

The Influence of Double Jeopardy on the Sentencing Process

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Introduction

Double jeopardy jurisprudence evolved in the common law in response to the inherent deficiencies in medieval criminal procedure and the draconian punishments imposed on defendants. This common law principle proscribes repeated attempts to convict an accused for the same criminal offence following an acquittal, or indeed the imposition of multiple punishments on conviction for the same offence. The objective of this paper is to examine the influence of double jeopardy on the sentencing process in circumstances where the trial court or the appellate court is effectively imposing multiple punishments for the same criminal offence.

The imposition of sentence occurs at the post-conviction stage of the criminal trial when the trial judge imposes the appropriate sentence for the particular criminal offence for which the defendant has been convicted, taking into consideration both aggravating and mitigating factors. Trial judges are generally vested with a broad discretion¹ as to sentencing. The only guidance is the maximum sentence authorised by statute, from which the trial judge may derogate so long as the principles of sentencing have been adhered to.² Double jeopardy jurisprudence may be relevant to the process of sentencing where the initial sentence imposed by the trial court is subsequently increased, either on reconviction for the same offence or where the initial sentence imposed is increased by an appellate court. If a defendant has his sentence increased, does this constitute a violation of the common law principle against double jeopardy?

Sentencing following a reconviction

Where an erroneous conviction has been overturned by the appellate court in circumstances where a retrial is permissible and which concludes in a valid conviction, then the trial court, when imposing sentence, is under a duty to take into consideration any term of imprisonment served by the defendant under the terms of the original sentence. This issue was addressed by the United States Supreme Court in *North Carolina v Pearce*,³ where the respondent had been convicted and sentenced accordingly. This conviction was quashed on appeal and a retrial was ordered, and the

* The views expressed in this paper are those of the author and not necessarily of the Centre for Criminal Justice.

¹ Under Irish law the only guidance for the trial court when imposing sentence is the statutory maximum prescribed for a particular offence, thereby leaving the trial court with a broad discretion as to the punishment to be imposed, the exception being a conviction for murder whereby the trial judge does not have any discretion but to impose a mandatory life sentence. Furthermore, under s.5 of the Criminal Justice Act 1999, a mandatory sentence of 10 years imprisonment is imposed for drug dealing. Judicial sentencing discretion has proven to be a contentious issue due to the varying disparities between the sentences imposed by trial judges, with the result that accused persons are, arguably, not held "equal before the law" as mandated by Art.40.1 of the Constitution of Ireland 1937.

² For a detailed analysis of the principles of sentencing, see O'Malley, *Sentencing: Law and Practice* (Round Hall Sweet & Maxwell, Dublin, 2000), pp.137–251.

³ 395 U.S. 711 (1969) (S.C.).

respondent was again convicted. The sentence imposed following the second conviction, when added to the time already served on the first conviction, amounted to a longer total sentence than that originally imposed—the defendant was not credited for time already served. Acknowledging that the guarantee against double jeopardy in the United States Constitution protects against the imposition of multiple punishments (and retrials *per se*) for the same offence, Stewart J., delivering the opinion of the court, said:

“We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully ‘credited’ in imposing sentence upon a new conviction for the same offense ... We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully ‘credited’ in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is re-convicted, those years can and must be returned - by subtracting them from whatever new sentence is imposed.”⁴

Consequently, where a defendant has been convicted and sentenced accordingly but this conviction is overturned with an order for retrial resulting in a reconviction, the defendant must be credited with time served on the original conviction otherwise his common law right (possibly constitutional based on Art.38.1) against the imposition of multiple punishments for the same criminal offence will have been violated. The defendant would, therefore, be well advised to seek an order of *certiorari* by way of judicial review proceedings quashing the term of imprisonment imposed by the trial court and an order of *mandamus* compelling the trial court to apply the proper sentencing principles while observing the defendant’s common law right against double jeopardy.

Vindictiveness against the defendant for successfully appealing against his initial conviction by the trial judge when imposing sentence upon reconviction for the same criminal offence would undoubtedly constitute a violation of the defendant’s constitutional right to a “trial in due course of law”.⁵ Accordingly, it would be appropriate for the trial judge, when imposing sentence following a reconviction, to clearly state the reasons for the greater sentence being imposed. The trial court is, of course, entitled to impose a greater sentence in circumstances where additional aggravating factors against the accused have been presented to the court during the course of the retrial.⁶

Another issue raised in *Pearce* was whether, assuming that proper credit is given for time already served, the trial court may impose a greater sentence on reconviction than was initially imposed. The U.S. Supreme Court held that the double jeopardy prohibition does not restrict the length of sentence imposed on re-conviction.⁷ The court found that the power to impose the legally authorised sentence is a corollary of the well-established power to retry a defendant whose conviction has been set aside due to the

⁴ *ibid.*, at 718–719 (S.C.).

⁵ Constitution of Ireland 1937, Art. 38.1.

⁶ The defendant must of course be credited with time already served on the original conviction.

⁷ The court concluded that the double jeopardy clause of the United States Federal Constitution does not impose an absolute prohibition against the imposition of a greater sentence following a retrial where a defendant has succeeded in having his original conviction overturned on appeal.

presence of procedural irregularities during the course of the initial criminal trial.⁸ An increased sentence may be imposed on reconviction where the trial court is made aware of particular aggravating factors which were not presented in evidence during the course of the first trial. In any event, if the defendant is successful in having his conviction quashed and is subsequently retried and again convicted for the same criminal offence, then the defendant is subject to whatever punishment the court deems appropriate, so long as the defendant is credited with the term of imprisonment served on the original conviction and, of course, that the proper principles of sentencing have been applied

An exception to this rule has been recognised by the U.S. Supreme Court where the jury at the first trial declined to impose the death penalty. Upon reconviction following a retrial for the same offence, the prosecution are precluded from again seeking the death penalty.⁹ Presumably, this rule relates to the rationale for the development of the common law principle against double jeopardy, *i.e.* the imposition of draconian punishments for most criminal offences. However, this exception is moot in the criminal justice system operative in Ireland since the abolition of the death penalty by statute,¹⁰ as substantiated by a constitutional referendum in 2001.¹¹

Successful appeal against an unduly lenient sentence

Pearce dealt with the imposition of a new sentence after a retrial (following the quashing of an erroneous conviction) and held that the defendant must be credited with the time already served upon the initial conviction when the trial court imposes sentence following the retrial, assuming of course that the defendant is re-convicted. If, following the imposition of sentence by the trial court, the case is then referred to the appellate court by the prosecution authorities (with the objective of seeking an increased sentence) and credit is not given for the period of imprisonment already served, then the defendant is once again placed in jeopardy of receiving multiple punishments for the same criminal offence. Indeed, this procedure might be too close to the approach taken in totalitarian states which permit cases to go back to the courts until a verdict and sentence satisfactory to the State are obtained.¹²

The common law principle against double jeopardy has been invoked by defendants against the right of the prosecution to appeal against what they consider to have been an unduly lenient sentence.¹³ On this point, Byrne explains that:

⁸ *North Carolina v Pearce*, *op. cit.* at 719-721 (S.C.), *per* Stewart J. delivering the opinion of the Supreme Court.

⁹ *Bullington v. Missouri* 451 U.S. 430 (1981) (S.C.); *Arizona v Rumsey* 467 U.S. 203 (1984) (S.C.).

¹⁰ s.1 of the Criminal Justice Act 1990 provides that “no person shall suffer death for any offence”.

¹¹ In 2001 an amendment was made to the Constitution of Ireland 1937 with the addition of subs.2 of Art.15 which reads as follows: “The Oireachtas shall not enact any law providing for the imposition of the death penalty”. Accordingly, in addition to the formal abolition of the death penalty as a mode of punishment in the criminal justice system of Ireland, the Constitution now specifically prohibits any future enactments authorising the use of the death penalty as a mode of punishment.

¹² Spencer, “Do we need a Prosecution Appeal Against Sentence?” [1987] *Crim. L. Rev.* 724 at 735, cites the following extract from an article published in *The Independent* (U.K.), February 10, 1987: “It is only in banana republics and totalitarian states that cases are bounced back at the courts by the authorities until a satisfactory verdict and sentence are forthcoming”.

¹³ See generally: Law Reform Commission of Ireland, Consultation Paper, *Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004); Law Reform Commission of Ireland, Consultation Paper, *Prosecution Appeals in Cases Brought on Indictment* (LRC CP19-2002).

“The principle of avoiding double jeopardy in criminal cases has also been called in aid against the right of the prosecution to appeal against sentence. When a person appears before a court for sentence, he or she is theoretically in jeopardy of the loss of liberty or other punishment to the extent allowed by the legislation, which prescribes the maximum penalty for the offence in question. If, after the court’s decision, the case can be referred to another court for the purpose of imposing a more severe penalty, the amount of punishment between that imposed by the court at first instance and the maximum available is once again in jeopardy.”¹⁴

However, this argument may be negated in consideration of the fact that the accused has been convicted of one offence and the only issue of contention is the appropriate sentence to be imposed by the appellate court.

In criminal justice systems that allow the prosecution to appeal what it considers to be an unduly lenient sentence imposed by the trial court, the appellate court may sustain the prosecution’s challenge and impose a greater sentence than that imposed by the trial court.¹⁵ It is arguable that the imposition of sentence by the trial court does not necessarily have the finality that a judgment of acquittal (or indeed a conviction) has. There have been dicta in the United States¹⁶ which have cast doubt on the constitutionality of appealing an unduly lenient sentence although any doubt has now been removed since the ruling in *United States v DiFrancesco*.¹⁷ Central to this case was United States Federal Organised Crime Control Act 1970, which provides that an increased sentence may be imposed upon a convicted “dangerous offender” and grants the prosecution the right, under specified conditions, to obtain appellate review of that sentence. In *DiFrancesco*, the trial judge imposed an additional sentence, having concluded that the defendant came within the provisions of the Act. However, he ordered that the additional sentence was to run concurrently with the sentence for the substantive criminal offence. The prosecution appealed this on the ground that imposing concurrent rather than consecutive sentences was an abuse of sentencing discretion given the provision of the Act to incarcerate dangerous offenders for longer periods *i.e.* the sentences should run consecutively. The Supreme Court allowed the prosecution’s appeal on the ground that the trial judge had erred as to the appropriate sentence to be imposed. The court emphasized that re-sentencing here was quite distinct from a retrial based on the defendant’s guilt. Blackmun J. explained that:

“This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under [the Federal Act] the appeal is to be taken promptly and is essentially on the record of the sentencing court.

¹⁴ Byrne, “Prosecution Appeals Against Sentence” (1988) 62 A.L.J. 465 at 468.

¹⁵ s.2 of the Irish Criminal Justice Act 1993 permits the D.P.P. to appeal an unduly lenient sentence imposed by the trial court to the Court of Criminal Appeal. s.4 provides that the person whose sentence is the subject of appeal may be entitled to a legal aid certificate. In the *People (D.P.P.) v Heeney* [2001] 1 I.R. 736 (S.C.), a unanimous Supreme Court held that the principle against double jeopardy was not violated where the D.P.P. appealed what it considered to be an unduly lenient sentence imposed by the trial court to the Court of Criminal Appeal pursuant to s.2 of the 1993 Act, as the accused was not being retried for the same criminal offence nor indeed were multiple punishments being imposed and, furthermore, that the Court of Criminal Appeal, prior to the enactment of the 1993 Act, always had power to impose a more severe sentence than that imposed by the trial court upon conviction.

¹⁶ For example *United States v. Benz* 282 U.S. 304 (1931) at 307 (S.C.), *per Sutherland J.*

¹⁷ 449 U.S. 117 (1980) (S.C.).

The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.”¹⁸

In these circumstances there can be no expectation of finality in the original sentence, indeed a sentence has never carried with it the finality in litigation that attaches to an acquittal.¹⁹ Furthermore, the Federal Organised Crime Control Act did not violate the double jeopardy prohibition against the imposition of multiple punishments upon conviction for the same criminal offence. More to the point, an appeal against an unduly lenient sentence does not involve a second trial for the same criminal offence, nor indeed a collateral attack on a conviction, but merely the imposition of the appropriate sentence as determined by the appellate court.²⁰ Accordingly, where the appellate court increases the sentence imposed by the trial court this will not *per se* constitute the imposition of multiple punishments for the same criminal offence; this process merely involves the imposition of the permissible sentence proportionate to the severity of the criminal offence for which the defendant has been convicted, taking into consideration relevant mitigating and aggravating factors. Consequently, the defendant cannot complain that his legitimacy of expectation²¹ following the imposition of the original sentence has been infringed. This is especially true in light of the right of the prosecution under Irish law to appeal an unduly lenient sentence. This issue may give rise to difficulties where the operative rules of criminal procedure do not in fact inform the accused to the possibility of an appeal against an unduly lenient sentence, whereby the accused may in fact have a legitimate expectation that the original sentence imposed following his conviction by the trial judge has the necessary ingredients of finality. This is an issue which has yet to be resolved by the superior courts in Ireland.

It may be argued, however, that since a prosecution appeal against an unduly lenient sentence does not involve a retrial of the defendant for the same criminal offence nor the imposition of multiple punishments for the same criminal offence (unless of course the defendant is not credited with time already served on the original sentence), the accused is not placed twice in jeopardy for the same criminal offence. Moreover, this appeal, in ensuring that the appropriate sentence is imposed, does not violate the double jeopardy prohibition, as it merely involves a continuation by the appellate court of what was begun by the trial court.²² In other words, the appellate court is merely imposing the

¹⁸ 449 U.S. 117 (1980) at 136 (S.C.).

¹⁹ A successful appeal by the prosecution against an unduly lenient sentence merely sets in place the completion by the appellate court of that which was begun by the trial court, *i.e.* a form of “continuing jeopardy”.

²⁰ Spencer, *op. cit.*, at 735, writes that: “A prosecution appeal against an over-lenient sentence does not offend against the principle in this sense, because a person is not punished twice when, before anything has been done to him, an adequate punishment or ordered to replace an inadequate one or no punishment at all ... the defendant, by definition, has already been found guilty. The appeal court is not overturning his acquittal, but examining the abstract evaluative question of what sentence it is appropriate to impose in the light of his conviction. This does not amount to double-jeopardy, any more than it offends the rule about *res judicata* to allow the Court of Appeal to examine the amount of damages which have been awarded in a civil case”.

²¹ On the principle of legitimate expectations see: Hogan and Morgan, *Administrative Law in Ireland* (3rd ed., (Round Hall Sweet & Maxwell, Dublin, 1998), chapter 16; Wade and Forsyth, *Administrative Law* (8th ed., Oxford University Press, Oxford, 2000), pp. 494–500; Craig, *Administrative Law* (5th ed., Sweet & Maxwell, London, 2003), chapter 19.

²² This analogy is drawn from the minority judgement of Holmes J. in *Kepner v. United States* 195 U.S. 100 (1904) at 134–137 (S.C.) where he advocated the “continuing jeopardy” doctrine under which a

appropriate sentence, and so does not place the accused twice in jeopardy for the same criminal offence.

The right of appeal against an unduly lenient sentence is a fundamental aspect of criminal procedure in jurisdictions, like Ireland, where the trial court is vested with a broad discretion as to the sentence to be imposed in a particular case. This discretion has given rise to disproportionate sentencing practices, with the result that a defendant may have received a more lenient or a more severe punishment from a different judge, perhaps in a different region of a criminal justice jurisdiction.²³ This may give rise to a constitutional challenge under the equality clause in Art.40.1 of the Constitution of Ireland, which provides that “all citizens shall, as human persons, be held equal before the law”, where in similar factual circumstances disparate sentences are imposed, with the result that a defendant may contend that because of this sentencing disparity he has not been sufficiently credited with time already served. Consequently, where two defendants are convicted following a retrial in similar circumstances, but one of the defendants receives a substantially greater sentence, he may argue on the basis of Art.40.1 that the common law principle against double jeopardy has been violated.

Since the enactment of the Irish Criminal Justice Act 1993, the Director of Public Prosecutions (D.P.P.) is empowered to appeal an unduly lenient sentence to the Court of Criminal Appeal.²⁴ Under Irish constitutional law, the accused is entitled to a speedy trial; once he has been charged with the commission of a criminal offence he must be tried within a reasonable period of time.²⁵ Consequently, the accused cannot complain that the crime for which he has been indicted was allegedly committed several decades previously so long as, once indicted, he is in fact tried within a reasonable period following his arrest and possible detention. By analogy, if the prosecution decides to appeal against an unduly lenient sentence to the appellate court, the objective of which is to ensure that the appropriate (increased) sentence is imposed, then this appeal must be brought within a reasonable period of time also. Indeed, this procedure is provided for by the 1993 Act, under which the D.P.P. must appeal an unduly lenient sentence within 28 days from the imposition of the original punishment.²⁶

It is unclear how the Irish criminal courts will approach the issue of allowing credit for time already served by the defendant upon the original conviction. Given that the only guidance available to trial courts is the maximum sentence as stipulated for by statute

retrial of the accused should be allowed following an appeal against conviction; the appeal process merely being a continuation of the criminal trial, *i.e.* one “jeopardy”.

²³ Judicial sentencing discretion has on occasion been inconsistent to the extent that the sentence imposed on defendants for the commission of the same criminal offence could best be described as a geographical lottery.

²⁴ This is provided for in s.2 of the Criminal Justice Act 1993. The D.P.P. must lodge an appeal under this section within 28 days from the day on which the sentence was imposed.

²⁵ It has been held that the right to a criminal trial without undue delay is an unspecified constitutional right to a “trial in due course of law” as mandated by Art.38.1 of the Constitution of Ireland, 1937; see *In Re Singer* (1963) 97 I.L.T.R. 130 and *The State (O’Connell) v Fawsitt* [1986] I.R. 363. This procedural requirement is also mandated by Art.6(1) of the European Convention on Human Rights 1950 which, *inter alia*, provides that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

²⁶ s.2 of the Criminal Procedure Act 1993.

(with the exception of some guideline judgement cases),²⁷ the appellate court may impose the maximum sentence for an offence without giving credit for time already served on the original sentence. For example, if the defendant has been sentenced to three years imprisonment for an offence carrying a maximum penalty of ten years imprisonment and has served six months before the appellate court increased the sentence to five years imprisonment, then this sentence (of five years imprisonment) must be deemed to have commenced at the time that the original sentence was imposed. Although the appellate court is permitted to increase (or decrease) the trial court's sentence, the failure to take into account the six months already served would violate the double jeopardy prohibition as it results in the imposition of multiple punishments for the same criminal offence. This is equally true where the defendant has been refused bail prior to the criminal trial and has not been credited with time already served while awaiting trial. The essential point here is that although the accused is not being prosecuted twice for the same criminal offence, he is nevertheless being punished twice, something which is also proscribed by double jeopardy jurisprudence.

Criminal procedure makes provision for a lesser-included offence to be considered by the trial court, and an acquittal on the greater offence impliedly includes an acquittal of the lesser-included offence.²⁸ Indeed, this also operates in the reverse, whereby a conviction of the lesser-included offence implies an acquittal of the greater offence, *e.g.* where the accused has been indicted for murder and the jury return a verdict of guilty of manslaughter as an implied alternative. This procedure cannot be argued by a defendant who has had his sentence increased on appeal, *i.e.* where he has been sentenced by the trial court this is not an implicit acquittal of a greater sentence being imposed on appeal or in the case of a retrial. In other words, the imposition of a sentence of less than the maximum should not be equated with an acquittal of the greater or maximum sentence authorised by statute for that offence in the event of an appeal against an unduly lenient sentence or in the case of a retrial.²⁹

In a recent Irish case, the *People (D.P.P.) v Heeney*,³⁰ the accused pleaded guilty in the Circuit Criminal Court to various sexual offences. A meeting was held in chambers between counsel and the Circuit Court judge prior to the sentencing and an indication was given of the sentence that would be imposed following a plea of guilty. However, the D.P.P. appealed the sentence imposed by the Circuit Court to the Court of Criminal Appeal on the basis that it was unduly lenient.³¹ The defendant further appealed, arguing that this was in violation of the double jeopardy prohibition. The Supreme Court held, however, that the double jeopardy proscription was not applicable to an adjudication by the D.P.P. appealing an unduly lenient sentence, as the defendant was not being tried a second time for the same criminal offence. In other words, the Court of Criminal Appeal is merely completing what the trial court has begun,³² *i.e.* the imposition of the appropriate sentence proportionate to the severity of the criminal

²⁷ For example, the *People (D.P.P.) v Tiernan* [1988] I.R. 250 concerning guidelines for sentencing offenders convicted of rape.

²⁸ Assuming that a general verdict of acquittal has been returned, as opposed to a partial verdict of acquittal on the substantive offence and a finding of guilt on the lesser-included offence.

²⁹ s.4 of the Criminal Procedure Act 1993 provides for a retrial in certain circumstances.

³⁰ [2001] 1 I.R. 736.

³¹ s.2 of the Criminal Justice Act 1993 confers on the D.P.P. the right of appeal in cases where in the opinion of the D.P.P. that the sentence imposed by the trial judge was unduly lenient.

³² See the dissenting judgement of Holmes J. propounding the doctrine of a "continuing jeopardy" in *Kepner v United States*, *op. cit.* at 134–137.

offence for which the defendant has been convicted. The essential point for the purposes of double jeopardy jurisprudence being that the accused has not been tried on more than one occasion for the same criminal offence, nor are multiple punishments for the the same criminal offence being imposed.

Collateral issues

There are two specific instances where sentencing may infringe the common law principle against double jeopardy: “offences taken into consideration” and “the reference factor”.

Offences “taken into consideration”

In circumstances where a defendant has been convicted and sentenced accordingly, he may request that the trial court take other offences into consideration when imposing sentence. Effectively, the defendant is pleading guilty to other criminal offences which are not necessarily included in the indictment before the trial court. Among the reasons for this request may be the defendant’s ambition to make a fresh start in life without any trials pending. Requesting the trial court to take other offences into consideration was originally a common law procedure but has since been given statutory recognition in Ireland.³³

The trial court’s capacity to take other offences into consideration when imposing sentence may be beneficial to the defendant, as the trial court may impose a sentence for these other offences to run concurrently with the offence for which the defendant has been convicted of on the indictment before the court. The defendant is thereby spared the additional years’ imprisonment that would be imposed were he tried separately for each of the other offences. In such situations, however, the trial court must adhere to the “totality principle” of sentencing, *i.e.* consider whether the total sentence being imposed is in proportion to the totality of the defendant’s criminal transgressions. The legislation, however, remains silent as to whether the sentence being imposed for those other offences taking into consideration are to run concurrently or consecutively. It also remains silent as to the procedure to be followed when taking other offences into consideration. An interesting question for present purposes is whether a defendant could request the trial court to take other offences into consideration which he did not in fact commit; could he plead double jeopardy if he had pleaded guilty to a lesser-included offence and is subsequently charged with a compound offence? This potential pitfall was addressed, at least partially, by the introduction of s.9 of the Criminal Justice (Miscellaneous Provisions) Act 1997, which provides that the D.P.P. must consent to the accused’s petition to the court to have other offences taken into consideration when imposing sentence. The rationale of this provision would appear to be to prevent the accused admitting guilt of lesser offences when he might be guilty of a greater offence and then pleading double jeopardy if subsequently indicted for the greater offence.³⁴

³³ s.8 of the Criminal Justice Act 1951 reads: “(1) Where a person, on being convicted of an offence, admits himself guilty of any other offence and asks to have it taken into consideration in awarding punishment, the Court may take it into consideration accordingly. (2) If the Court takes an offence into consideration, a note of that fact shall be made and filed with the record of the sentence, and the accused shall not be prosecuted for that offence, unless his conviction is reversed on appeal”.

³⁴ The most common example of this scenario would be where the accused admits himself guilty of manslaughter (lesser-included offence) whereas he may be guilty (the police may be in the process of establishing this guilt) of the greater or compound offence, murder.

The “reference factor”

While not, strictly as a matter of law, a double jeopardy issue, what has become known as the “reference factor” has relevance for jurisprudence in this area.) The so-called reference factor was succinctly described by the English Court of Criminal Appeal in *Attorney General’s Reference (No. 3 of 1993) (W)*,³⁵ where Lord Taylor C.J. explained that the Court of Criminal Appeal:

“...[has to] bear in mind the element of double jeopardy in all Attorney-General’s references: the offender is sentenced, he then hears that the sentence is to be reviewed, he has the added suspense and anxiety of waiting and attending on the hearing.”³⁶

In other words, where the appellate court increases the sentence of the trial court, then a deduction is made in the increased sentence because of the additional anxiety suffered by the defendant.³⁷ However, double jeopardy jurisprudence *per se* is not concerned with the anxiety experienced by the defendant who knows that his sentence is to be appealed to the Court of Criminal Appeal on the basis that it is unduly lenient. Instead, it is concerned with the prevention of a retrial for the same criminal offence following an acquittal (or conviction for a lesser-included offence) or the imposition of multiple punishments for the same criminal offence. Nevertheless, given that the application of the reference factor is a frequent feature of recent decisions³⁸ of the English Court of Criminal Appeal, the practice has to be noted. It is submitted, however, that this practice should not be adopted by the Irish appellate criminal courts as it is not a constituent rule of double jeopardy jurisprudence and, accordingly, should be confined to a principle of sentencing.

The application of the “reference factor” to the sentencing process as constituting a violation of the principle against double jeopardy may indeed constitute judicial activism by the appellate court. The continued application by appellate courts of the “reference factor” would undoubtedly muddy the waters in relation to the proper application of double jeopardy jurisprudence.

Conclusion

Double jeopardy jurisprudence is not applicable *per se* to the process of re-sentencing defendants following a conviction. It is only where the imposition of sentence is deemed to constitute multiple punishments for the same criminal offence that the

³⁵ (1994) 98 Cr. App. R. 84 (C.C.A.).

³⁶ *ibid.* at 90. The application of the reference factor has added complexities to the difficulties in relation to judicial sentencing discretion, see generally Henham, “Attorney-General’s References and Sentencing Policy” (1994) *Crim. L. Rev.*, 499 at 504–505.

³⁷ See O’Malley, “The First Prosecution Appeal Against Sentence” (1994) 4 I.C.L.J. 192 at 201: “As used in the context of sentencing appeals, it denotes a policy of making some reduction in a sentence increased on appeal because of the hardship to the offender in knowing that his sentence is under appeal and liable to be increased”.

³⁸ See: *Attorney General’s Reference (Nos. 59 and 60 of 2005)*; *R. v Teale and another* [2005] All E.R. (D) 328, 28 June (C.C.A.); *Attorney General’s Reference (No. 54 of 2005)*; *R. v Mann* [2005] EWCACrim 1896, 11 July (C.C.A.); *Attorney General’s Reference (No. 50 of 2005)*; *R. v Andrews* [2005] All E.R. (D) 322, 22 July (C.C.A.); *Attorney General’s Reference (Nos. 39, 40 and 41 of 2005)*; *R. v Dale and others* [2005] EWCACrim 1961, 6 July (C.C.A.); *Attorney General’s Reference (No. 32 of 2005)*; *R. v Lincoln* [2005] EWCACrim 1819, 30 July (C.C.A.); *Attorney General’s Reference (No. 26 of 2005)*; *R. v Aldridge* [2005] EWCACrim 1973, 7 July (C.C.A.).

defendant may contend that his common law right against double jeopardy has been infringed. The imposition of sentence does not *per se* have the quality of finality as an acquittal. Furthermore, the imposition of a greater, or what is perhaps best described as the appropriate sentence, does not constitute a violation of the defendant's common law right against double jeopardy, as the appellate court is merely imposing what is deemed to be the appropriate sentence in consideration of both mitigating and aggravating factors. The defendant's guilt has been established following a trial on the merits by a court of competent criminal jurisdiction and the appellate court is vested with the responsibility of examining the abstract question of what sentence should be imposed in consideration of the severity of the criminal offence for which the defendant has been convicted.

Thus, where a defendant has been convicted for the commission of a criminal offence by a court of competent jurisdiction and has been sentenced accordingly, he is not placed in double jeopardy if the prosecution appeals this sentence on the basis that it is unduly lenient, as the appellate court is not placing him in double jeopardy of a second conviction nor indeed imposing multiple punishments for the same offence but rather imposing the appropriate sentence.³⁹ This is also true where the accused is successful in having his conviction quashed by the appellate court but is subsequently re-convicted following a re-trial whereby the second trial court imposes what is deemed to be the appropriate sentence. This will not constitute the imposition of multiple punishments for the commission of the same criminal offence so long as the defendant is credited with time already served on the original conviction by the second trial court when imposing sentence. In consideration of the dearth of Irish precedent on the fundamental issue of double jeopardy and sentencing, the principles of law expounded by the U.S. Supreme Court in *Pearce* and *DiFrancesco* will undoubtedly provide influential assistance when these issues are ultimately presented before the Irish courts for determination.

³⁹ Similarly, in a civil law case the principle of *res judicata* does not prohibit the appellate court from reconsidering the award of damages by the trial court; see for example *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523 (S.C.).