LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

STEPHEN LAWRENCE[1]

BARRISTER, NSW

PRESENTED AT LEGAL EAGLES CLE CONFERENCE

LUANG PRABANG, LAOS 15/09/2016-20/09/2016

MY CLIENT IS A NO SHOW

'WARRANTS, ADJOURNMENTS, EX PARTE CONVICTIONS, SECTION 4 APPLICATIONS, TRIALS IN ABSENTIA – AN ANALYSIS OF NATIONAL AND INTERNATIONAL LAW'

Contents

[1] Barrister, Sir Owen Dixon Chambers, Sydney. slawrence@sirowendixon.com.au

Introduction

1. What do I do if my client doesn't turn up? It's a question every criminal lawyer quickly learns the answer to.

2. This paper outlines the processes that can occur when a criminal accused fails to appear and a trial proceeds in their absence and analyses some of the legal principles that underpin these processes.

3. In this discussion the paper makes some limited practical suggestions on when and how lawyers can save their clients from forfeiting their right to a fair trial according to law. It is suggested that particularly for children, convictions[2] in the absence should be strongly resisted.

4. This discussion includes an examination of some of the ethical issues that arise for criminal lawyers when their client fails to attend court and to what extent they can and should remain involved in the proceedings after that point.

5. The paper also briefly outlines the international law on the right to be present at trial and the exceptions recognised to the right. It can be seen that the scheme in the summary jurisdiction in New South Wales for hearings in the absence of the defendant falls far short of what is required by international law.

6. One of the fundamental propositions of common law criminal justice is the right of the accused person to be present at trial. Its existence highlights an important distinction between the common law and civil legal traditions. A range of countries operating under civil law system allows trials *in absentia* even for the most serious of offences. In contrast the common law has generally regarded as sacrosanct the presence of the accused for trial of serious offences.

7. International law also tends to favour the protection of the fundamental procedural fairness achieved by an accused being present for their trial. International criminal

[2] The word conviction is used in this paper to mean also a finding of guilt.

law has tended to avoid trials *in absentia* and to require the extradition and surrender of accused before a trial commences. Recently however there has been some departures from this standard, in particular at the Special Tribunal for Lebanon.

8. An examination of the actual operation of this right in Australia however highlights another fundamental legal distinction. The difference between the quality of summary justice and the justice given when persons are tried on indictment. In Australia persons are routinely convicted in their absence for a range of summary offences, including ones capable of being heard on indictment. In contrast indictable offences are rarely dealt with in the absence of the accused, with the most common exception being when the accused absconds after the beginning of the trial.

9. This paper primarily examines the law of New South Wales, but most states and territories appear to have analogous statutory schemes raising broadly similar issues.

The Local Court

When Does a Client Fail to Appear?

10. It is well established in New South Wales that a person can appear for hearing in the summary jurisdiction through their legal representative, rather than in person.

11. Section 3 of the *Criminal Procedure Act 1986* (NSW) states:

> ***3 Definitions***
>
> *(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:*
>
> ***accused person includes**, in relation to summary offences, a defendant and, in relation to all offences (where the subject-matter or context allows or requires), **an Australian legal practitioner representing an accused person**.*

12. Section 36 states:

36 Representation and appearance

(1) A prosecutor or accused person may appear personally or by an Australian legal practitioner or other person empowered by an Act or other law to appear for the prosecutor or accused person.

(2) A prosecutor who is a police officer may appear personally or by a person permitted by subsection (1) or by a police prosecutor.

13. Section 37 states:

37 Conduct of case

(1) The prosecutor's case may be conducted by the prosecutor or by the prosecutor's Australian legal practitioner or any other person permitted to appear for the prosecutor (whether under this or any other Act).

(2) The accused person's case may be conducted by the accused person or by the accused person's Australian legal practitioner or any other person permitted to appear for the accused person (whether under this or any other Act).

14. In *McKellar v Director of Public Prosecutions* [2014] NSWSC 459 (23 April 2014) Adamson J was concerned with a situation where the defendant had failed to appear for the hearing of a criminal charge at the Local Court in Dubbo.

15. An Aboriginal Legal Service lawyer appeared for Ms. McKellar and declined to withdraw upon her non-appearance.

16. Adamson J described the factual situation at para 8-10:

"The plaintiff's matter was listed for hearing on 27 June 2013 before the Local Court at Dubbo. Her solicitor, Mr Cranney, applied for an adjournment on the grounds that the plaintiff was unable to come from Sydney, where she was then living, to Dubbo because her Centrelink payments had been terminated two days before. The Magistrate said that, if the prosecutor wished to proceed, he thought he was obliged to deal with the matter by reason of s

196 of the Act. Mr Cranney said if the Magistrate intended to take that course, he might be able to get instructions to run the matter in the absence of the accused. When the Magistrate expressed doubt as to the availability of that course, Mr Cranney reminded his Honour that the definition of an accused person under the Act included a defendant's legal representative. The prosecutor said he was ready to proceed with the matter. The Magistrate then stood the prosecution down to enable Mr Cranney to obtain instructions.

When the matter resumed Mr Cranney said he had been able to contact his client, and submitted he could appear by virtue of s 36 of the Act, which he contended referred to summary matters because a "prosecutor" did not appear at trials. The Magistrate said that, whilst s 36 was directed to the appearance of a legal practitioner, it was obvious the defendant was meant to be present, since the Supreme Court trial procedure was applicable by reason of s 38 of the Act. The Magistrate remained of the view that s 196 of that Act contemplated the present situation, namely the non-appearance of the defendant in person, although her legal representative was present. The matter was stood down in the list to be mentioned at noon.

On resumption, Mr Cranney submitted that he could conduct the matter on behalf of the plaintiff by reason of s 15, s 36 and s 38 of the Act".

17. The Magistrate disagreed with the defence submission and proceeded to determine the matter in the absence of the defendant convicting her pursuant to section 196 of the *Criminal Procedure Act 1986* (NSW).

18. Adamson J upheld an appeal against this order, set aside the conviction and remitted the matter for hearing, stating at [34]:

"The effect of s 3 and s 36 of the Act is that Mr Cranney's appearance before the Magistrate meant that the plaintiff was before the court and s 196 of the Act did not apply. Once the Magistrate had refused the plaintiff's adjournment application, the Court was obliged by s 192(1) to proceed to hear and determine the CAN. Further, pursuant to s 202 of the Act, the Magistrate was

obliged to hear the evidence in the matter, whether this was by way of the prosecutor tendering the police brief of evidence or the prosecution witnesses giving their evidence orally. Section 202, in terms, contemplates that the accused person will not necessarily be present in person during the hearing and contemplates the issue of a warrant to bring the person before the Court for sentencing where a custodial sentence is to be imposed or is in contemplation. In the present case it was common ground that no penalty other than a fine would be imposed".

19. In so finding Adamson J followed a long line of case law including *Ex parte Dunn* (1904) 21 WN (NSW) 152; *Ex parte Hughes; re Moulden* [1946] ; (1946) 47 SR (NSW) 91 and *Barker v Jacob* (Supreme Court (NSW), RS Hulme J, 27 March 2000, unrep).

20. In *R v Paauwe* [1971] 2 NSWLR 235 the Court (Manning JA, Lee & Slattery JJ) said at 238:

> *"It is well settled that where a proceeding for a non-indictable offence is instituted by summons, the accused is not required to appear in person and counsel or solicitor may appear for him and plead guilty or not guilty: Ex parte Hughes; Re Moulden [1946] NSWStRp 57; (1946) 47 S.R.(N.S.W.) 91; 63 W.N. 293; R v Thompson [1909] 2 K.B. 614 and Ex parte Dunn [1904] NSWStRp 73; (1904) 4 S.R. (N.S.W.) 486; 21 W.N. 152. But where the information results in a charge being laid, it is the invariable practice, when the accused is before the magistrate, that the proceedings should commence with the accused being charged. Once charged, his counsel or attorney in his presence, may answer for him: Justices Act , s. 70(3); R v Salisbury and Amesbury Justices; Ex parte Greatbatch (1954) 2 Q.B. 142, at p.147 per Goddard L.J"*

21. The simplest situation where a legal representative appears in a criminal matter in the absence of their client is where the client is not on bail and the lawyer is expressly instructed to appear and defend a charge.

22. Detailed instructions sufficient to cover every eventuality will obviously be required and a capacity to contact the client at short notice for the purpose of taking instructions on unforeseen events advisable.

Failure to Appear v Breach of a Bail Undertaking to Appear

23. Other situations however arise where the client's non-attendance is unforeseen and perhaps in breach of their bail undertaking. In such situations Magistrates will be acutely aware a defendant is in breach of bail by way of their non-appearance and perhaps reluctant to allow the matter to proceed, rather than issuing a warrant for the arrest of the defendant or convicting them in their absence.

24. Such a breach of bail however would seem to be an entirely different issue to the one of appearance through a legal representative.

25. The defendant might be liable to be dealt with under Part 8 of the *Bail Act 2013* (NSW) including by way of prosecution for fail to appear, but will not have necessarily forfeited their right to a hearing in which they are represented by their legal representative.

26. Caution and thought however is required before making a decision in these circumstances to stay on the record and defend a matter on behalf of the absent client.

27. It may be that your client fails to appear on the hearing day, but has a rock solid technical defence, one that will be forfeited completely if you withdraw and allow the inevitable conviction in their absence to follow. It would seem inconsistent with one of your primary duties to the client (to act in their best interests[3]) to withdraw in such circumstances.

[3] NSW Solicitors Rules, 4.1.1, a solicitor must, "act in the best interests of a client in any matter in which the solicitor represents the client".
https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/803185.pdf

28. In other circumstances however a non-appearance on the hearing day will effectively preclude staying on the record for the purposes of conducting a defended hearing. This will be so in most defended matters where you have no instructions to remain in the absence of the client, where instructions will be necessary for the defence of the matter and where the client may need to give evidence.

29. The obvious difficulty in the absence of express instructions is that the hearing might end in a conviction and you will have effectively waived your client's right to a trial in their presence. Their lack of presence will have meant they were unable to give evidence and may have been unable to instruct you on key matter.

30. They will also not have the option of seeking to set aside the conviction under section 4 of the *Crimes (Appeal and Review) Act 2001* (NSW) as they would if they had been convicted in their absence.

31. This eventuality may also lead to a complaint that you have acted in breach of your obligations or some aspect of the rules of the profession.

32. One possibility of course is to take instructions in advance in cases where a matter can be properly defended in the absence of the client and where their non-attendance might be an issue.

33. Some lawyers take a strict position and will always withdraw upon the non-appearance of their client, presumably on the basis that the failure to appear represents an implicit exhaustion of instructions.

34. Often it will realistically depend on the stage to which the matter has progressed.

35. If a client fails to appear at the reply to brief for example (when pleas of not guilty have entered and instructions taken) there may be little reason for a lawyer to withdraw. The client appears through them and the lawyer can act to safeguard the client's legal rights. The question of the breach of the bail undertaking is a separate one from the question of appearance for the purposes of the mention.

36. However, if a client fails to appear at a second mention and a lawyer is effectively without instructions (and unable to obtain them) and unable to enter a plea it may be that withdrawing is appropriate.

37. One option that should almost always be at least considered is to stay in the matter for the purpose of representing the client in respect of the matters relating to their fail to appear, including the possible issuing of a warrant, the possible adjournment of the matter and the possible proceedings to convict them in their absence. Reasonable minds may differ but it is my opinion these are matters squarely within your implicit instructions as part of your retainer.

38. Personally I will always generally stay on the record for the purposes of submitting on the question of warrants and seeking to persuade the Magistrate to adjourn the proceedings and to not proceed to an ex-parte conviction, where there is a realistic possibility of assisting the client by doing so.

39. Some Magistrates however will expect lawyers to withdraw in such situations and will challenge lawyers who do not as to their 'standing' or 'instructions' to be remaining. I have found a formulation of words to the effect of, "*I am comfortable that my remaining in the matter for this purpose to be within the ambit of my retainer as the legal representative of the Defendant*" is generally sufficient to convince the Magistrate that you intend to remain.

40. On other occasions I have remained on the record as *amicus curiae* on the question of whether a conviction should be entered in the absence of the defendant. On occasion this has included tendering evidence, sometimes the entire brief, to explain why it would be just to adjourn the matter and not proceed to convict a person who has a substantial defence.

41. This latter course of remaining as a 'friend' of the court to assist on the question of how the matter should proceed in the absence of the accused was recognised by Adams J as a proper course of action in *Williams v R* [2012] NSWCCA 286 (20 December 2012) where the accused absconded towards the end of the trial.

42. Adams J stated at [19]

> *"It cannot be doubted that the applicant's conduct necessarily terminated the retainers both of her solicitor and her counsel. It was reasonable - and, indeed, quite proper for Mr Carty to have continued in the role of amicus curiae (though he was by no means bound to have done so) in respect of the appropriate disposition of the proceedings, in particular whether the jury should be discharged or the trial continue in the absence of the applicant".*

43. Interestingly, as discussed below, on occasion the shoe is on the other foot. In *The Queen v Antonios Mokbel* [2006] VSC 520 the Victorian Supreme Court was faced with a situation where the accused absconded during closing submissions of his lengthy trial. Justice Gillard firmly expressed the view that counsel should remain and deliver his closing address, at [14] "*to perform their duty to the court, "in the doing of justice according to law".*

44. Counsel disagreed and withdrew on the basis of ethical advice, at [12], "*that they were not obliged to remain in this trial to the end*".

Warrants

45. A court can issue a warrant for an absent accused person in summary proceedings under Chapter 4, Part 4, Division 2 of the *Criminal Procedure Act 1986* (NSW).

46. A warrant is of course not mandatory upon the failure to appear of the defendant, as section 197 of the Act makes clear, in stating:

> ***197 Adjournment when accused person not present***
>
> *(1) Instead of hearing and determining a matter in the absence of the accused person, the court may, if it thinks that the matter should not proceed on the specified day or without the accused person, adjourn the hearing to another day for mention or for hearing.*

(2) If a warrant is issued for the arrest of the accused person, the Magistrate or authorised officer before whom the accused person is brought after arrest may specify the date, time and place to which the proceedings are adjourned

47. There is also the general power to adjourn contained in section 40 of the *Criminal Procedure Act 1986* (NSW).

48. It is important to be aware however that certain punishments cannot be imposed in the absence of the defendant and a warrant can issue for the purpose of bringing such offenders to court to be sentenced, following conviction (whether in their absence or otherwise).

49. Section 25 of the *Crimes (Sentencing Procedure) Act 1999* NSW) states:

25 Local Court not to impose certain penalties if offender is absent

(1) The Local Court must not make any of the following orders with respect to an absent offender:

(a) an order imposing a sentence of imprisonment,

(b) an intensive correction order,

(c) a home detention order,

(d) a community service order,

(e) an order that provides for the offender to enter into a good behaviour bond,

(f) a non-association order or place restriction order,

(g) an intervention program order.

(2) At any time after it finds an absent offender guilty of an offence or convicts an absent offender for an offence, the Local Court:

(a) may issue a warrant for the offender's arrest, or

(b) may authorise an authorised officer to issue a warrant for the offender's arrest,

for the purpose of having the offender brought before the Local Court for conviction and sentencing, or for sentencing, as the case require

Proceedings in the Absence of the Defendant

50. The Local Court and the Children's Court in New South Wales have very broad powers to proceed and determine charges against defendants who fail to appear before the Court.

51. These powers apply on the day that a summary matter is fixed for hearing, with section 196 of the *Criminal Procedure Act 1986* (NSW) providing:

> ***196 Procedure if accused person not present***
>
> *(1) If the accused person is not present at the day, time and place set for the hearing and determination of the matter (including a day to which the hearing has been adjourned), the court may proceed to hear and determine the matter in the absence of the accused person in accordance with this Division.*
>
> *(2) If:*
>
> *(a) a penalty notice enforcement order is annulled under Division 5 of Part 3 of the Fines Act 1996 and the order (together with any annexure) is taken to be a court attendance notice in relation to the offence, and*
>
> *(b) the accused person has been given notice of the hearing of the matter of the court attendance notice, and*
>
> *(c) the accused person does not appear on the day and at the time and place specified by the court attendance notice,*
>
> *the court may proceed to hear and determine the matter in the absence of the accused person in accordance with this Division.*
>
> *(3) The court may not proceed to hear and determine the matter unless it is satisfied that the accused person had reasonable notice of the first return date or the date, time and place of the hearing.*

(4) If an offence is an indictable offence that may be dealt with summarily only if the accused person consents, the absence of the accused person is taken to be consent to the offence being dealt with summarily and the offence may be dealt with in accordance with this Division.

52. The power can also be exercised at any mention date where a defendant fails to appear, with Section 190 of the *Criminal Procedure Act 1986* (NSW) providing:

190 Time for hearing

(1) On the first return date for a court attendance notice in any summary proceedings, or at such later time as the court determines, the court must set the date, time and place for hearing and determining the matter.

(2) The court must notify the accused person of the date, time and place, if the accused person is not present.

(3) However, if the accused person is not present at the first return date or at any subsequent mention of the proceedings and has not lodged a written plea of not guilty in accordance with section 182, the court may proceed to hear and determine the matter on the first or a subsequent day on which the matter is listed for mention at its discretion.

(4) The court may not proceed to hear and determine the matter unless it is satisfied that the accused person had reasonable notice of the first return date or the mention date.

53. This section was amended in 2014, with it previously in more limited terms, with sub-section (3) reading:

"However, if the accused person is not present at the first return date and has not lodged a written plea of not guilty in accordance with section 182, the court may proceed to hear the matter on that day at its discretion".

54. Prior to the 2014 amendment the legislative scheme seemed to provide for convictions ex-parte only on the first mention date (section 190) or on a day fixed for hearing (section 196).

55. The section was amended after the decision of Latham J in *Hammond v DPP* [2013] NSWSC 888 (1 July 2013) where a challenge was taken to a conviction entered under section 196 of the Act on a day that was contended by the appellant to be neither the "*first return date*" or the day "*set for hearing and determination*".

56. The facts were summarised by Latham J, at [12] to [14]:

> *"On Sunday, 26 February 2012, the plaintiff was taken to Dubbo Local Court to appear before the registrar in respect of a breach of an apprehended violence order. He was represented by the Aboriginal Legal Service (ALS). The registrar granted the plaintiff conditional bail and adjourned the proceedings to 29 February 2012 at Dubbo for mention.*
>
> *The bail undertaking (Annexure A to the affidavit of Felicity Graham of 6 July 2012) imposed residential and reporting conditions upon the plaintiff. More particularly, the bail undertaking records the plaintiff's obligation to appear at Dubbo Local Court on 29 February 2012 at 9:30 am, "where the matter is listed for mention and before such court on such day and at such time and place as it is from time to time specified in the notice to be given or sent".*
>
> *On 29 February 2012, the plaintiff failed to attend, although the same legal representative who appeared for the plaintiff before the registrar was in attendance"*

57. Latham J held that in fact the matter was dealt with on the first return date, accepting the submission, at [41] that:

> "*the expression "first return date" was interpreted as a reference to a listing before a judicial officer, that is, not a registrar or administrative officer*".

58. While there was no express discussion of the issue, (nor a notice of contention seemingly raised by the Defendant to the appeal), it seems Latham J was content to dismiss the appeal on the basis that while section 196 of the Act was incorrectly

used, the order in question could lawfully have been made pursuant to section 190 of the Act.

59. It is important to note that proceeding by way of determining the matter in the absence of the defendant is a discretionary matter and reviewable as such.

60. Latham J stated in Hammond at [47]:

> *"The exercise of the discretion in s 190(3) (assuming the conditions of its exercise are satisfied) must conform to the requirements of House v The King [1936] HCA 40 ; 55 CLR 499. It is not suggested that the magistrate took into account a factor that he was not entitled to take into account, or that he failed to consider a relevant factor. His Honour was aware that the matter was listed for mention, as one might expect on a first return date. The plaintiff had ample notice of the court date, given that the bail undertaking he entered on 26 February included a requirement that he attend court on 29 February. The fact that the plaintiff may not have received the letter sent from the ALS office on 28 February was irrelevant to the issue of reasonable notice".*

61. As discussed above section 197 is a ready statutory alternative to determining the matter in the absence of the Defendant:

> ***197 Adjournment when accused person not present***
>
> *(1) Instead of hearing and determining a matter in the absence of the accused person, the court may, if it thinks that the matter should not proceed on the specified day or without the accused person, adjourn the hearing to another day for mention or for hearing.*
>
> *(2) If a warrant is issued for the arrest of the accused person, the Magistrate or authorised officer before whom the accused person is brought after arrest may specify the date, time and place to which the proceedings are adjourned.*

62. It is important to be aware of the service requirements, in section 196(3) the Court may not proceed, "*unless it is satisfied that the accused person had reasonable notice of the first return date or the date, time and place of the hearing*". In section

190(4), the Court similarly, "*may not proceed to hear and determine the matter unless it is satisfied that the accused person had reasonable notice of the first return date or the mention date*".

63. In the event a court does decide to proceed in the absence of the defendant a number of provisions govern the procedure to be adopted.

64. Section 199 states:

> ***199 Material to be considered when matter determined in absence of accused person***
>
> *(1) The court may determine proceedings heard in the absence of the accused person on the basis of the court attendance notice without hearing the prosecutor's witnesses or any other additional evidence of the prosecutor, if it is of the opinion that the matters set out in the court attendance notice are sufficient to establish the offence.*
>
> *(2) Before determining the matter, the court must consider any written material given to the court by the prosecutor, or lodged by the accused person under section 182.*

65. Section 200 applies in the event the Court Attendance Notice alone is insufficient:

> ***200 When court may require prosecution to provide additional evidence***
>
> *(1) The court may, in proceedings heard in the absence of the accused person, require the prosecution to provide additional evidence if it is of the opinion that the matters set out in the court attendance notice are not sufficient to establish the offence.*
>
> *(2) The additional evidence is not admissible unless:*
>
> *(a) it is in the form of written statements that comply with Division 3 of Part 2 of Chapter 3, including in the form of any recorded statement that may be given instead of a written statement under that Division, and*

(b) in the case of a written statement, a copy of any such statement has been given to the accused person a reasonable time before consideration of the additional evidence by the court, and

(c) in the case of a recorded statement, the requirements of Division 3 of Part 4B of Chapter 6 in relation to service of, or access to, a recorded statement are complied with in relation to the recorded statement.

(3) However, the court may require evidence to be given orally if it is not practicable to comply with subsection (2) or if the court thinks it necessary in the particular case.

(4) The court must reject a written statement or recorded statement, or any part of a written statement or recorded statement, tendered in summary proceedings if the statement or part is inadmissible because of this section

66. The requirements of section 200 are rarely complied with in the experience of the author, with ex-parte convictions under section 190 or 196 generally occurring by way of a tender of a police facts sheet.

67. An interesting question arises as to whether such a police facts sheet is able to be had regard to because of the reference in section 199(2) to "*any written material given to the court by the prosecutor",* or whether its use is an impermissible substitute for compliance with the provisions of section 200, in circumstances where the Court seemingly, *is of the opinion that the matters set out in the court attendance notice are not sufficient to establish the offence",* as evidenced by regard being had to the facts sheet.

68. Section 202 is concerned generally with the determination of summary matters, but perhaps superfluously, also refers to persons convicted in their absence in sub-section (3), stating:

202 Determination by court

(1) The court must determine summary proceedings after hearing the accused person, prosecutor, witnesses and evidence in accordance with this Act.

(2) The court may determine the matter by convicting the accused person or making an order as to the accused person, or by dismissing the matter.

(3) In the case of a matter heard in the absence of the accused person, the court may adjourn the proceedings to enable the accused person to appear or be brought before the court for sentencing.

Note. Section 25 of the Crimes (Sentencing Procedure) Act 1999 provides for the issue of warrants of arrest for absent defendants so that they may be brought before the Court for sentencing. Section 62 of that Act also provides for the issue of warrants of commitment after sentencing.

Setting Aside Ex-parte Convictions

69. A person convicted in their absence in the Local Court of NSW can make an application to the same Local Court for the setting aside of the order pursuant to section 4 of the *Crimes (Appeal and Review) Act 2001* (NSW).

70. Section 4 states:

4 Applications to Local Court

(1) An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Local Court sitting at the place at which the original Local Court proceedings were held.

(1A) An application may be made by the defendant or by the prosecutor. However, an application by the defendant may be made only if:

(a) in the case of an application for an annulment of a conviction—the defendant was not in appearance before the Local Court when the conviction was made, or

(b) in the case of an application for an annulment of a sentence—the defendant was not in appearance before the Local Court when the sentence was imposed.

(1B) A defendant may not make an application for annulment of a conviction or sentence under this section if the defendant had lodged a notice in writing under section 182 of the Criminal Procedure Act 1986 in respect of the offence for which the defendant was convicted or the sentence was imposed.

(2) An application under this section must be made:

(a) within 2 years after the relevant conviction or sentence is made or imposed, or

(b) if an application has been made to the Minister under section 5 within that 2-year period, within 2 years after the application under section 5 has been disposed of under this Part.

(3) Except by leave of the Local Court, a person may not make more than one application under this section in relation to the same matter.

(4) An application must be in writing, and must be lodged with a registrar of the Local Court

71. Section 8 of the Act contains the necessary preconditions for the exercise of the power to set aside a conviction, stating:

Circumstances in which applications to be granted

(1) The Local Court must grant an application for annulment made by the prosecutor if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so.

(2) The Local Court must grant an application for annulment made by the defendant if it is satisfied:

(a) that the defendant was not aware of the original Local Court proceedings until after the proceedings were completed, or

(b) that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or

(c) that, having regard to the circumstances of the case, it is in the interests of justice to do so.

72. In *Miller v Director of Public Prosecutions* [2004] NSWCA 90 (1 April 2004) the Court of Appeal considered a judicial review application of a decision of Dowd J dismissing an appeal brought under sections 101 and 104 of the (now repealed[4]) *Justices Act 1902* (NSW).

73. The appellant had been refused an annulment application under section 100D of the *Justices Act 1902* (NSW), the predecessor section to section 4 of the *Crimes (Appeal and Review) Act* 2001. Section 100K of the *Justices Act 1902* (NSW) was in relevantly similar terms of section 8 of the *Crimes (Appeal and Review) Act* 2001.

74. The facts and findings were succinctly summarised at [1]:

> *"The learned Magistrate appears to have ignored the uncontroverted evidence of Dr Bartipan that he attended upon the appellant on 10 December 2001 and formed a view that he was unfit to attend court on that day. Further, her Worship appears to have also ignored the appellant's evidence, again unchallenged, that he was extremely unwell on 10 December 2001. The Magistrate was of the opinion that because the plaintiff was well enough to take action in relation to the proceedings and contact his solicitor to arrange for an adjournment, "he simply chose not to attend court that day." This finding was not open to the Magistrate on the evidence"*

75. Shelly J stated at [24] to [25]:

> *"Under the earlier provision of s100A(3), if the summons or attendance notice did not come to the notice of the defendant or the defendant was not aware of an adjourned date the magistrate "may order" that the conviction be annulled. By contrast s100K(2) in the new Part 4A, by adopting the language "must grant" an application for an annulment, requires the Local Court to grant the application if the conditions are satisfied. If the narrow construction that the magistrate preferred be given to the words "from taking action in relation to the relevant proceedings" is correct, such relief could be refused in the case of*

[4] Predecessor legislation to the *Crimes (Appeal and Review) Act 2001* (NSW)

an applicant on the way to court who is badly injured in a motor vehicle accident and fails to ring his or her solicitor from the hospital to ask for an adjournment, because no doubt it could be argued that the accident had not hindered the defendant from taking that action. In my opinion, the phrase must be given a different construction. It is clearly part of a scheme to avoid the obvious injustice to a defendant who is unable, properly, to defend the case against him, on the day he is convicted in his or her absence, because of an accident, illness or misadventure or other cause.

The use of the word "hindered" is instructive. It does not only mean "prevented" but also "impeded" or "obstructed". There are no doubt many ways in which this can happen and it is not desirable, even if possible, to catalogue them here. The basis for the application is that the conviction was made in the absence of the defendant. It seems to me quite obvious that if the appellant was prevented from coming to court on 10 December 2001 because of illness, that falls well within the ambit of the expression "hindered by illness from taking action in relation to the proceedings". It is not to my mind, significant or any answer to such a claim that the appellant was well enough to telephone his solicitor or to write a letter. To conclude otherwise, defeats the intention of the legislation"

76. In *Rukavina v Director of Public Prosecutions* [2008] NSWDC 214 (4 September 2008) the District Court was concerned with a situation where the appellant failed to appear, was convicted in his absence and then subsequently arrested, telling police, "*I thought my Court date was on the 6th of May 2008, not the 5th of May 2008*".[5]

77. A Magistrate later declined to set aside the conviction, despite finding that there had been a "*genuine mistake*"[6] in the appellant not attending court.

78. Bennett DCJ held at [65]:

"Failure of an accused wishing to defend the charges against them to attend court, through mere oversight, should not result in a finding of guilt and

[5] *Rukavina v Director of Public Prosecutions* [2008] NSWDC 214 (4 September 2008) at para [13]
[6] Rukavina v Director of Public Prosecutions [2008] NSWDC 214 (4 September 2008) at para [31]

conviction as a matter of course. Where an accused person has made an error, such as by losing the note of the date of the hearing, and whilst operating under the genuine but mistaken belief that his day in court was to be on the day following the day upon which the matter was in fact to be heard, he or she has been hindered by misadventure or otherwise from doing an act in relation to the proceedings, namely, from attending on the appointed day

79. In *Willis v R* [2014] NSWDC 325 (16 October 2014) Cogswell DCJ considered whether self-induced intoxication could constitute "*illness, misadventure or other cause*" for the purpose of section 8.

80. The facts were summarised at [7]:

"The reason given by Mr Willis for missing the hearing is that his life was in disarray between his release on bail in January and the hearing date because of his addiction to the prohibited drug ice. He had lost the bail slip which contained the date. In fact he was regularly reporting as he was required to do by the bail conditions. His father accompanied him in this. But as soon as he realised that he had missed the date, as he said, he left town. He was concerned about being arrested. He was eventually arrested and is presently in custody".

81. Cogswell DCJ at [10] to [13] held:

"Minds may differ over whether a disordered life brought about by self-induced addiction to a powerful drug of addiction should qualify as a hindrance by way of illness or misadventure. I am inclined to think that it would.

I agree with his Honour Judge Bennett where his Honour said as [77] (324-325) by reference to the Court of Appeal, that there is a "proposition that the word 'hindered' meant something less than prevented, namely, making something more or less difficult but not impossible, or alternatively, affecting to an appreciable extent the activity in question." Self-induced drug intoxication could well be regarded as an illness or a misadventure and certainly as an "other cause."

I am satisfied by the explanation of Mr Willis that although his missing his court appearance was culpable in the sense that it was his own fault, it resulted from "illness, misadventure or other cause." In any event, I would also be of the opinion that "having regard to the circumstances of the case, it is in the interests of justice" to allow the application in this case.

For those reasons I propose to allow the appeal"

82. In *Boulghourgian v Ryde City Council* (2008) 8 DCLR (NSW) 314 Bennett DCJ discussed the meaning of, "*accident, illness, misadventure or other cause*" and held at [79]:

> "*The legislation was not intended to produce injustice. Those accused who wish to defend the charges brought against them must be permitted to do so*."

83. Further at [79] Bennett DCJ held that those:

> "*Wishing to defend the charges against them to attend court, through mere oversight, should not result in a finding of guilt and conviction as a matter of course*".

Failure to Appear by Children

84. In NSW special legislation exists governing the criminal prosecution of children.

85. There exist very substantial arguments[7] that the scheme described above providing for ex-parte convictions should be very rarely, if at all, applied to children who fail to appear.

[7] Credit to Georgia Lewer (Forbes Chambers) and Felicity Graham (Sir Owen Dixon Chambers) who developed such arguments and made the author aware of them.

86. Section 27 of the *Children (Criminal Proceedings) Act 1987* (NSW) applies the bulk of the *Criminal Procedure Act 1986* (NSW) to the prosecution of children in the Childrens Court.

87. However, there are a number of sections of the *Children (Criminal Proceedings) Act 1987* (NSW) which suggest that at least a matter of discretion, convictions in the absence of the child, should be avoided.

88. Section 6 of the Act states:

> ***6 Principles relating to exercise of functions under Act***
>
> *A person or body that has functions under this Act is to exercise those functions having regard to the following principles:*
>
> *(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,*
>
> *(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,*
>
> *(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,*
>
> *(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,*
>
> *(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,*
>
> *(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,*

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

89. Section 12 of the Act then states:

> ***12 Proceedings to be explained to children***
>
> *(1) If criminal proceedings are brought against a child, the court that hears those proceedings must take such measures as are reasonably practicable to ensure that the child understands the proceedings.*
>
> *(2), (2A) (Repealed)*
>
> *(3) The Children's Court shall, if requested by the child or by some other person on behalf of the child, explain to the child:*
> *(a) any aspect of the procedure of the Children's Court, and*
>
> *(b) any decision or ruling made by the Children's Court,*
>
> *in or in relation to the proceedings.*
>
> *(4) A court shall give the child the fullest opportunity practicable to be heard, and to participate, in the proceedings*

90. There would seem to be a real argument, at least as to the exercise of the discretions in 190 and 196, but perhaps more completely, as to the extent to which convicting a child in their absence is conformable with an obligation to take, *"such measures as are reasonably practicable to ensure that the child understands the proceedings"* or an obligation to recognize that, "*it is desirable that children who commit offences accept responsibility for their actions".*

91. These provisions reflect to some extent international obligations Australia has in respect of children under the United Nations *Convention on the Rights of the Child*,

with articles 3, 12 and 37 and 40 being of relevance to the question of how readily children should be considered to have waived the right to a trial in their presence.

Higher Courts

Statute

92. As discussed above the provisions of section 196 of the *Criminal Procedure Act 1986* (NSW) apply to strictly summary matters and indictable matters capable of being heard summarily with the consent of the accused person, with, "*the absence of the accused person [is] taken to be consent to the offence being dealt with summarily*".

93. Interestingly section 190 makes no such reference to indictable matters capable of being heard summarily and there is perhaps an argument available that only summary matters can be disposed of in the absence of the defendant prior to the day fixed for hearing. There is sound reason perhaps to adopt such an interpretation as the fixing of the matter for hearing would generally indicate no election is to be made for trial on indictment.

94. In NSW neither the Supreme Court or the District Court have express statutory power to convict accused persons in their absence and without trial, with Part 3 of Chapter 3 silent on such a power. The exception is when a higher court is exercising a summary jurisdiction, see for example section 250 of the *Criminal Procedure Act 1986* (NSW).

Common Law

95. Generally, at common law it is considered that the presence of the accused is necessary for the trial on indictment to proceed.

96. In *Lipohar v R* [1999] HCA 65; 200 CLR 485; 168 ALR 8; 74 ALJR 282 (9 December 1999) Gleeson CJ stated at [69]

"It is necessary for the exercise by the Supreme Court of its authority to try and punish those accused of indictable offences that they be brought before the Supreme Court, there being no trial in absentia at common law in the ordinary course"

97. Accordingly in trial proceedings before higher courts the most common outcome of an accused failing to appear is the issue of a warrant for their arrest.

Trials in Absentia

98. In *Lawrence* [1933] AC 699 the House of Lords considered the question of in what circumstances a criminal matter could proceed in the absence of the accused person and held that except for the need to exclude a violent accused from the courtroom[8] there were no exceptions to the requirement of physical presence for the trial of a felony.

99. Lord Atkin at [708] said:

"It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid"

100. This stringent approach however has not been followed in more recent times (and the rather limited and unusual facts of *Lawrence* distinguished) and it is now widely accepted in Australia and the United Kingdom that trials on indictment in the

[8] This is also a well-recognised basis for continuing a trial in the absence of the accused in Australia: *Eastman v R* (1997) 158 ALR 107

absence of the accused can continue in the absence of the accused in certain circumstances.

101. Perhaps the best known example in recent time was the sensational non-appearance of Melbourne drug baron Tony Mokbel in the dying days of his 2006 trial in the Supreme Court of Victoria on serious drug charges. After failing to appear Mokbel ultimately boarded a yacht and left Australia. It was only in May 2008 that he was returned to Australia from Greece after protracted extradition proceedings.

102. In ruling[9] that the trial would proceed Gillard J summarised the non-appearance at [1]:

> *"Last Thursday, 16 March 2006, the defence closed its case. After I dealt with a submission that there was no case to go to the jury, the Crown prosecutor, Mr Parsons SC, commenced his address, and the address continued for the balance of that day and on the following day. On Monday, 20 March 2006 the Court was informed at the beginning of the hearing that day, namely around 10.30 a.m., that the accused had not been seen or heard of since 5pm on the Sunday evening. I caused to be issued a warrant for his arrest. I informed counsel in the course of that day that it was my provisional opinion that the trial should continue".*

103. Gillard J dealt with two different issues in his reasons for decision. Firstly, whether the trial could proceed in the absence of the accused. Secondly, whether counsel for the accused should and could withdraw from the proceedings without delivering his closing address.

104. Of the first question Gillard J held at [19]:

> *"The Court does have a discretion to continue a trial in the absence of the accused, but there are competing interests which must be considered and weighed. The first, of course, is the right of an accused person to have a fair trial in which he can hear the case put against him and respond to it. The*

[9] *The Queen v Antonios Mokbel* [2006] VSC 520

other interest is the public interest, namely that the administration of justice must not be unnecessarily impeded. It is trite to observe that trials would be put at risk if accused persons on bail could absent themselves in the course of a trial, thereby seeking to abort the trial".

105. Of the second question Gillard J lamented the decision of defence counsel to withdraw (upon advice from the ethics council of the Bar Association that they were able to do so), stating at [12] to [15]:

> *"Mr Heliotis informed the Court that he and his junior had attended a meeting of the Ethics Committee on Tuesday 21 March and were then informed that they were not obliged to remain in this trial to the end. Mr Heliotis informed the Court that he and his junior would withdraw from the case because their client was unavailable.*
>
> *I must say I have difficulty accepting the ruling. Counsel have a clear duty to the Court and to their client. Whilst it is believed that the accused has absented himself intentionally from the trial, the fact is that the trial has reached a stage where his presence is no longer necessary for his proper defence by an experienced legal team. Mr Heliotis has been a Queen's Counsel for many years and is very experienced in the field of criminal law.*
>
> *I indicated that in my opinion, defence counsel should remain and address the jury, and take any exception to the charge that was thought necessary and appropriate in the circumstances. However, counsel have indicated that they do not propose to remain. In my view, they should remain to perform their duty to the Court "in the doing of justice according to law".*
>
> *I provisionally made a decision to proceed with this trial to its conclusion because all of the evidence has been called, and the presence of the accused for the balance of the trial is not necessary for his proper defence. In my view, counsel should remain. They should do so both in the interests of their client and pursuant to their duty to the Court. As the eminent jurist, Sir Owen Dixon, said in delivering a lecture on professional conduct –*

"Professional ignorance is often the real source of the so-called ethical problems which men feel. For with more knowledge of the law and of the customs and traditions of the Bar, men know instinctively what they ought to do, they do not conjure up fancy situations and imaginary problems."[10]

(Emphasis added)

106. A similar circumstance arose in *R v Jones* (1998) 104 A Crim R 399 where the accused was indicted for wounding with intent to do grievous bodily harm. The accused attended the first day of his trial and then failed to appear. His legal representatives sought and were granted leave to withdraw.

107. The trial judge ruled the trial would continue and the prosecution case closed, the Crown Prosecutor did not make closing submissions. The jury was directed by the judge and ultimately returned a verdict of guilty. The accused was subsequently apprehended, sentenced and appealed his conviction on the basis, *inter alia*, that the decision to proceed in his absence was in error.

108. The Court of Criminal Appeal of South Australia disagreed, Lander J (with whom Prior and Wicks JJ agreed) stating at [412]:

"In my opinion a court may proceed with a trial in the absence of an accused person. It may do so in circumstances where the accused person has indicated that he or she waives a right to be present. An accused person will waive a right to be present when that person, during the currency of the trial, for example, escapes from custody; or where the accused person unlawfully absents himself or herself in breach of a bail agreement; or where, without any good cause or explanation, the person absents himself or herself from the proceedings.

[10] See forward by Sir John Young in Sir Gregory Gowan's work, *Professional Conduct, Practise and Etiquette at the Victorian Bar*.

If in any of those cases, if the court is satisfied that the accused person has waived his or her right to be present during the trial, and that the trial may proceed without any injustice to that person, except the injustice caused by the accused's own waiver, then the court may proceed with the accused's trial.

Any discretion to proceed in the absence of the accused, however, should be exercised sparingly"

109. The Court accepted that a fair trial does require the presence of the accused, Lander J stating at [412] to [413]:

> *"It is not only the public interest which demands the accused's presence but so also the accused's presence is fundamental for the fair trial of that accused".*

110. The focus of the decision was however heavily on the issue of waiver with the Court pointing to the significant policy considerations favouring waiver being a valid exception to the otherwise absolute fair trial principle, Lander J stating at [413]:

> *"There must be circumstances where a trial can proceed in the absence of the accused. Otherwise any accused, who was on bail, and who believed at some time during a trial that his or her prospects of acquittal were remote could absent himself or herself from the trial and thereby force a new trial. That cannot be right. If that was a principle, then it would be necessary to revoke the bail of all accused persons at the outset of their trial. That would be an unfortunate and unfair consequence of that fundamental principle"*

111. The same exception to the principle requiring the presence of the accused at a trial on indictment was recognised in *R v Cornwell* [1972] NSWLR 2 at 1 and *R v McHardie and Danielson* [1983] NSWLR 2 at 733.

112. More recently in NSW in *Williams v R* [2012] NSWCCA 286 (20 December 2012) the Court of Criminal Appeal dismissed an appeal against conviction following a

trial in which the accused absconded before closing addresses and an application to discharge the jury was rejected.

113. R A Hume J stated at [96]:

> *"In my view it has not been established that there was error in the exercise of the trial judge's discretion to order the continuation of the trial in the absence of the applicant. This was particularly so given the late stage at which the applicant absconded, with little left for which the applicant could have had any input and particularly having regard to the warning that the trial judge had given as to the consequences of absconding. The other matters her Honour took into account were of the type considered relevant in R v McHardie & Danielson and R v Jones. The conclusion to continue the trial was one that was open to her Honour. Her judgment was based upon correct principle, it was unaffected by any extraneous matters, there was no mistake as to the facts, and she took into account all material considerations: House v The King [1936] HCA 40; (1936) 55 CLR 499 at 505".*

114. The same position of principle was accepted by the Court of Criminal Appeal in *Jamal v R* [2012] NSWCCA 198 (8 June 2012) (McLellan, Hidden & Rothman JJ) but in that case the conviction was set aside on the basis that a view pursuant to section 53 of the *Evidence Act 1995* (NSW) had taken place without the presence of the accused despite his firm indication he wished to attend.

115. Hidden J at [46] stated:

> *"The conduct of a view in breach of the statutory requirement to provide the accused with a reasonable opportunity to be present constitutes a fundamental flaw in the trial process. This ground is made out and, standing alone, would be sufficient to establish that the conviction must be set aside".*

116. All of these Australian authorities, to the extent they endorse a trial in the absence of the accused, are of course concerned with circumstances where an accused person absents themselves from a trial following its commencement in their presence.

117. There is however ample modern United Kingdom authority for the proposition however that a trial can both commence and continue in the absence of the accused.

118. The first such authority seems to have been in *R v Jones, Planter and Pengelly* [1991] CrimLR 856. This decision was affirmed as correct by the House of Lords in *R v Jones* [2002] UKHL 5 where the following question was certified by the Court of Appeal for answering, *"Can the Crown Court conduct a trial in the absence, from its commencement, of the defendant?"*

119. Lord Hutton stated at [35]:

> *"In the present case I consider that the deliberate decision of the defendant to abscond in breach of his bail conditions to avoid his forthcoming trial on a serious charge justifies the inference that he had no intention of putting forward a defence at that trial and that therefore he did waive his right to defend himself in an unequivocal manner. Accordingly I am of opinion that the Court of Appeal was entitled to hold that there had been such a waiver. I further consider that the position of the appellant was adequately safeguarded in two ways. First, it was safeguarded by the fair and careful way in which the judge, and also prosecuting counsel, conducted the trial. As the Court of Appeal [2001] 3 WLR 125 stated in paragraph 41 of its judgment, at p 143:*
>
> > *"This defendant, as it seems to us, had, clearly and expressly by his conduct, waived his right to be present and to be legally represented. Thereafter the course of the trial was, as it seems to us, as fair as it could be, the defendant having waived those rights. Prosecuting counsel (whose duty under paragraph 11.1 of the Bar Council's Code of Conduct was not to attempt to obtain a conviction by all means at his command and not to regard himself as appearing for a party, but to lay before the court fairly and impartially the whole of the facts which comprised the case for the prosecution) and the judge did all they reasonably could to ensure that the trial was fair, in the unusual circumstances prevailing."*

Secondly, the position of the defendant was safeguarded by his right to appeal against his conviction to the Court of Appeal. He exercised this right and the Court of Appeal conducted a careful review of the evidence against him and concluded at paragraph 41 of its judgment that "the case against the defendant was in our view overwhelming".

International Law Standards

120. International law recognises both a right to be present for a criminal trial as well as circumstances in which that right can be waived.

121. Article 14 of the *International Covenant on Civil and Political Rights* recognising:

> *3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> *(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
> *(c) To be tried without undue delay;*
> ***(d) To be tried in his presence,** and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

122. In *Mbenge v Zaire*[11] the United Nations Human Rights Committee[12] stated as follows in respect of the exceptions that exist to the right stated in article 14 of the ICCPR:

[11] U.N. Human Rights Comm., Mbenge v. Zaire, U.N. Doc. CCPR/C/OP/2 (Mar. 25, 1983)
[12] The body established by an optional protocol to the ICCPR to hear and determine complainants of breaches by states of the Convention.

"According to Article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible, irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice"

123. The United Nations Humans Rights Committee has further stated[13] of the requirements for waiver to be established:

"Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance".

124. In *Maleki v. Italy*[14] the complainant to the United Nations Human Rights Committee had been tried in his absence in Italy on drug charges following the refusal by the United States to extradite him. The decision of the UNHRC makes it clear that the capacity to seek a re-trial will be an important factor in determining whether a state party is in breach of Article 14.

125. The Committee holding at [9.4] to [9.5]:

"The State party has not denied that Mr. Maleki was tried in absentia. However, it has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him. It merely

[13] Centre for Civil and Political Rights, Human Rights Comm., 90th Sess., Gen. Comment No. 32, Art. 14, ¶ 36, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007)
[14] Communication No. 699/1996, U.N. Doc. CCPR/C/66/D/699/1996 (27 July 1999).

states that it "assumes" that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused in absentia. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial in absentia. Failing evidence that the court did so, the Committee is of the opinion that the author's right to be tried in his presence was violated.

In this regard the Committee wishes to add that the violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy. The State party described its law regarding the right of an accused who has been tried in absentia to apply for a retrial. It failed, however, to respond to the letter from an Italian lawyer, submitted by the author, according to which in the circumstances of the present case the author was not entitled to a retrial. The legal opinion presented in that letter must therefore be given due weight. The existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided the author with a potential remedy in the face of unrefuted evidence that these provisions do not apply to the author's case"

126. The European Convention on Human Rights has generated a large amount of jurisprudence on the question of trials in absentia, arising from Article 6(3) of the '*European Convention on Human Rights and Fundamental Freedoms'* which states that persons accused of criminal offences have the right, "*to defend himself in person or through legal assistance of his own choosing*".

127. In *Colozza v. Italy*[15] the European Court of Human Rights stated:

"Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3

[15] *Colozza v. Italy*, 89 Eur. Ct. H.R. (ser. A) (1985)

> *guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person,' 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court,' and it is difficult to see how he could exercise these rights without being present".*

128. An important feature of the European case law is that there is a strict requirement that actual knowledge by the accused of the proceedings must be proven before it can be considered a person has waived the right to a trial in their presence.[16] One exception to this is where there is an unconditional right to a re-trial.[17]

Does New South Wales Law Comply with International Law Standards?

129. The statutory scheme in NSW for ex parte convictions in the summary jurisdiction would seem to be non-compliant with these international standards.

130. A person can be convicted under section 190 of the *Criminal Procedure Act 1986* (NSW) for non-appearance at a mere mention.

131. There is no obligation on the Court to be satisfied the person has waived their right to be present, with only 'reasonable notice' being required to be proved before the matter can proceed to a finding of guilt on the paltry basis of the Court Attendance Notice alone. It is also unclear exactly what 'reasonable notice' means.

132. It is obvious that the combination of non-appearance and reasonable notice will not necessarily prove waiver, with there being a myriad of circumstances that might explain non-attendance despite even actual notice.

133. It is particularly notable that under section 196 of the *Criminal Procedure Act 1986* (NSW) a person can be convicted in their absence on a hearing day, without it being

[16] *Sejdovic v. Italy* [2008] ECHR 620
[17] *Sejdovic v. Italy* [2008] ECHR 620

necessarily proven they even had notice of the hearing day, with the section seemingly requiring, "*reasonable notice of the first return date* ***or*** *the date, time and place of the hearing".*

134. Despite full waiver not being required to be proven, there is no automatic right to a re-trial with section 4 of the *Crimes (Appeal and Review) Act 2001* (NSW) placing an onus on a person to satisfy the court of certain matters before a trial will be available.

135. It is also noteworthy that convictions in the absence in New South Wales occur either on the papers or on the basis of a Court Attendance Notice alone. In these circumstances there is not even a modicum of fair trial rights accorded to the absent accused.

136. This non-compliance is of further concern given the range of indictable maters capable of being dealt with under section 196 (and possibly section 190).

137. Given the relevance of international law to questions of statutory interpretation it is suggested that the discretion embodied in sections 190 and 196 of the Act should not be routinely or lightly exercised in a way adverse to the fair trial rights of a defendant.

138. As Mason CJ and Deane J stated in *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* 183 CLR 273 at [26]:

> *"But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a partys, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law".*

139. The author is happy to be contacted with feedback, comments and corrections at slawrence@sirowendixon.com.au.

Stephen Lawrence
Barrister
Sir Owen Dixon Chambers, Sydney

10 September 2016.