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THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 906 JR]

D. S.

APPLICANT

AND
THE JUDGES OF THE CORK CIRCUIT AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of O'Neill J. delivered the 16th day of October, 2006.

1. By his order of the 18th October, 2004, McKechnie J. gave leave to the applicant to seek by way of judicial review a permanent injunction restraining the second named respondent from taking any further steps in the prosecution entitled *The People (at the Suit of the Director of Public Prosecutions) v. D.S.*, pending before Cork Circuit Criminal Court. The grounds upon which that leave was given were set out in paragraph (E)1 to (E)5 inclusive and were in summary; that the further prosecution of the applicant who had already been tried twice for the same offence was a violation of the applicants right to a fair trial pursuant to Article 38 of the Constitution; that a retrial of the applicant violated the applicants right to a fair hearing pursuant to Article 6 of the European Convention on Human Rights: that a retrial of the applicant, he having been tried twice on the same offence was contrary to a long standing rule of practice, that a retrial of the applicant would be oppressive to the applicant and an abuse of process; and that the applicants right to the expeditious institution of criminal proceedings had been violated.

2. The background to this matter is as follows.

The applicant was returned by the District Court to Cork Circuit Criminal Court for trial on 30th October, 2002, in respect of charges of sexual assault allegedly perpetrated on one T.L. and S.L.. His trial in respect of these matters commenced on 6th December, 2002, before his Honour Judge Patrick Moran. At the outset of the trial an application was made on behalf of the applicant to sever the indictment so that the charges in respect of each of the complainants would be tried separately. The learned Circuit Judge granted this application and on 6th November, 2002, and the trial proceeded in respect of three counts on the indictment relating to charges of sexual assault on T.L.. On 8th November, 2002, Counsel for the applicant applied to discharge the jury and despite objections by the prosecution the learned trial judge acceded to that application and discharged the jury.

A second trial in respect of eight charges relating to T.L. commenced on 6th March, 2003, and the applicant was acquitted on the 12th March, 2003, on all counts.

The trial in respect of the charges relating to S.L. commenced on the 3rd July, 2003, and ended with a jury disagreement on the 4th July, 2003. A retrial commenced on the 2nd March, 2004, and on the 4th March, 2004, the jury disagreed on counts 1 and 2 and acquitted the applicant on count no. 3. The applicant was remanded on bail to Cork Circuit Criminal Court on the 19th October, 2004.

Leave to pursue the remedy sought herein by way of judicial review was sought and granted on the 18th October, 2004.

The issue which primarily arises for consideration in this case is whether the applicant is entitled to have any further prosecution of him in respect of these charges restrained or prohibited on the grounds that a third trial following jury disagreements in the previous two, violates the ancient common law prohibition of double jeopardy and/or is an abuse of the process of the Court and in either case a third trial would not be a trial in due course of law as required by Article 38(1) of the Constitution.

The second named respondent has raised the issue of delay in initiating these proceedings as a preliminary issue and I should deal with that first.

Junior Counsel for the applicant who appeared for the applicant in the criminal proceedings in the Circuit Court, informed the court that when the criminal proceedings were adjourned after the second jury disagreement, it was not known whether or not the second named respondent would wish to proceed to a third trial, and the intention of the second named respondent to proceed to a third trial did not become known until some time close to the adjourned date.

Although it is not entirely clear, precisely when the applicants legal advisors were made aware of the intention of the second named respondent in that regard, I am satisfied that in all probability it was within a month of the application to this court for leave and hence I am satisfied that the applicant did move his application with reasonable promptness and within the time prescribed by Order 84 r. 21.

A second ground of opposition which should be dealt with at this stage is to the effect that the decision to proceed with the third trial on the part of the second named respondent is one which is not open to a judicial review unless there is evidence of *mala fides* or of an improper motive or improper policy. In this regard reliance is placed by the second named respondent on the case of the *State (McCormack) v. Curran* [1987] I.L.R.M. 225 and *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260.

The decision of the second named respondent to initiate the prosecution in this case is not in issue in these proceedings nor is his decision to pursue a second trial after the first disagreement. The only issue for consideration is whether a third trial as mentioned earlier offends the prohibition on double jeopardy or is an abuse of process. Whether a third trial is impermissible on either of these grounds has little or nothing to do with the second named respondent's decision to initiate a prosecution in this case. Thus the kind of exploration of, or review of a decision to prosecute by the second named respondent as was out ruled in the above two cases does not arise here. In essence the challenge brought by the applicant in this case is to be viewed as similar to the many applications for prohibition that are brought in respect of prosecutions initiated by the second named respondent, on grounds, such as delay or abuse of process or oppression. Hence in my view this ground of opposition fails.

3. This brings me to the main issue in the case.

4. The applicant relies heavily on the following statement from Black J. giving the opinion of the United States Supreme Court in the case of *Green v. United States* 355 U.S. 184 [1957] where the learned judge says the following in respect of double jeopardy:-

> *"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 offence, 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."*

5. It is submitted that this opinion has direct application to the circumstances of this case and leads to a conclusion that a third trial would offend the double jeopardy principle.

7. The applicant also relies on the judgments of the High Court of Australia in the case of *Demirok v. The Queen* [1977] 137 C.L.R. 20 and also in the case of *Pearce v. R*. [1998] H.C.A. 57.

8. It was further submitted that a third trial in which there is no suggestion at this stage that the evidence would be any different to the previous two, would be an abuse of process and oppressive to the applicant and not a trial in due course of law as required by Article 38(1) of the Constitution. The applicant submitted that there was a convention or practise of long standing; that when, after two trials, a jury had failed to agree on a verdict, that the prosecution would not seek a further trial, and hence the second named respondent was in breach of this long standing practice in seeking a third trial, and in so doing was seeking to subject the applicant to an abuse of process.

9. For the respondents it was submitted that the prohibition on double jeopardy in our law is confined to the special pleas of *autrefois acquit or autrefois convict*. In this regard reliance was placed on the judgment of Kenny J. in the case of *O'Leary v. Cunningham* [1998] I.R. at 379. It was submitted that the jurisprudence of the courts of the United States excludes the application of the double jeopardy prohibition where a retrial is ordered as a necessity arising out of circumstances such as a mis-trial, owing to a jury disagreement. In this regard reliance is placed on the cases of *U.S. v. Perez Wheat* 579 [1824] and *Wade v. Hunter* 336 U.S. at 688 – 689.

10. It was further submitted that in the Court of Appeal in the United Kingdom in the case of *Frank Henworth* [2001] E.W.C.A. 120 [2001] 2 C.R. App.R. 47, the Court of Appeal refused to elevate the long standing convention, to the effect that where two juries had disagreed the prosecution did not seek a further trial, to a proposition of law, but that in that case the Court of Appeal recognised that repeated prosecutions could be an abuse of process; as to whether such abuse occurred would depend upon the circumstances of each case and in that particular case the court had declined to find that there had been any abuse of process.

11. It was submitted that the applicant in this case could not point to any ground upon which it could be said that a third trial would be unfair to him and it was submitted that there was no grounds upon which it could be said that a third trial would not be a fair trial as required by Article 38(1) of the Constitution.

12. It was further submitted that the case of the *Attorney General v. Thomas Kelly* (No. 2) [1938] I.R. 109 was ample authority for the proposition that where a jury had disagreed the accused might be put on trial again as often as might be necessary until the question of his guilt or innocence was determined by a verdict.

13. It was submitted, that in Ireland there was never any convention or practice, to the effect that after two jury disagreements, the prosecution, would not seek a third trial.

14. Whilst one of the grounds in respect of which the applicant was given leave to apply for a judicial review, was that the applicant's right to an expeditious institution of criminal proceedings had been violated that ground was not pursued in the hearing before me.

Decision

15. This case appears to be the first time that this court has been asked to consider whether the common law prohibition on double jeopardy has any application beyond circumstances, in which, in the first or previous trial, the accused person has either been acquitted or convicted and therefore can avail of the special plea of either *autrefois acquit or autrefois convict*. Thus it would appear that the following passage from the judgment of Kenny J. in the Supreme Court in the case of *O'Leary v. Cunningham*, at page 370 of the report represents the furthest extent of Irish law on this topic where he says:

> *"The whole doctrine and its historical development was discussed most elaborately in the speeches of the Law Lords in Connelly v. Director of Public Prosecutions. In the course of his speech, Lord Morris of Borth-y-Gest said at p. 1305 of the report:-*
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> > *'I pass, therefore, to a consideration of the questions which arise concerning the plea of autrefois acquit. In giving my reasons for my view that the direction given by the learned judge was entirely correct, I propose to examine some of the authorities and to state what I think are the governing principles. In my view, both principle and authority establish:*
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> > > *(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;*
> > >
> > > *(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;*
> > >
> > > *(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted . . .".*

16. The fifth amendment to the Constitution of the United States contained what is known as the double jeopardy clause and reads as follows:

> *'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."*

17. As a consequence of this provision the American jurisprudence is rich in experience of its application, but notwithstanding its antiquity as of 1984, the case of Richardson v. the United States 468 U.S. 317 [1984] illustrates that the extent of the application of

the prohibition was not well settled.

18. Before dealing with the American cases I would like to refer to the judgment of Murphy J. in the High Court of Australia, in the case of *Demirok v. The Queen* [1977] 137 C.L.R. where he says commencing at p. 37:

> *"Blackstone referred to the "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" (Commentaries, vol. 4, p. 335; see also Coke (3rd Institutes, pp. 213-214)). The objections to double jeopardy have long been extended beyond capital offences to offences in general (see "Double Jeopardy: The Reprosecution Problem", Harvard Law Review, vol. 77 (1963-1964), p. 1272; Friedland, Double Jeopardy, (1969). The United States Supreme Court expressed the same view in Ex parte Lange (9:)*
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> > *'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted'."*
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> *This was cited in Green v. United States where the Court went on to State (10):*
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> > *'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 offence, 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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> *In the United States, the constitutional protection against double jeopardy bars retrial even after mistrial (unless the trial was unavoidably aborted, that is, by "manifest necessity") … In most jurisdictions, however, retrial after a successful appeal against conviction is not treated as a breach of the common law rule against double jeopardy. There are two rationales for ordering a retrial after conviction is set aside, but neither of these has been universally accepted. One is the concept of "continuing jeopardy", that is that the original jeopardy survives "to the end of the cause" (Holmes J., Kepner v. United States (11). The other, that an accused who appeals from a conviction waives his right to be free from reprosecution (Trono v. United States (12)) was rejected decisively in Green v. United States… In the United Kingdom, the deep-seated prejudice against double jeopardy has been so strong that the Court of Criminal Appeal was originally not given the power to order a retrial (see Criminal Appeal Act 1907) and was given the power in the Criminal Appeal Act 1968 only when a conviction is set aside on the ground of fresh evidence. (This is apart from the power to order a venire de novo where the trial was a nullity). In Victoria (and other Australian states), there is a general statutory power to order a retrial where a conviction is set aside.*
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> *A balance must be achieved between the interests of society in prosecuting charges and the interests of society and the individual in avoiding multiple criminal trials. The prosecution has had two opportunities to have the applicant convicted according to law but in each case the trial was irregular and unfair to him. He was convicted at the first trial, which was a long one (May 1975), appealed successfully to the Full Court of the Supreme Court of Victoria (26th September 1975) who ordered a new trial on the ground that he had not had a fair trial (14).. The Crown's application for special leave to appeal to this Court was dismissed (5th March 1976) (Reg. v. Demirok (15). He was convicted at the second trial (7th May 1976), his application for leave to appeal to the Full Court of the Supreme Court of Victoria was refused (31st August 1976) and he now appeals to this Court. He has spent a considerable time in gaol. Without fault on his part, he has not yet had a fair trial although he has twice "run the gauntlet". In my opinion, this is enough. He should not be subjected to triple jeopardy.*
>
> *Whatever steps may be taken to exclude prejudice, an accused who goes to a third trial is under an enormous handicap compared to one facing a first trial. The danger that the jury will know of his earlier convictions is high. Repeated trials increase the possibility that even an innocent accused may be found guilty (see Green v. United States (16) and also United States v. Wilson).*
>
> *I would not order a new trial."*

19. The above passage from the judgment of Murphy J. in that case was a dissent, on the issue of a retrial, the majority of the High Court concluding that in that case there should be a retrial. I have quoted the passage in question as it appears to me to be a very succinct, clear and full exposition of the relevant factors that bear on the extent of the Double Jeopardy prohibition beyond the special pleas of *autrefois acquit or autrefois convict*. In it the learned judge place reliance on the seminal passage from the judgment of Black J. in *Green v. United States* in which in one short paragraph, the entire weight of reason against repeat trials for the same offence, is expressed.

20. In this case we are concerned with the problem of repeat trials where each of the previous trials has ended in jury disagreement. That problem is expressly addressed by the United States Supreme Court in the case of *Richardson v. the United States* 468 U.S. 317 [1984].

21. Paragraph 2 of the head note is in the following terms:

> *"On the merits, however, regardless of the sufficiency of the evidence at his first trial, a petitioner has no valid double jeopardy claim. The protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, that terminates the original jeopardy. Neither the failure of the jury to reach a verdict nor a trial court's declaration of a mistrial following a hung jury is an event that terminates the original jeopardy. Like the defendant, the Government is entitled to resolution of the case by the jury."*

22. The following is the relevant passage from the judgment of Rehnquist J. who delivered the opinion of the court:

> *"The case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic. It has been established for 160 years, since the opinion of Justice Story in United States v. Perez, 9 Wheat. 579 (1824), that a failure of the jury to agree on a verdict was an instance of "manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because "the ends of public justice would otherwise be defeated."*

23. Since that time we have had occasion to examine the application of double jeopardy principles to mistrials, granted for reasons other than the inability of a jury to agree, whether the mistrial was granted on the motion of the prosecution, see Illinois v. Somerville, 410 U.S. 458 [1973] or on the motion of the defendant, see Oregon v. Kennedy, 456 U.S. 667 [1982]; United States v. Dinitiz 424 U.S. 600 [1976]. Nevertheless we constantly adhere to the rule that a retrial following a "hung jury" does not violate the double jeopardy clause. Logan v. United States, 144 U.S. 263, 297–298 [1892]. Explaining our reasons for this conclusion in Arizona v. Washington 434 U.S. 497 [1978] we said:

> *"Without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws."*

24. Whilst the American jurisprudence to which I have been referred clearly establishes that there may be a retrial following one trial in which there has been a jury disagreement, I have not been referred to any case in which the problem of a retrial after two disagreements has been considered by the America Supreme Court. It could be said that it is implicit in the notion that the "*rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws*" that whilst a second trial was permissible a third might not be.

25. It would appear then, that the great weight of common law authority favours the idea that a retrial after a jury disagreement does not offend the double jeopardy principle. No authority has been opened to me in which there was express consideration of whether after two trials ending in jury disagreement, a third trial offended the double, or perhaps more aptly, the triple jeopardy principle.

26. If one were to accept the reasoning of the American Supreme Court as expressed in the *Richardson* case one would be led to the conclusion that in principle a third and indeed a fourth retrial would not offend the double jeopardy principle because as was stated the protection of the double jeopardy clause only applies if there has been some event such as an acquittal that terminates the original jeopardy, and a jury disagreement is not an event that terminates the original jeopardy and that the parties i.e. prosecution and defendant are entitled to a resolution of the case by a jury. If this principle applied to a third or fourth retrial, could it not be said that there was a remarkable inconsistency, between this and the leading statements such as that of Black J. in Green v. United States supra and O'Connor J. in *Tibbs v. Florida* 457 U.S. 511 where she said:

> *"This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance."*

27. As said earlier I have not been referred to any case where the Supreme Court of the United States has yet to consider the problem of a third or later trial following jury disagreements and hence I have no assistance from that source in arriving at a resolution of this apparent conflict.

28. Although the problem of repeated trials was considered by the Court of Appeal in the *Frank Henworth* case no argument appears to have been advanced in reliance upon the double jeopardy prohibition.

29. In that case the appellant placed reliance upon the convention against seeking a third trial after two jury disagreements and also submitted that a third trial after two failed trials was an abuse of process. Insofar as the latter submission was concerned reliance was placed upon a passage from the judgment of Lord Steyn given obiter in a Privy Council case i.e. *Charles v. The State* [2000] 1 W.L.R. 384, a murder appeal from Trinidad and Tobago.

30. Insofar as the convention was concerned the Court of Appeal held firstly that it didn't apply because in the instant case, as there were not two jury disagreements and in any event they were not prepared to elevate the convention to a proposition of law. In considering the submission on abuse of process, based on the following passage from the opinion of Lord Steyn.

> *"It may be contrary to due process and unacceptable as a separate ground from delay that the prosecution having failed twice should continue to try to secure a conviction…".*

31. Kennedy L.J. dismissed that proposition in the following terms:

> *"We see no reason to think that when saying what he did, Lord Steyn intended even to suggest that there should be some new principle of law such as that for which Mr. Clegg now contends. If we are wrong as to that, we respectively reject the suggestion that any such principle should be said by this court to exist. Where a serious crime has been committed and it is shown that there is a case to answer as far as the defendant is concerned, there is clear public interest in having a jury decide positively, one way or the other, whether the case is established."*

32. A further case relied upon by the appellant in the *Frank Henworth* appeal was another Privy Council case i.e. *Flowers v. The Queen* [2000] 1 W.L.R. 2396. This was an appeal against a murder conviction in Jamaica where the conviction occurred in a third trial after two previous trials in which there had been jury disagreements. No reliance was placed on the double jeopardy principle, the appellant relying principally, it would appear, on delay and oppression as being a breach of his right under the constitution of Jamaica to a trial within a reasonable time.

33. However Kennedy L.J. in the *Frank Henworth* case did recognise the risk of abuse of process with repeated prosecutions, where he says the following:

> *"Having said that, we recognised the possibility that in any given case a time may come when it would be an abuse of process for the prosecution to try again. Whether that situation arises must depend on the facts of the case which include, first, the overall period of delay and the reasons for the delay; second the results of the previous trials; thirdly, the seriousness of the offence or offences under consideration; and fourthly, possibly, the extent to which the case now to be met has changed from that which was considered in previous trials."*

34. It is of some significance that what was in issue in the Henworth appeal was a conviction in the first trial which was overturned on appeal, a disagreement in the second trial, a third trial which was aborted on the application of the appellant who was conducting his own defence and finally the last trial in which the appellant was convicted and which gave rise to the appeal.

35. In resolving the issues which arise before me the first question which must necessarily be addressed is whether the common law

prohibition on double jeopardy has any application to the circumstances of this case.

36. As the richest vain of authority on this topic is the American jurisprudence, that is the source to which one is drawn to for assistance and enlightenment.

37. Two strands of thought emerge clearly from the U.S. Supreme Court cases. Firstly a clear sense of the dangers involved in putting a person on trial for the same offence repeatedly and secondly a strong sense of the public right to have a full and fair opportunity to prosecute a person in respect of an alleged crime all the way to a verdict from a jury.

38. It is undoubtedly the case that the problem confronted in the various cases which were opened to me was whether a second trial was permissible. I have not seen any case in which there was a consideration of the problem posed by a third trial for the same offence, save the Jamaica case; *Flowers v. The Queen*, in which the double jeopardy principle was not raised.

39. If one takes the various statements such as that of Black J. in *Green v. U.S.* the statement from the *Ex Parte Lange* case, and the dictum of O'Connor J. in *Tibbs v. Florida*, as representing the philosophy which leans against multiple trials for the same offence, one would be compelled in my view to conclude that the *ratio deciendi* of *Richardson v. the United States* and earlier cases in a similar vein, was in the nature of an exception to a general principle to the effect that a person should not be tried more than once for the same offence. The nature of the exception was that where the first trial was aborted as a matter of "*necessity*" the public should not thereby be deprived of their full and fair opportunity to prosecute to a verdict by a jury.

40. In my view the correct balance between protecting that public right and at the same time guarding against the obvious and inherent dangers of repeat trials, which in itself is a very important public interest, is correctly achieved by limiting the number of trials that may be had, which end in jury disagreement to two trials. In so doing in my view the public has a full and fair opportunity to bring the case to a jury verdict and if on two occasions juries failed to reach a verdict through disagreement, it cannot be said that the publics right to a full and fair opportunity to bring the case to a jury has been curtailed or frustrated.

41. Beyond two such trials in my opinion, it can fairly be said, that the risk of an innocent person being convicted becomes unacceptable. This risk arises from the potential for the adjustment of evidence where it was seen perhaps to have been inadequate in the previous trials and also perhaps more importantly the potential prejudicial notoriety that will inevitably be attached to an accused person the more often he is tried for the same offence. These factors have greater weight in this case because all of the potential witnesses come from the same rural area and the trial is scheduled to take place locally. In addition the applicant was previously tried twice in respect of similar allegations made by T.L. and notwithstanding that he was acquitted, a fifth trial could in my opinion only give rise to the gravest concern as to the risk of a verdict kiltered simply by the perseverance of the State in pursuing the matter to that length. The fact that the applicant sought the severance of the indictment originally and was thus responsible for having at least two trials is irrelevant in my view. What is at stake here is not just the safeguarding of this individual applicant but also the public interest in the preservation of the integrity of the criminal trial process.

42. It could not ever reasonably be said, in my view, that a person could be exposed to say four or five or more trials for the same offence where there had been jury disagreements in all the previous trials. As a matter of common sense and decency reasonable people would say that at some point, enough is enough. In my view, in principle, the point at which there should be a prohibition on a further trial, is after all relevant public interests have been satisfied; namely after the public have had a full and fair opportunity to bring the case to a jury twice. Where two juries in separate trials fail to reach a verdict, because of disagreement, that public interest has been amply protected. In my view, at that point, there should be a prohibition of a further trial of the same person for the same offences in order to safeguard that individual from the risks of a verdict distorted by the dangers of multiple trials and to protect the public interest in preserving the integrity of the criminal trial process.

43. I have come to the conclusion therefore that the ancient common law prohibition on multiple trials known as the double jeopardy principle has application to this case, although it might more aptly be described as the triple jeopardy principle.

44. It follows that a third trial of a person for the same offence where in the two previous trials a jury has disagreed, would not in my opinion be a trial in due course of law as required by Article 38(1) of the Constitution.

45. It was submitted by the second named respondent that the case of *A.G. v. Kelly* (No. 2) [1938] I.R. 109 is authority for the proposition that a person may be tried any number of times until a jury finally returns a verdict of either guilty or acquitted. The facts of that case were unusual. The appellant in it had been at his original trial convicted of murder. He appealed that conviction and was successful solely on the ground that he persuaded the court that there were witnesses available who had not given evidence at his trial and whose evidence would establish his innocence. As the matter was so grave i.e. he had been convicted of capital murder and sentenced to death, the Court of Criminal Appeal quashed the conviction and ordered a new trial. That trial preceded and the jury disagreed. He was put on trial again. Before that trial opened an application was made on his behalf, that the indictment be quashed on the ground that it was preferred without jurisdiction. This application was refused, the trial proceeded and he was convicted. He appealed again and the only ground of appeal was to the effect that s. 5 sub-s.(1)(b) of the Courts of Justice Act 1928, under which his retrial had been ordered, contemplated only one trial even though such trial may have been aborted by the failure of the jury to agree on a verdict.

46. It was held by the Court of Appeal that the term "*retrial*" as used in the section contemplated a trial in which the guilt or innocence of the accused is determined and that where there was no verdict there had been no trial. O'Sullivan C.J. in giving the judgment of the court said:

> *"It is established beyond question that when a jury in a criminal trial have failed to bring in a verdict and have been properly discharged, the accused may be put on trial again, and as often as may be necessary until the question of his guilt or innocence is determined by a verdict. We are entitled to assume that the legislator that enacted the Courts of Justice Act 1928 was aware of that principle and that it contemplated that s. 5 sub-s. 1(b) of that Act will be construed in accordance with it."*

47. As is apparent what was at issue in that appeal was a jury disagreement following upon the quashing of a verdict on appeal in very unusual circumstances. It follows therefore that what was said by the learned Chief Justice concerning repetitious trials resulting from jury disagreements was said obiter. That being so the case is one which is properly distinguishable from the instant case and for the reasons already set out above I am unable to follow it.

48. Accordingly I have reached the conclusion that the applicant is entitled to the relief claimed.