



Queensland

Criminal Code (Double Jeopardy) Amendment Act 2007

Act No. 49 of 2007



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Criminal Code (Double Jeopardy) Amendment Act 2007

Act No. 49 of 2007

An Act to amend the Criminal Code to provide 2 exceptions to the double jeopardy rules to allow an acquitted person to be retried, and for other purposes

[Assented to 25 October 2007]

The Parliament of Queensland enacts—

1 Short title

This Act may be cited as the *Criminal Code (Double Jeopardy) Amendment Act 2007*.

2 Code amended

This Act amends the Criminal Code.

3 Amendment of s 17 (Former conviction or acquittal)

Section 17—

insert—

Note—

This section does not apply to the charge mentioned in section 678B (Court may order retrial for murder—fresh and compelling evidence) or 678C (Court may order retrial for 25 year offence—tainted acquittal).’.

4 Insertion of new ch 68

After section 677—

insert—

‘Chapter 68 Exceptions to double jeopardy rules

‘678 Definitions

‘(1) In this chapter—

25 year offence means an offence punishable by imprisonment for life or for a period of 25 years or more.

acquittal—

(a) includes—

- (i) an acquittal in appeal proceedings in relation to an offence; and
 - (ii) an acquittal at the direction of a court; and
 - (iii) a dismissal under section 700 or the *Justices Act 1886*, section 149;¹ but
- (b) does not include—
- (i) an acquittal on account of unsoundness of mind under section 647; or
 - (ii) a discontinuance of proceedings under the *Mental Health Act 2000*, section 281.²

administration of justice offence means an offence under chapter 16.

Court means the Court of Appeal.

fresh and compelling evidence see section 678D.

interests of justice see section 678F.

tainted acquittal see section 678E.

- ‘(2) For the purposes of this chapter, the retrial of an acquitted person for an offence includes a trial if the offence is not the same as the offence of which the person was acquitted.
- ‘(3) In this chapter, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

‘678A Application of ch 68

- ‘(1) This chapter applies if, after the commencement of this chapter, a person is acquitted of an offence, whether the offence is committed before or after the commencement of this chapter.

1 *Justices Act 1886*, section 149 (Dismissal of complaint)

2 *Mental Health Act 2000*, section 281 (Proceedings discontinued—unsound mind)

‘(2) However, this chapter does not apply if, in relation to a charge of an offence, although a person is acquitted of the offence as charged, the person is convicted instead of a lesser offence.

Examples where this chapter does not apply—

- in relation to a charge of the offence of murder, a person is acquitted of murder and convicted instead of manslaughter
- in relation to a charge of an offence committed with circumstances of aggravation, a person is acquitted of the offence committed with circumstances of aggravation and convicted instead of the offence without any of the circumstances of aggravation

‘(3) This section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held.

‘(4) However, this section does not extend as mentioned in subsection (3) if the law of the place where the proceedings were held does not permit the person to be retried and the application of this chapter to the retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth.

‘678B Court may order retrial for murder—fresh and compelling evidence

‘(1) The Court may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for the offence of murder if satisfied that—

- (a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and
- (b) in all the circumstances it is in the interests of justice for the order to be made.

‘(2) The Court may order a person to be retried for the offence of murder under this section even if the person had been charged with and acquitted of a lesser offence.

‘(3) If the Court orders an acquitted person to be retried for the offence of murder, the Court must quash the person’s acquittal or remove the acquittal as a bar to the person being retried.

‘(4) On the retrial, section 17 does not apply in relation to the charge of the offence of murder.

‘678C Court may order retrial for 25 year offence—tainted acquittal

- ‘(1) The Court may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 25 year offence if satisfied that—
 - (a) the acquittal is a tainted acquittal; and
 - (b) in all the circumstances it is in the interests of justice for the order to be made.
- ‘(2) The Court may order a person to be retried for a 25 year offence under this section even if the person had been charged with and acquitted of a lesser offence.
- ‘(3) If the Court orders an acquitted person to be retried for a 25 year offence, the Court must quash the person’s acquittal or remove the acquittal as a bar to the person being retried.
- ‘(4) On the retrial, section 17 does not apply in relation to the charge of the 25 year offence.

‘678D Fresh and compelling evidence—meaning

- ‘(1) This section applies for the purpose of deciding under this chapter whether there is fresh and compelling evidence against an acquitted person in relation to the offence of murder.
- ‘(2) Evidence is *fresh* if—
 - (a) it was not adduced in the proceedings in which the person was acquitted; and
 - (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.
- ‘(3) Evidence is *compelling* if—
 - (a) it is reliable; and
 - (b) it is substantial; and
 - (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

- ‘(4) Evidence that would be admissible on a retrial under this chapter is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

‘678E Tainted acquittal—meaning

- ‘(1) This section applies for the purpose of deciding under this chapter whether the acquittal of an accused person is a tainted acquittal.
- ‘(2) An acquittal is *tainted* if—
- (a) the accused person or another person has been convicted in this State or elsewhere of an administration of justice offence in relation to the proceedings in which the accused person was acquitted; and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.
- ‘(3) An acquittal is not a tainted acquittal during any of the following periods—
- (a) the period provided under section 671(1) for the person convicted of the administration of justice offence (the *convicted person*) to appeal, or obtain leave to appeal, from the conviction;
 - (b) if, within the period mentioned in paragraph (a), the convicted person gives notice of an appeal—the period ending when the appeal is decided;
 - (c) if, within the period mentioned in paragraph (a), the convicted person gives notice of an application for leave to appeal, the period ending—
 - (i) if the application is refused—when the decision refusing the application is made; or
 - (ii) if the application is granted—when the appeal is decided.

Note—

Section 668D provides the right of appeal.

- ‘(4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court has ordered the acquitted person to be retried under this chapter because of the conviction, the person may apply to the Court to set aside the order and—
- (a) restore the acquittal that was quashed; or
 - (b) restore the acquittal as a bar to the person being retried for the offence.

‘678F Interests of justice—matters for consideration

- ‘(1) This section applies for the purpose of deciding under this chapter whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.
- ‘(2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court is satisfied that a fair retrial is likely in the circumstances.
- ‘(3) The Court must have regard in particular to—
- (a) the length of time since the acquitted person allegedly committed the offence; and
 - (b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to—
 - (i) the investigation of the commission of the offence of which the person was acquitted and the prosecution of the proceedings in which the person was acquitted; and
 - (ii) the application for the retrial of the acquitted person.

‘678G Application for retrial—procedure

- ‘(1) If a person has been acquitted, not more than 1 application for the retrial of the person may be made under this chapter in relation to the acquittal.
- ‘(2) If the acquittal results from a retrial under this chapter—

- (a) an application may not be made for an order under section 678B in relation to the acquittal; but
 - (b) an application may be made for an order under section 678C in relation to the acquittal.
- ‘(3) An application for the retrial of an acquitted person may not be made under this chapter unless—
- (a) the person has been charged with the offence for which the retrial is sought (the *relevant offence*); or
 - (b) a warrant has been issued for the person’s arrest in relation to the relevant offence.
- ‘(4) The application must be made not later than 28 days after the person is charged with the relevant offence or the warrant is issued for the person’s arrest in relation to the relevant offence.
- ‘(5) The Court may extend the period mentioned in subsection (4) for good cause.
- ‘(6) The Court must consider the application at a hearing.
- ‘(7) The person to whom the application relates is entitled to be present and heard at the hearing, whether or not the person is in custody.
- ‘(8) However, if the person has been given a reasonable opportunity to be present, the application may be decided even if the person is not present.
- ‘(9) The powers of the Court mentioned in section 671B(1) may be exercised in relation to the hearing of the application.
- ‘(10) The Court may at 1 hearing consider more than 1 application under this chapter for a retrial (whether or not relating to the same person), but only if the offences concerned may be tried on the same indictment.
- ‘(11) If the Court decides in proceedings on an application under this chapter that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

‘678H Retrial

- ‘(1) An indictment for the retrial of a person that has been ordered under this chapter may not, without the leave of the Court, be presented after the end of the period of 2 months after the order was made.
- ‘(2) The Court may give leave only if it is satisfied that—
 - (a) the prosecutor has acted with reasonable expedition; and
 - (b) there is good and sufficient reason for the retrial despite the lapse of time since the order was made.
- ‘(3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this chapter, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court to set aside the order for the retrial and—
 - (a) restore the acquittal that was quashed; or
 - (b) restore the acquittal as a bar to the person being tried for the offence.
- ‘(4) If the order is set aside, a further application may not be made under this chapter for the retrial of the accused person in relation to the offence concerned.
- ‘(5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court has found that it appears that—
 - (a) there is fresh and compelling evidence against the acquitted person; or
 - (b) more likely than not, but for the commission of the administration of justice offence, the accused person would have been convicted.

‘678I Authorisation of police investigations

- ‘(1) This section applies to any police investigation of the commission of an offence by an acquitted person in relation to the possible retrial of the person for the offence under this chapter.

- ‘(2) For the purposes of this section, a police investigation is an investigation that involves, whether with or without the consent of the acquitted person—
- (a) any arrest, questioning or search of the acquitted person, or the issue of a warrant for the arrest of the person; or
 - (b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person.
- ‘(3) A police officer may carry out or authorise a police investigation to which this section applies only if the Director of Public Prosecutions—
- (a) has advised that, in the opinion of the Director of Public Prosecutions, the acquittal would not be a bar to the retrial of the acquitted person in this State for the offence; or
 - (b) has given written consent to the police investigation on the application in writing of the commissioner, or a deputy commissioner, of the police service.
- ‘(4) The commissioner, or a deputy commissioner, of the police service may make an application for the police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial under this chapter—
- (a) has been obtained; or
 - (b) is likely to be obtained as a result of the investigation.
- ‘(5) The Director of Public Prosecutions may give consent to the police investigation only if satisfied that—
- (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation; and
 - (b) it is in the public interest for the investigation to proceed.
- ‘(6) Despite the *Police Service Administration Act 1990*, section 4.10, the commissioner of the police service may not delegate powers of the commissioner under this section to a police officer or staff member.

‘678J Bail

- ‘(1) This section has effect despite anything to the contrary in the *Bail Act 1980*.
- ‘(2) There is a presumption in favour of bail for a person who is charged with an offence for which a retrial is sought under this chapter until the application for the retrial is dealt with.

‘678K Restrictions on publication

- ‘(1) A person must not publish any matter for the purpose of identifying or having the effect of identifying an acquitted person who is being retried under this chapter or who is the subject of—
 - (a) a police investigation, or an application for a police investigation, mentioned in section 678I; or
 - (b) an application for a retrial, or an order for retrial, under this chapter.
- ‘(2) Subsection (1) does not apply if the publication is authorised by order of the Court or of the court before which the acquitted person is being retried.
- ‘(3) The relevant court may make an order authorising publication only if the court is satisfied that it is in the interests of justice to make the order.
- ‘(4) Before making an order under this section, the relevant court must give the acquitted person a reasonable opportunity to be heard on the application for the order.
- ‘(5) The relevant court may at any time vary or revoke an order under this section.
- ‘(6) The prohibition on publication under this section ceases to have effect, subject to any order under this section, when the first of the following paragraphs apply—
 - (a) there is no longer any step that could be taken which would lead to the acquitted person being retried under this chapter;
 - (b) if the acquitted person is retried under this chapter—the trial ends.

- ‘(7) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- ‘(8) A contravention of a prohibition on publication under this section is punishable as contempt of the Supreme Court.’.