

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Exceptions to rule against double jeopardy

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.
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.

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

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.