

DOUBLE JEOPARDY (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Plea in bar of trial

38. Sections 7 to 10 deal with a broader range of situations than that covered by the rule in section 1 against double jeopardy. These sections will prevent multiple trials for the same act, in particular, where the new offence charged is not the original offence (or an aggravated way of committing it).

Section 7 Plea in bar of trial that accused has been tried before

39. This section allows a person to aver as a plea in bar of trial that the offence he or she faces on the indictment or complaint arises out of the same or largely the same acts or omissions upon which he or she has already been tried. 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.
40. Subsection (1)(b) provides that a plea in bar of trial will not be available in relation to the exceptions to double jeopardy detailed in this Act (sections 2, 3 and 4) or to the special cases detailed in sections 11 and 12. The references to provisions of the 1995 Act ensure that a plea in bar of trial will not be available where the High Court has already granted authority for a retrial following a successful appeal.
41. Subsection (2) provides a broad basis for a person seeking to plead that the trial should be barred because of a previous trial for largely the same acts or omissions. It is broader than the rule against double jeopardy in section 1, which focuses on the offences charged at the previous trial, therefore not necessarily prohibiting a trial for other offences which were not charged at the previous trial, but which arose out of the same or substantially the same acts or omissions.
42. Subsection (3) provides that the court must sustain the plea in bar of trial if it is satisfied on the balance of probabilities that the crime charged relates to the same acts or omissions, or substantially the same acts or omissions, as a crime of which he or she has already been convicted or acquitted, unless the prosecutor can persuade the court that there is some “special reason” as to why the case should be prosecuted and the court is satisfied it would be in the interests of justice to do so (subsections (4) and (5)).
43. This provision is designed to permit further proceedings for essentially the same criminal act that resulted in an earlier conviction or acquittal where there is “special reason”. The section does not define “special reason” as such, which will be left to the courts to determine in any particular case. An example of a special reason might include a case in which trials were separated on the application of, or with the consent of, the person against whom the charge is brought. Another possibility would be where a charge was brought at a previous trial for the sole purpose of allowing a witness to give evidence in a natural way but where the prosecutor had no intention of seeking

a conviction for that offence.¹ Two further examples of special reason are contained within sections 8 and 9.

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.
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

¹ For further detail, see paragraphs 2.31 to 2.35 of the SLC’s Report

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.

Section 9 Plea in bar of trial: nullity of previous trial

53. This section applies where a plea in bar of trial is taken in terms of section 7(2) and the prosecutor avers as a special reason to repel the plea that the original trial was a nullity and therefore cannot be regarded as either a valid acquittal or conviction. 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 the section.
54. Subsections (2) and (3) provide that the matter must be considered by the High Court.
55. Subsection (4) sets out the test that must be satisfied before the High Court can repel the plea in bar. This is essentially the same test as the Court would have applied had an application been made to it under section 12 before proceedings were raised. The Court must also be satisfied that the existence of the original trial was not known to the prosecutor before these proceedings were raised. This could arise, for example, where the original trial took place abroad.

Section 10 Plea in bar of trial: previous foreign proceedings

56. This section applies where a plea in bar of trial is taken under section 7(2) where the accused was originally tried in a jurisdiction outwith the United Kingdom.
57. The general rule is that, for the purpose of the plea in bar, it does not matter whether the original trial took place in Scotland or elsewhere. However, if the person was originally tried outwith the United Kingdom, section 10 means that the court may disregard a conviction or acquittal where it determines that there is a sufficient special reason and it would be in the interests of justice to do so. Subsection (2) provides particular factors for the court to consider in determining whether it is in the interests of justice to permit a trial to proceed.
58. Subsections (3) and (4) provide that the court is prevented from disregarding a non-UK verdict where trying the accused would be inconsistent with the UK's obligations under Article 54 of the Schengen Convention; that is, where a charge relating to the same acts has been finally determined in another State to which Article 54 of that Convention applies.