

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Exceptions to rule against double jeopardy

11. [Sections 2, 3](#) and [4](#) provide that a further prosecution can take place under certain limited exceptions to the rule against double jeopardy set out in section 1.

Section 2 Tainted acquittals

12. This section provides that where a person has been acquitted of an offence either on indictment (solemn proceedings) or complaint (summary proceedings), the acquitted person can be tried again if the High Court is satisfied that the acquitted person or some other person has committed an offence against the course of justice in connection with the original proceedings (whether or not anyone has been convicted of such an offence). Section 14 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section.
13. Subsection (1) provides that the person can be prosecuted anew for the original offence, any other offence of which it would have been competent to convict the person on the original indictment or complaint or for a new offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence. This is subject to subsection (2).
14. Subsection (2) provides that the Lord Advocate is required to apply to the High Court to have the acquittal set aside and to seek authority to prosecute anew. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.
15. Subsection (3) provides that the court cannot set aside the acquittal unless it is satisfied that the acquitted person or some other person has either been convicted of or has committed an offence against the course of justice in connection with the original proceedings. This subsection needs to be read with subsections (4) to (7).
16. Subsection (4) provides that where the offence against the course of justice is in respect of interference with a juror or the trial judge, the High Court must set aside the acquittal if satisfied that the interference had an effect on the outcome of the original proceedings and that the setting aside of the acquittal would be in the interests of justice. However, subsection (5) provides that where the interference related only to a juror and this was known to the trial judge, who allowed the trial to continue, then the acquittal is not to be set aside (the trial judge having had an opportunity to consider at the time whether or not it was safe to continue with the trial).
17. Subsections (6) and (7) make provision for where the offence against the course of justice is not in respect of interference with a juror or trial judge. They allow the acquittal to be set aside only if the High Court is satisfied on the balance of probabilities that the offence led to the withholding of evidence or the giving of false evidence which a jury would have been able to regard as being credible and reliable and which was likely to

have had a material effect on the outcome of the proceedings. If satisfied as to this and that it is in the interests of justice to do so, the court may set aside the acquittal.

18. Subsection (8) defines an “offence against the course of justice” for the purposes of section 2. It excludes the crime of perjury and its statutory equivalent, an offence under section 44(1) of the [Criminal Law \(Consolidation\) \(Scotland\) Act 1995 \(c.39\)](#). This is because the assessment of whether a witness is guilty of perjury is a part of the normal trial process in a way that external interference is not (see paragraph 3.10 of the SLC’s Report).

Section 3 Admission made or becoming known after acquittal

19. This section provides an exception to the rule against double jeopardy in section 1. It allows a further prosecution to take place where it becomes apparent following an acquittal that the acquitted person has admitted to committing the offence. This applies to both summary and solemn proceedings. Section 14 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 goes beyond the recommendation in the SLC’s Report¹ by including admissions made prior to the date of the acquittal, but which were unknown (and could not with the exercise of reasonable diligence have been known) to the investigating and prosecuting authorities. So, subsection (3)(a)(ii), in conjunction with subsections (3)(b) and (4), permits an application for a retrial in such circumstances.
20. Subsections (1) and (2) provide that a fresh prosecution may take place where the admission relates to the original offence; any other offence of which it would have been competent to convict the person on the original indictment or complaint; or an offence which arises out of, or largely out of, the same acts or omissions and is an aggravated way of committing the original offence.
21. Subsection (3)(b) provides that the Lord Advocate needs to apply to the High Court if the prosecution wants to set aside the acquittal and bring a fresh prosecution. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.
22. Subsection (4) provides for the test that has to be satisfied before the High Court can set aside the acquittal. The application may be granted only if:
- any admission made before the previous acquittal was not known and could not with the exercise of reasonable diligence have become known to the prosecutor at the time of that acquittal;
 - the case against the person is strengthened substantially by the admission; and
 - that on the admission and the evidence which was led at the original trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.
23. Finally, the court may only grant the application where it considers that to do so would be in the interests of justice.

Section 4 New evidence

24. This section provides an exception to the rule against double jeopardy in section 1, potentially allowing a fresh prosecution where new evidence is discovered. Section 14 ensures that this section applies regardless of whether the original acquittal was obtained prior to the coming into force of this section. Section 3 is the relevant provision where the new evidence in question takes the form of an admission.

¹ Recommendation 25

*These notes relate to the Double Jeopardy (Scotland) Act
2011 (asp 16) which received Royal Assent on 27 April 2011*

25. Subsection (1) provides, among other things, for the exception outlined in section 4 to apply only to persons who have been originally prosecuted and acquitted in the High Court. The section does not therefore apply the exception to persons prosecuted in a Sheriff or Justice of the Peace Court. Subsection (1) goes on to permit a new prosecution for the original offence or a “relevant offence” (as described in subsection (2)), as long as the conditions set out in subsection (3) are satisfied.
26. Subsection (3) sets out the requirement for there to be new evidence that the person subject to the application committed the offence in question. This new evidence may relate either to the commission of the original offence; any other offence of which it would have been competent to convict the person on the original indictment; or an offence which arises out of, or largely out of, the same acts or omissions and which is an aggravated way of committing the original offence. As in the case of the other exceptions to the double jeopardy rule, the Lord Advocate needs to apply to the High Court to have the acquittal set aside and to seek authority to re-prosecute. Section 5 ensures that any application under this section must be heard by a court of three judges, whose decision on the application is final.
27. Subsection (4) provides that “new evidence” does not include evidence which was inadmissible at the original trial even if it would be admissible at the time of the subsequent trial. Such previously inadmissible evidence could still be used at the subsequent trial if the relevant changes to admissibility had taken place since the original trial (as the rules that apply at the time of the subsequent trial will govern what evidence is admissible). But it could not, of itself, form the basis of the “new evidence” for the purposes of authorising that subsequent prosecution.
28. Subsection (5) provides that only one new evidence application can be made under section 4 in relation to any one individual offence. Alongside subsection (6), it means that where new evidence emerges that is relevant to only one (or some of the) offence(s) considered at the original trial, the prosecutor will be able to make a new evidence application limited to the relevant offence(s) from the original trial. This would mean that if different new evidence subsequently arose for the remaining offence(s) from the original trial a new evidence application could be made under the Act in relation to that offence(s). Only one such application could be made.
29. Subsection (7) provides for the test that must be satisfied before the High Court can set aside the acquittal. The application may be granted only if:
 - the case against the person is strengthened substantially by the new evidence;
 - the new evidence is evidence which was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence; and
 - that on the new evidence and the evidence which was led at the original trial it is highly likely that a reasonable jury properly instructed would have convicted the person of the offence.
30. Finally, the court may only grant the application where it considers that to do so would be in the interests of justice.