen K. Jain, a student of Jindal Global Law School, Sonipat (Haryana), available on <http://blog.ipleaders.in/double-jeopardy-and-the-law-in-india/>, last visited on dated 06.12.2014 at about 6.30 P.M

⁷ Id.

⁸ A Discussion on Law of Double Jeopardy in India by Tirthankar Das, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1303324, last visited on dated 06.12.2014 at about 9 P.M

already been tried for and acquitted of the same offence.

The pleas operated in the context of a criminal law with relatively few offences and limited opportunities for a given fact situation to give rise to multiple offences. The last 100 years, however, have seen the proliferation of criminal law, the modernization of criminal procedure, and the development of modern criminal process and institutions. The consequence has been the development of a more extensive double jeopardy rule which more properly gives effect to its underlying principle: that no person shall be troubled twice for the same offence. The decision in *Connelly v Director of Public Prosecutions*⁹ (UK) provided the first judicial statement of coherent general principle on the rule:

“For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that which he is then charged. The word „offence“ embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.”

“The underlying idea ... 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 [sic], 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”.

This statement captures the essential arguments for maintaining the double jeopardy rule. Foremost among these is that such a rule is necessary to protect against wrongful convictions. Repeated exposure to

the (fallible) trial process increases such a risk.

3. INDIAN LAW AND DOUBLE JEOPARDY¹⁰

The Double Jeopardy principle was existed in India prior to the enforcement of the Constitution of India. It was enacted under in section 26 of General Clauses Act, 1897. Section 26 states that “provision as to offences punishable under two or more enactments,- where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

And section 403(1) of (the old) Cr.P.C,1898 (Section 300 of the amended Criminal Procedure Code,1973) , which states, 300(1) a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been under sub-section (1) of the section 221 or for sub-section (2) there of. It is to be noted that, the Code of Criminal procedure recognize both the pleas of *autrefois* acquit as well as *autrefois* convict. The conditions which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be

⁹ [1964] AC 1254

¹⁰ Double Jeopardy - Can an accused be actually punished twice for same offence in India, available on <http://www.legalservicesindia.com/article/article/double-jeopardy-in-india-1633-1.html>, last visited on dated 06.12.2014 at about 1.20 P.M

by be a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression “same offence” shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.

Section 71 of Indian Penal Code runs as- limits of punishment of offence made up of several offences where anything which is an offence is made up of parts is itself an offence, the offender shall not be punished of more than one of such his offences, unless it be so expressly provided.

3.1 Constitutional Implications of Double Jeopardy¹¹

In Constitution of India, Double Jeopardy is incorporated under Article 20(2) and it is one of fundamental right of the Indian Constitution. And the features of fundamental rights have been borrowed from U.S. Constitution and the concept of Double Jeopardy is also one of them. Principle of Double Jeopardy is incorporated into the U.S. Constitution in the Fifth Amendment, which says that “no person shall be twice put in Jeopardy of life or limb.”

Article 20 of the Indian Constitution provides protection in respect of conviction for offences, and article 20(2) contains the rule against double jeopardy which says that “no person shall be prosecuted or punished for the same offence more than once.” The protection under clause (2) of Article 20 of Constitution of India is narrower than the American and British laws against Double Jeopardy.

Under the American and British Constitution the protection against Double Jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against

double punishment is given only when the accused has not only been ‘prosecuted’ but also ‘punished’, and is sought to be prosecuted second time for the same offence. The use of the word ‘prosecution’ thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause (2) of the article 20 has no application and an appeal against acquittal, if provided by the procedure is in substance a continuance of the prosecution.

3.2 Can Different Charge is laid for the Same Action or Same Offence?¹²

Doctrine against Double Jeopardy in Constitution of India, Article 20(2) says that ‘no person shall be prosecuted and punished for the same offence more than once.’ But it is subjected to certain restrictions. And it is to be noted that Article 20(2) of Constitution of India does not apply to a continuing offence.

There are some examples of cited cases mentioned below which throw light on the above question:

In Venkataraman v. Union of India,¹³ An enquiry was made before the enquiry commissioner on the appellant under the Public Service Enquiry Act, 1960 & as a result, he was dismissed from the service. He was later on, charged for committed the offence under Indian Penal Code & the Prevention of Corruption Act. The court held that the proceeding held by the enquiry commissioner was only a mere enquiry & did not amount to a prosecution for an offence. Hence, the second prosecution did not attract the doctrine of Double Jeopardy or protection guaranteed under Fundamental Right Article 20 (2).

It is to be noted that Article 20 (2) will applicable only where punishment is for the same offence, **In Leo Roy v.**

¹¹ Ibid.

¹² Ibid.

¹³ AIR 1954 SC 375

Superintendent District Jail,¹⁴ The Court held: if the offences are distinct the rule of Double Jeopardy will not apply. Thus, where a person was prosecuted and punished under sea customs act, and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

In Roshan Lal & ors v. State of Punjab,¹⁵ The accused had disappeared the evidence of two separate offences under section 330 & section 348 Indian Penal Code. So, it was held by the court that the accused was liable to be convicted for two separate sentences.

In this case,¹⁶ the appellants were charged under section 409 IPC & Section 5 of the prevention of Corruption Act, 1947 for making false panchnama in which they have shown recovery of 90 gold biscuits while according to the prosecution case, they had recovered 99 gold biscuits. The appellants were tried for the same & acquitted. The appellants were again tried for the offence under section 120-B of Indian Penal Code, Section 135 & 136 of the Customs Act, Section 85 of the Gold (control) Act & Section 23(1-A) of FERA and Section 5 of Import Export (control) Act, 1947. The validity of the subsequent prosecution was challenged by the appellant by the appellant on the ground that it contravened the constitutional guaranteed embodied in Article 20(2). The court held: "After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are

entirely different. The second trial with which we are concerned in this appeal, envisages a different fact- situation and the enquiry for finding out constituting offences under the Customs Act and the Gold (Control) Act in the second trial is of a different nature. Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial was not barred under Section 403 Cr.P.C of 1898 as alleged by the appellants."

In Union of India & Anr. v. P.D. Yadav,¹⁷ In this case, the pension of the officer, who was convicted by a Court-Martial, had been forfeited. The court held: "This principle is embodied in the well-known maxim *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa*, meaning no one ought to be vexed twice if it appears to the court that it is for one and the same cause. Doctrine of Double Jeopardy is a protection against prosecution twice for the same offence. Under Article 20-22 of the Indian Constitution, provisions are made relating to personal liberty of citizens and others offences such as criminal breach of trust, misappropriation, cheating, defamation etc., may give rise to prosecution on criminal side and also for action in civil court/ other forum for recovery of money by way of damages etc., unless there is a bar created by law. In the proceedings before General Court Martial, a person is tried for an offence of misconduct and whereas in passing order under Regulation 16 (a) for forfeiting pension, a person is not tried for the same offence of misconduct after the punishment is imposed for a proven misconduct by the General Court Martial resulting in cashiering, dismissing or removing from service. Only further action

¹⁴ AIR 1958 SC119

¹⁵ AIR 1965 SC 1413

¹⁶ A.A.Mulla & Ors. v. State of Maharashtra & ans., AIR 1997 SC 1441

¹⁷ (2002)1SSC 405

is taken under Regulation 16 (a) are entirely different. Hence, there is no question of applying principle of Double Jeopardy to the present cases.”

4. CONCLUSION

The rule against double jeopardy is a centuries old common law principle, which bears repeated criminal prosecution for the same offence. The rule plays a vital role in the protection of integrity of the criminal justice system, including precious human rights of the accused persons. The existence of the rule is very essential as far as criminal justice administration is concerned irrespective of the nature of the system.¹⁸

The rule against double jeopardy¹⁹ is a universally accepted principle for the protection of certain values within the criminal justice system. It serves many purposes such as preventing the arbitrary actions of the state against its subject, ensures finality in litigations etc., which are of great importance for the protection of human rights of the accused persons. It is a centuries old principle, which survived not by chance, but for many good reasons. It must be noted that when the English legislatures intended to introduce an exception to the rule, strong criticism was raised from the part of legal fraternities as well as human rights activists. Thus, existence of such a rule is inevitable for the integrity of the criminal justice system itself.

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¹⁹ Id.