

Chapter 43: Double Jeopardy

43.1 The Double Jeopardy (Scotland) Act 2011 came into force on 28th November 2011 and places the existing rule against a person being prosecuted twice for events arising out of the same acts or omissions on a statutory footing. This rule promotes certainty and protects the accused from being subjected to repeated trials.

43.2 The Act, however, provides three exceptions to the rule against double jeopardy:-

1. Where there is a tainted acquittal (section 2)
2. Where there is an admission subsequent to acquittal or discovered after acquittal (section 3);
3. Where, in High Court cases, there is new evidence (section 4)

43.3 This policy will relate to High Court cases. Full guidance in respect of the new provisions can be found in Crown Office Circular 6 of 2012.

43.4 Disclosure on an Application to Prosecute Anew

43.4.1 The application process is a new procedure and the disclosure obligation relates to **disclosing all information of which the prosecutor is aware that relates to the double jeopardy application.**

43.4.2 Sections 140A – 140F of the Criminal Justice and Licensing (Scotland) Act 2010 provide that the principles and procedures laid down in part 6 of that Act apply in the same way to double jeopardy applications as they do to any other criminal proceedings.

43.4.3 Section 140B places an obligation on the prosecutor to review and disclose all information of which the prosecutor is aware that relates to the double jeopardy application which also includes;

- (i) information which is disclosable in terms of the materiality test which was not previously disclosed
- (ii) information which it was deemed could not materially weaken the crown case or strengthen the defence case in the first proceedings but which the prosecutor now thinks could
- (iii) information of which the prosecutor has become aware since the disposal of the first proceedings that had the prosecutor been aware of during or after those proceedings would have been disclosable in terms of the materiality test
- (iv) information, other than that referred to in (iii) above, of which the prosecutor has become aware since the disposal of the first proceedings which:
 - (a) would materially weaken or undermine the evidence that is likely to be led or relied on by the prosecutor in the double jeopardy proceedings
 - (b) would materially strengthen the respondent (ie previous accused)'s case, or
 - (c) is likely to form part of the evidence to be led or relied on by the prosecutor in the double jeopardy proceedings

43.5. Cold Case Review Unit

43.5.1 On 9th November 2011, COPFS launched the COPFS Unresolved Homicide Database which is operated by the Cold Case Review Unit of the Serious and Organised Crime Division. The database records all unresolved homicides known to COPFS.

43.5.2 The agreed database definition of “an unresolved homicide” is:

“a death where there is clear evidence of homicide or there is a suspicion that the death has resulted from the homicidal act of another person in respect of which:

- (a) no suspects are identified*
- (b) a suspect has been identified but not charged*
- (c) a suspect has been identified and charged but not placed on petition*
- (d) a suspect has appeared on petition but no indictment served due to there being considered an insufficiency of evidence at that time*
- (e) a suspect has been indicted and the case has not proceeded to a conclusion due to the failure of the accused to appear, the indictment not being called or being deserted pro loco et tempore*
- (f) a suspect has been indicted and a trial concluded which has resulted in an acquittal*
- (g) a suspect has been convicted but acquitted on appeal and no fresh prosecution has been authorised by the appeal court*

43.5.3 All acquittals of homicides after trial or following a successful appeal will be included on the database and subject to review.

43.6 Retention of Papers and Productions

43.6.1 In respect of **any** acquittal after trial or appeal in a homicide case which will be included in the Unresolved Homicide Database all case papers and relevant productions, i.e. all productions listed on the original indictment, **must** be retained. Consideration should also be given to any other productions it would be appropriate to retain. Clear instruction should be provided in the case file indicating that the productions are not to be destroyed or returned. The SIO should also be given clear instructions about retention and storage of the productions in the case, particularly those that may require to be stored in a temperature controlled environment

43.6.2 It is important to remember that all information, including productions, contained on the original disclosure schedules will be relevant (even if a decision has previously been taken that it is not material) and careful consideration must be given as to whether to retain these relevant productions.

43.6.3 It is important to remember that there may be cases in the High Court other than homicides where, following an acquittal, there are grounds for considering the retention of productions and papers for the possibility of a review under one of the exceptions to the double jeopardy rule.

43.7 Retention of Samples

43.7.1 In terms of section 18(3) of the 1995 Act, samples and information derived therefrom must be destroyed on acquittal. There is, however, a provision in section 18A to allow samples to be retained for 3 years in cases where there was an acquittal for sexual or violent offences. Retention after 3 years for additional periods of 2 years at a time can be authorised by a Sheriff on the application of the Chief Constable, if there are reasonable grounds for doing so. All cases which are included on the Unresolved Homicide Database will be notified to the police such that the relevant section 18A applications will be made and all samples kept.

43.8 Disclosure Implications

43.8.1 To ensure consistency, disclosure in all criminal proceedings should be governed by the same statutory framework. This includes any applications for a fresh prosecution under the Double Jeopardy (Scotland) Act 2011.

43.8.2 The disclosure provisions within part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 were amended to take account of the 2011 Act. Therefore the statutory disclosure principles laid down therein apply equally to information given to or obtained by the prosecutor in connection with the proceedings (including any appellate proceedings or other appeal) in or as a result of which the respondent was convicted or acquitted; the application under the Double Jeopardy (Scotland) Act 2011 for authority to prosecute anew; and any subsequent retrial which arises.

43.10 Continuing Duty of Prosecutor

43.10.1 Section 140C ensures that the prosecutor has a continuing duty to disclose information during the application stage. This section provides that where the prosecutor has complied with the obligation to disclose in respect of the double jeopardy application proceedings as outlined above, and has since then (but prior to disposal or abandonment of the double jeopardy application proceedings) become aware of disclosable information, in terms of (i) – (iv) above), the prosecutor must disclose that information to the respondent.

43.10.2 Nothing in section 140C requires the prosecutor to carry out a further review of information of which the prosecutor was already aware.

43.11 Applications for Further Disclosure

43.11.1 Section 140D provides that the prosecutor must respond to properly framed requests from the respondent for further disclosure during the application process.

43.11.2 Section 140D(2) specified that requests for further disclosure must set out:-

- (a) the nature of the information that the respondent wishes the prosecutor to disclose, and
- (b) the reasons why the respondent considers that such further disclosure by the prosecutor is necessary

43.11.3 Upon receipt of such a request the prosecutor must, as soon as practicable, review any information of which the prosecutor is aware that relates to the request, and disclose anything which is disclosable in terms of (i) – (iv) above.

43.12 Court Ruling on Disclosure

43.12.1 Section 140E allows the respondent to apply to the court for a ruling on a disputed issue of whether particular information should or should not be disclosed.

43.12.2 If following a request for further disclosure the respondent considers that the prosecutor has failed, in responding to the request, to disclose information which is disclosable in terms of (i) – (iv) above, the respondent may apply to the court for a ruling.

43.12.3 An application for such a ruling must be in writing and must set out a description of the information in question and the grounds for considering that the information is disclosable. Both the prosecutor and the respondent must be given the opportunity to be heard at any such hearing before determining the application. Except where it is impracticable to do so, the application for a ruling is to be assigned to the same judge(s) who are to hear the double jeopardy application proceedings.

43.12.4 Upon receipt of such an application the Court must appoint a hearing at which the application is to be considered and determined. If the court considers that the application does not comply with the conditions noted above or does not otherwise disclose any reasonable grounds upon which to consider that the information in question is disclosable, the court may dispose of it without appointing a hearing.

43.12.5 In determining an application the court must make a ruling on whether the information in question, or any part of it, falls to be disclosed in terms of (i) – (iv) above.

43.12.6 Section 140F lays down the procedures upon which the respondent may apply for a review of a court ruling.

43.13 Disclosure Schedules

43.13.1 To assist prosecutors in ensuring that they are in a position to satisfy the Court that COPFS has met its disclosure obligations, **in all solemn proceedings** the investigating agency will provide the Crown with schedules detailing all information obtained or generated during the investigation that they consider *may* be relevant.

43.13.2 Schedules were introduced initially for all High Court cases in which the investigation commenced on or after 5th October 2009 and for all Sheriff and Jury cases in which the investigation commenced on or after 4th May 2010.

43.13.3 However, the Disclosure of Evidence in Criminal Proceedings Code of Practice which was laid before the Scottish Parliament in terms of section 164 of the Criminal Justice and Licensing (Scotland) Act 2010 provides, at paragraph 19.1 that:

Where a case has been identified as one that will be prosecuted under solemn procedure, in order to satisfy their obligation under sections 117(2) and 118(2) of the 2010 Act to provide the Crown with details of all information that may be relevant, the police (or other reporting agency) **must prepare and complete schedules** listing all the information obtained or generated during the investigation that may be relevant.

This Code of Practice applies in respect of all criminal investigations conducted by police officers, which begin on or after the day on which this Code comes into force, namely 6th June 2011.

43.13.4 The disclosure provisions within Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 were amended to take account of the Double Jeopardy (Scotland) Act 2011. Therefore the statutory disclosure principles laid down therein, including the Code of Practice made under section 164, apply equally to information given to or obtained by the prosecutor in connection with the proceedings (including any appellate proceedings or other appeal) in or as a result of which the respondent was convicted or acquitted; the application under the Double Jeopardy (Scotland) Act 2011 for authority to prosecute anew; and any subsequent retrial which arises.

43.13.5 Thus all double jeopardy matters will fall within the scheduling regime.

43.13.6 Early discussion should take place between the Senior Investigating Officer and the Solemn Legal Manager in order to ensure that the requirement for disclosure schedules is understood.