



16 June 2009

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By email: malcolm.luey@justice.govt.nz

Dear Malcolm

Criminal Procedure (Simplification Project) – Proceeding in the absence of the defendant

The Society's Criminal Law Committee is grateful for the opportunity to comment on the above discussion document. The committee's responses to the questions in the discussion document are set out below.

1. *Do you agree with the proposal (to apply in both the summary and indictable jurisdictions from the stage at which the defendant enters a plea) that:*
 - (a) *If the accused does not attend court and fails to provide a reasonable excuse for his or her absence, there is a statutory presumption that the court will commence or continue the proceedings in the accused's absence, unless satisfied that it would be manifestly unjust to do so in light of the following factors:*
 - *The issues that the defence identified pre-trial as being in dispute;*
 - *The likely length of an adjournment, given the particular interests of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates and the effect of delay on the memories of witnesses;*
 - *The extent to which an absent accused's counsel has received instructions and is generally able to run the defence;*
 - *The interests of any co-accused;*
 - *The extent to which the accused's evidence is critical to an evaluation of the issues identified as being in dispute.*
 - (b) *The courts may set aside a conviction when the accused can establish that he or she has a defence to the charge(s) that would have had a reasonable prospect of success if he or she were present at the hearing or trial.*

Although some committee members supported this proposal it was suggested that it be extended to allow for circumstances when an accused does not attend court and a reasonable excuse for his or her absence is provided, such as in *R v Dunn*, where the accused was unable to attend due to illness.

Other members did not agree with the broadness of the suggested provision, and believed that no specific provision is required because an appeal should succeed where the appellant can prove that one of the provisions of s 385(1) Crimes Act is applicable. If, however, it is decided that a specific provision for an appeal is required where an accused does not appear, then, as a preliminary matter, such a ground of appeal must require that the appellant did not voluntarily remove themselves. If this is not a preliminary requirement of a successful appeal, then an accused would be encouraged not to appear and subsequently appeal on the basis that there was a defence with a reasonable prospect of success.

An alternate view suggested is that the ground of appeal must require that the appellant did not voluntarily absent him or herself from trial. There might be some room for different rules, depending on whether the ground of appeal is that a defence was apparent, based on the evidence at trial (which was not run because of the absence of the accused), and where a previously absent appellant seeks to rely on a positive defence or evidence which would have been available at trial, but for the fact of his or her absence.

In the latter case, the position is akin to the current position for appeals, which relies on “new evidence”. If the only reason the evidence is not available at trial is that the accused voluntarily absconded from his or her trial, then perhaps he or she should not be granted leave to rely on the new evidence on appeal. If, however, defence is available based on the evidence at trial, then the reasons for the accused’s absence would be irrelevant. A miscarriage of justice might result regardless of the reason for his or her absence.

2. *Do you agree that the proposal should not be extended to allow a judge to sentence an offender in his or her absence?*

Some members believe that where it can be established that the accused voluntarily removed him or herself from the trial, then the judge should be permitted to sentence the offender in his or her absence.

Other members believe there should not be a power to sentence *in absentia*. One can never be sure whether the absence is voluntary or not, unless specifically stated, and sentencing *in absentia* might be unfair to the defendant. Sentencing *in absentia* might not necessarily save time. Sentencing could take place after the trial if and when the accused is located.

The committee hopes that the above comments are of assistance to the Ministry. If you wish to discuss any matters raised in this letter please contact me, or the committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



Jonathan Krebs
Convener, Criminal Law Committee