

CRIMINAL JUSTICE ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Retrial for Serious Offences

Section 75: Cases that may be retried

310. *Section 75* sets out the cases which may be retried under the exception to the normal rule against double jeopardy. These cases all involve serious offences which in the main carry a maximum sentence of life imprisonment, and which are considered to have a particularly serious impact either on the victim or on society more generally. The offences to which the provisions apply are called “qualifying offences”, and are listed in Schedule 5 to the Act.
311. The cases which may be re-tried are those in which a person has been acquitted of one of the qualifying offences, either on indictment or following an appeal, or of a lesser qualifying offence of which he could have been convicted at that time. This takes into account cases of “implied acquittals”, in which, under the current law, an acquittal would have prevented a further prosecution being brought for a lower level offence on the same facts. For example, an acquittal for murder may also imply an acquittal for the lower level offence of manslaughter, but new evidence may then come to light which would support a charge of manslaughter. A person may only be re-tried in respect of a qualifying offence.
312. In certain circumstances cases may also be tried where an acquittal for an offence has taken place abroad, so long as the alleged offence also amounted to a qualifying offence and could have been charged as such in the UK. This would include for example offences such as War Crimes, and murder committed outside the UK, for which the courts in England and Wales have jurisdiction over British citizens abroad. Such cases are likely to be rare. Subsection (5) recognises that offences may not be described in exactly the same way in the legislation of other jurisdictions.
313. The law in Scotland is not being changed in this respect at present, so this Part of the Act is not applied to acquittals which take place in Scotland.

Section 76: Application to Court of Appeal

314. *Section 76* allows a prosecutor to apply to the Court of Appeal for an order which quashes the person’s acquittal and orders him to be retried for the qualifying offence. A “prosecutor” means a person or body responsible for bringing public prosecutions, such as the Crown Prosecution Service or HM Customs and Excise. Where a person has been acquitted outside the United Kingdom the Court will need to consider whether or not the acquittal would act as a bar to a further trial here and, if it does, the Court can order that it must not be a bar.
315. Applications to the Court of Appeal require the personal written consent of the Director of Public Prosecutions (DPP). This provides a safeguard to ensure that only those cases in which there is sufficient evidence are referred to the Court of Appeal. The DPP will

also consider whether it is in the public interest to proceed. This section also recognises any international obligations arising under the Treaty of the European Union, under which negotiations are taking place to support the mutual recognition of the decisions of the courts in other EU member states.

- 316. Applications may also be brought by public prosecuting authorities if new evidence arises in cases which have previously been tried by means of a private prosecution.
- 317. Only one application for an acquittal to be quashed may be made in relation to any acquittal.

Section 77: Determination by Court of Appeal

- 318. *Section 77* sets out the decisions which the Court of Appeal may make in response to an application for an acquittal to be quashed. The Court must make an order quashing an acquittal and ordering a retrial if it considers that the requirements set out in *Sections 78 and 79* of the Act are satisfied, namely that there is new and compelling evidence in the case, and that it is in the interests of justice for the order to be made. The Court must dismiss an application where it is not satisfied as to these two factors.
- 319. Where an acquittal has taken place outside the United Kingdom, the Court must decide whether that acquittal provides a bar to prosecution. A “bar” means that the Court would not allow a further prosecution to proceed. If it does not provide a bar, then the Court must make a declaration to that effect. If the acquittal does provide a bar, then the Court must make an order that the acquittal is not to be a bar to a trial in respect of the qualifying offence, if it is satisfied that, as above, the requirements in *Sections 78 and 79* are met. If it is not satisfied, then the Court must make a declaration that the acquittal remains a bar to retrial.

Section 78: New and compelling evidence

- 320. *Section 78* sets out the requirement for there to be new and compelling evidence against the acquitted person in relation to the qualifying offence, and defines evidence which is “new and compelling”. Evidence is “new” if it was not adduced at the original trial of the acquitted person. Evidence is “compelling” if the Court considers it to be reliable and substantial and, when considered in the context of the outstanding issues, the evidence appears to be highly probative of the case against the acquitted person. The Court is thus required to make a decision on the strength of the new evidence. So for example, new evidence relating to identification would only be considered “compelling” if the identity of the offender had been at issue in the original trial. It is not intended that relatively minor evidence which might appear to strengthen an earlier case should justify a re-trial.
- 321. This applies equally to acquittals abroad. In such cases it will be for the prosecution to provide the Court with information relating to the evidence available and the issues in the trial.

Section 79: Interests of justice

- 322. *Section 79* sets out the requirement that in all the circumstances it is in the interests of justice for the Court to quash an acquittal and order a re-trial. In determining whether it is in the interests of justice, the Court will consider in particular: whether there are existing factors which make a fair trial unlikely (for example, the extent of adverse publicity about the case); the length of time since the alleged offence was committed; and whether the police and prosecution acted with due diligence and expedition in relation to both the original trial and any new evidence. The Court may take into account any other issues it considers relevant in determining whether a retrial will be in the interests of justice.
- 323. Both *sections 78 and 79* apply where a previous prosecution case may have been led by a private rather than public prosecutor.

Section 80: Procedure and evidence

324. *Section 80* sets out a number of technical and evidential procedures to be followed in bringing an application for an acquittal to be quashed. These provide for a notice of the application to be made to the Court of Appeal and served on the acquitted person within 2 days of the application being made (a longer time may be allowed where the service has to be made overseas); that there will be a Court of Appeal hearing to consider the application; that the acquitted person is entitled to attend the hearing (except where he is in lawful custody abroad); and that he is entitled to be represented at the hearing.

Section 81: Appeals

325. *Section 81* allows appeals on a point of law to be made to the House of Lords from decisions made by the Court of Appeal on an application, for example to order or refuse a retrial, or to make a declaration with regard to whether an acquittal is a bar to further proceedings, or to decline to order a retrial on the grounds of admissibility of evidence or points of law. It amends the Criminal Appeal Act 1968 accordingly.

Section 82: Restrictions on publication in the interests of justice

326. *Section 82* makes provisions for reporting restrictions to apply in respect of matters surrounding the application for a retrial, until either the end of the re-trial or to any point at which it is clear that the acquitted person can no longer be re-tried. These provisions are aimed at ensuring that a fair trial can take place by limiting the extent to which the media can report on the proceedings under this Part of the Act, to ensure that any potential jury is not influenced by these developments. Reporting restrictions may be sought only by the Director of Public Prosecutions or made by the Court of its own motion and may be imposed by order of the Court of Appeal at any stage after a new investigation into the acquitted person has commenced. The restrictions may apply to any information in respect of the investigation and to the re-publication of matters previously published. The Court will decide whether such restrictions are required, and their content and duration, according to what is necessary in the interests of justice. .

Section 83: Offences in connection with publication restrictions

327. *Section 83* sets out the summary offences created by the new reporting restrictions under section 82 and the penalties which may be imposed upon conviction. Prosecutions under this Section may only be brought in England and Wales by or with the consent of the Attorney General, or where instituted in Northern Ireland, by or with the consent of the Attorney General for Northern Ireland, or after the Justice (Northern Ireland) Act 2002 comes into force, the Director of Public Prosecutions for Northern Ireland.

Section 84: Retrial

328. *Section 84* makes provisions relating to the holding of retrials. An acquitted person may only be retried on an indictment preferred by the direction of the Court of Appeal. Arraignment on this indictment must be made within two months of the date on which the Court ordered a retrial, unless the Court allows a longer period. The Court can only extend this period if it is satisfied that the prosecutor has acted with due expedition since the order was made, and that there is still a good and sufficient reason to hold the retrial despite any additional lapse of time.
329. If the acquitted person is not arraigned for the retrial within the two months or any further time allowed, then he can apply to the Court of Appeal to set aside the order for retrial and restore the previous acquittal; or in the case of people acquitted outside the United Kingdom, for a declaration that the acquittal constitutes a bar to any trial for the qualifying offence.
330. An indictment may relate to more than one offence or to more than one person, including offences for which the accused has not been tried before.

331. This section also brings the provisions for retrial into line with changes to the law in respect of hearsay evidence and the use of depositions made elsewhere in this Act. It provides that evidence given orally at an original trial must be given orally at the retrial unless an exception in *subsection (6)* applies. **Section 85: Authorisation of investigations**
332. *Section 85* relates to the authorisation and conduct of police investigations. It requires the police to obtain the consent of the Director of Public Prosecutions before taking certain steps in the re-investigation of cases where new evidence has come to light, or where there are reasonable grounds to believe that further investigation will give rise to new evidence. The DPP must consider whether the previous acquittal constitutes a bar to a further prosecution. If the DPP certifies that in his opinion it does not constitute a bar, then there are no restrictions on police investigations into the offence. Where the previous acquittal does constitute a bar, the DPP's consent is required for the taking of specified steps which impinge directly on the acquitted person, where police wish to interview or arrest him, search his person, vehicle or premises occupied by him, seize evidence or take fingerprints or samples from him, in connection with the qualifying offence. It does not permit such actions to take place without authorisation even with the consent of the acquitted person, as this would provide a means of carrying out re-investigations without using appropriate police powers. This provides a safeguard against any potential harassment of acquitted persons. The requirement for the DPP's consent is not intended to hamper the police making other enquiries which do not directly impact on the life of the individual, for example by interviewing new or previous witnesses, or comparing fingerprint or DNA samples with records which they already hold.
333. An application for the DPP's consent must be made in writing by an officer of Commander rank or above in the Metropolitan and City Police forces, or Assistant Chief Constable or above in other police forces or bodies of constables. It can be made where new evidence has already been obtained, or where he has reasonable grounds to believe that new evidence is likely to be obtained if the investigation proceeds. There must therefore be some "trigger" for the application; it is not intended that the re-investigation of an acquitted person can take place without any element of new evidence.
334. The DPP can only give his consent if he is satisfied that there is sufficient new evidence to justify the re-investigation, or that such new evidence is likely to come to light if the investigation goes ahead, and that it is in the public interest for the investigation to proceed. In giving his consent, the DPP may also recommend to the chief officer of the force requesting the consent, that another force should conduct the re-investigation. It will then be for the chief officer to make appropriate arrangements with another force which can provide an appropriate level of investigative expertise.
335. The section applies similarly to investigators of HM Customs and Excise who are responsible for investigating a number of the qualifying drugs offences.

Section 86: Urgent investigative steps

336. *Section 86* makes complementary provisions to *Section 85*, in circumstances where the police need to act urgently to prevent the investigation being substantially and irrevocably prejudiced, for example by securing evidence immediately. Urgent action may be needed in cases where new evidence is found during the course of other investigations, or where information provided to the police indicates that new evidence is temporarily at a particular location.
337. In such cases, urgent police action may be authorised by an officer of the rank of Superintendent or above. A Superintendent can only do this if there has been no undue delay in seeking the DPP's consent, and consent has not previously been refused. If the authorisation is not given in writing, it must be recorded in writing as soon as possible. It also allows an individual officer to act immediately where necessary without any advance authorisation, and to obtain a confirming authorisation by a Superintendent later.

Section 87: Arrest and charge

338. *Section 87* allows for the arrest of a person in respect of a qualifying offence by warrant, if the DPP's consent has not previously been obtained and the police are acting under the urgent procedures. A justice of the peace may issue a warrant where he is satisfied that new evidence against the acquitted person has been obtained. This does not affect his arrest in respect of any matter other than the qualifying offence. Where a person is arrested, the Section provides that he may be charged with the offence for which he has been arrested in accordance with the provisions of the Police and Criminal Evidence Act 1984 (PACE), if an officer of the rank of Superintendent or above, who has not been involved with the investigation, considers that there is sufficient evidence available for the case to be referred to a prosecutor in order to consider making an application for the acquittal to be quashed in accordance with this Part of the Act. This is the equivalent stage to bringing a criminal charge under PACE in normal proceedings, but provides the additional safeguard that the evidence must be considered at Superintendent level or above.
339. This Section also requires the Custody Officer to ensure that any relevant evidence which becomes available during the investigation is made available to the relevant officer at Superintendent rank or above to enable him to reach such a decision, and allows the Superintendent (or above) to direct that a charge shall be brought where there is sufficient evidence to do so.

Section 88: Bail and custody before application

340. *Section 88* provides for a decision on bail or remand in custody to be made, in cases where an acquitted person has been charged under *Section 87*. The person must be brought before the Crown Court within 24 hours (excluding Sundays, bank holidays etc). This provision enables the courts either to bail the individual, or to remand him in custody, for a period not greater than 42 days (or such longer period as the court may, for good and sufficient cause, impose), whilst the application to the Court is prepared. It is subject to the same safeguards as other decisions on bail set out in the Bail Act 1976.
341. A power to remand in custody is considered necessary for the courts in those cases where there may be a risk of absconding prior to the application to the Court of Appeal being made or heard. It recognises that it will take some time for the police and prosecutors to formulate the appropriate application to the Court of Appeal, but this time should not be disproportionate. The bail or custody decision will be taken by the Crown Court who may either bail the person, with conditions on bail if necessary, or remand him in custody, either to a time at which the Court will review the decision, or to the time at which notice of the application is made to the Court of Appeal. If no notice of application to the Court of Appeal is made within the maximum 42 days, the prosecutor may ask the Court for an extension provided that there is good and sufficient cause to do so, and that the prosecution has acted expeditiously up to that point.

Section 89: Bail and custody before hearing

342. *Section 89* similarly sets out the arrangements for bail or remand in custody once the notice of application is made to the Court of Appeal. At this stage, if the acquitted person is in custody, the Crown Court will make a further decision regarding bail or remand in custody pending the Court of Appeal hearing.

Section 90: Bail and custody during and after hearing

343. *Section 90* makes similar provision for bail or remand in custody during and after the Court of Appeal hearing. At this stage decisions on bail or remand will be made by the Court of Appeal, which will need to take into account its own decision in relation to the application. The Court may decide either to bail the person or remand him in custody until a retrial can be held, or until any appeal against the Court's ruling is determined.

Section 91: Revocation of bail

344. *Section 91* provides for circumstances in which the court revokes a person's bail but the person is not in court. The court may order the person to surrender to the custody of the court and, should he fail to do so, the person may be arrested without warrant and must be brought before the court within 24 hours.

Section 92: Functions of the DPP

345. *Section 92* disapplies for the purposes of Part 10 the provision of the Prosecution of Offences Act 1985 which allows the DPP's functions to be exercised by a Crown Prosecutor. In these cases it is intended that the DPP will take decisions personally as to when consent to re-investigate or to apply to the Court should be given. However, this section does allow for another person to be nominated by the DPP to take these decisions in cases where he is unavoidably absent.

Section 93: Rules of Court

346. *Section 93* enables rules of court to be made in respect of the various court procedures set out in this Part.

Section 94: Armed Forces: Part 10

347. *Section 94* ensures that section 31 of the Armed Forces Act 2001 will apply to Part 10 of the Act as it applies to "criminal justice enactments". Under section 31(3) the Secretary of State may by order make provisions for the armed forces' system of justice equivalent (subject to any modification) to those of "criminal justice enactments". Under section 31(2) "criminal justice enactments" broadly covers Acts relating to conduct, procedure and powers in relation to criminal investigations and trials; for example arrest, custody, evidence and sentence. Part 10 might by contrast be considered to affect the substantive criminal law.
348. Under *Section 94*(2) the Secretary of State is empowered to use section 31 to apply provisions equivalent to Part 10 to such offences under service law as he thinks fit. Service offences likely to be specified include such serious offences as assisting the enemy and mutiny.
349. *Section 31* applies to persons subject to service law wherever they are. This Section will have the same extent of application as that section.
350. An order under *Section 31* is generally subject to negative resolution procedure in Parliament. If however it alters the text of an Act (under *section 31(6)(c)*), such an order is subject to affirmative resolution procedure.

Section 95: Interpretation of Part 10

351. *Section 95* defines various terms which appear in this Part of the Act, and provides that the jurisdiction of the Court of Appeal is exercised by the Criminal Division of the Court.

Section 96: Application of Part 10 to Northern Ireland

Section 96 applies Part 10 of the Act to Northern Ireland, subject to modifications which take account of the different legal procedures and arrangements in that jurisdiction.

Section 97: Application of Criminal Appeal Acts to proceedings under Part 10

352. *Section 97* provides that the Secretary of State may make an order in relation to proceedings before the Court of Appeal under this Part which corresponds to any provisions which are contained in the Criminal Appeal Act 1968 and equivalent Northern Ireland legislation.