

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Plea in bar of trial

Section 8 Plea in bar of trial for murder: new evidence and admissions

44. **Section 8** contains provision which applies where a plea in bar of trial under section 7(2) is taken in a prosecution for murder in circumstances where murder was not charged at the previous trial and the prosecution argue, as a special reason to permit the case to proceed, that, since the original trial, the person has admitted to committing the murder (or such an admission made before the conviction or acquittal at the original trial has subsequently come to light) or new evidence has emerged. The process to be followed and the tests to be applied are modelled on those set out in sections 3 and 4. The court may not permit a retrial where it considers that to do so would be contrary to the interests of justice.
45. **Section 8** is necessary because section 1, which sets out the general rule against double jeopardy, and sections 2, 3 and 4, which set out the exceptions to it, do not expressly deal with this scenario. Those provisions are premised on the basis of the new prosecution being either for the original offence; for 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 the same or largely the same acts or omissions as gave rise to the original indictment or complaint and is an aggravated version of that offence. Those provisions do not apply where the original trial was for, say, culpable homicide or assault and a second trial is proposed for murder. Section 8 deals with such cases. It builds on section 7 which is also relevant as it permits the previous trial to be cited in a plea in bar of trial, on the basis that the new prosecution will arise from the same or largely the same acts or omissions that already led to the original trial. Section 7 puts the onus onto the prosecution to explain what “special reason” justifies the new trial. Section 8 deals expressly with the situation of an accused being charged with murder where the original trial was for a lesser offence. It sets out two possible special reasons (new evidence and admissions) that may justify a new trial and the factors that the court must consider in determining whether to sustain or repel the plea in bar of trial.
46. **Section 14** ensures that this section applies regardless of whether the original acquittal or conviction was obtained prior to or after the coming into force of this section.
47. Subsection (2) lists the special reasons averred by the prosecutor to repel the plea in bar of trial and to which this section applies. Those reasons are that there is new evidence that the person committed the murder or an admission that the person committed the murder (including an admission made before the conviction or acquittal at the original trial which only subsequently comes to light).
48. Subsection (3) 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.

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

49. Subsection (4) provides that the plea must be considered by three judges of the High Court, whose decision on the matter is final.
50. In relation to the new evidence special reason, subsection (5) sets out the test to be satisfied before a plea can be repelled. This is essentially the same test as is contained in section 4(7).
51. Where the special reason relates to an admission, subsection (6) provides the test that the court must apply in deciding if it is satisfied that a plea in bar of trial should be repelled. This test is essentially the same test as is contained in section 3(4). This includes an assessment of whether an admission made before the acquittal or conviction at the original trial was not, and could not with the exercise of reasonable diligence have been known to the prosecutor at the time of the original trial. It also provides that the court can only repel the plea in bar of trial if to do so is in the interests of justice.
52. Subsection (7) applies subsections (2), (4), (5) and (6) of section 5 so that, among other things, the High Court may appoint an *amicus curiae* and that the court's decision on the plea in bar of trial is final.