X _Dispensing with the Presence of the Defendant at a Court Hearing_

For the more serious criminal offences, the presence of the defendant in court, with or without counsel, is seen as being a necessary prerequisite for the proper administration of justice. "Justice" cannot be done in his absence; he must be given the opportunity to participate in the proceedings. By contrast, with very minor offences, where the penalties are concomitantly small, the presence of the accused at the hearing is not seen as being so essential. Often defendants in such cases do not bother to show up in court, and if the accused's appearance _is_ necessary, the court must adjourn the hearing and issue a summons to compel his appearance. To deal with situations such as these, some jurisdictions allow the court to proceed with an _ex parte_ hearing in some circumstances.

In Western Australia, for example, an _ex parte_ hearing may be held if the defendant does not appear at a hearing set for a "simple" offence. Where this occurs and the complaint is a simple offence against the Road Traffic Act, 1974, or other prescribed Act, the justices may receive affidavits of evidence in support of the matter alleged in the complaint rather than demand the physical presence of witnesses.[1] As a protection for the accused, the justices have a residual jurisdiction to set aside decisions given in default of the appearance of any party.[2]

Upon proof that the summons was served a reasonable time before the time appointed for the defendant's appearance, justices in South Australia may proceed _ex parte_ to the hearing of the complaint and "to adjudicate thereon as fully and effectually, to all intents and purposes, as if the defendant had personally appeared before it in obedience to the summons".[3]

Amendments to the Justices Act of New South Wales enacted in 1973, provide that an information may be dealt with in the absence of the defendant in certain cases:[4]

> Where -
> (a) an information for an offence punishable summarily before a justice or justices has been laid under this Division by a member of the police force or a public officer;
> (b) a summons for the appearance of the defendant to answer to the information has been served on the defendant in any manner provided by law for the service of such summons on that defendant in relation to that offence; and
> (c) the defendant does not appear at the time and place fixed for the hearing of the information,
> the court before which the information comes for hearing may, if it is satisfied that the facts as alleged in or annexed to the summons constitute such an offence and that reasonably sufficient

> particulars thereof are set out or annexed to the summons, thereupon make an order imposing on the defendant a penalty to be paid within such time as is specified in the order, being a penalty of an amount of the pecuniary penalty that might have been imposed had the defendant been convicted of the offence.

In other words, a penalty is imposed, but there is in law no conviction, which is a significant protection for the accused who is proceeded against in his absence. Provisions such as these prevent the delays which occur while the presence of the accused is secured and are a boon to court scheduling as the court diary is not disrupted by adjournments and the subsequent re-scheduling of cases.

Other jurisdictions, rather than waiting for a defendant to fail to make an appearance, dispense in advance with his attendance in court. In Nigeria, for example, under section 100 of the Criminal Procedure Law of Lagos States, where a magistrate issues a summons in respect of an offence punishable by a fine not exceeding $100 or by imprisonment for a term not exceeding six months, or both, he may, on the application of the accused, if he sees sufficient reason to do so, dispense with the personal attendance of the accused provided that he pleads guilty in writing or pleads guilty through counsel.[5] This type of procedure is commonly known as "mail order justice" or pleading guilty by mail.

For offences which are only triable summarily and which are not to be heard in juvenile court, a procedure was introduced by the English Magistrates' Court Act, 1957, whereby the accused may plead guilty without being present in court. The procedure does not apply to an offence for which the accused is liable to be sentenced to be imprisoned for a term exceeding three months. Whenever a summons is issued requiring an accused to appear to answer an information charging an offence covered by this procedure, the prosecution must serve on the accused:

(i) a concise statement of the facts which will be placed before the court if the accused pleads guilty without appearing;

(ii) a notice stating the effect of doing so, in terms of the penalty which may be imposed and

(iii) a form for the accused to send to the clerk of court expressing his intention of doing so and containing, if he wishes, a submission with a view to the mitigation of sentence.

When the accused uses this procedure, the clerk informs the prosecution and the court proceeds to hear and dispose of the case in the usual way. The prosecuting counsel need not attend the hearing as the accused has admitted

the facts which are stated in court and on which his conviction will be based. If, upon hearing these facts, the court intends to disqualify the accused from driving or sentence him to imprisonment, it must adjourn the case and secure his presence in court.[6] Most defendants under this procedure do plead guilty by post and the statements are read out in court without any witnesses attending. This saves a great deal of the time of the police and other participants at the cost of additional typing and office work.

For minor traffic offences, an accused may plead guilty by post in Kenya.[7] In Zambia, section 99 of the Criminal Procedure Code provides that whenever a summons is issued in respect of any offence other than a felony, a magistrate may, if he sees reason to do so, and shall when the offence with which the accused is charged is punishable only by fine and/or imprisonment not exceeding three months, dispense with the personal attendance of the accused if he pleads guilty in writing or appears by an advocate. The corresponding provision in Malawi is more or less identical to this with the proviso that no magistrate may impose a sentence of imprisonment without the option of a fine except in the presence of the accused.[8] Such provisions are designed to save the time of the courts, defendants, prosecutors and to save expense. The safeguard against the infliction of a term of imprisonment or the disqualification from holding or obtaining a driving licence without notice to the defendant in addition to the original notice is a very desirable one.[9]

In Scotland, the appearance of an accused in summary proceedings is dispensed with not merely where he pleads guilty, but also in relation to his first appearance in court where he intends to plead not guilty.[10] Accused persons are summoned to attend the first calling of their case in a summary court by a citation issued by the procurator fiscal. This citation requires the accused to attend personally but the fiscal may inform him that he may intimate his plea in his absence by letter to the court and plead on his behalf. If the accused intends to plead guilty in his absence he is asked to add any explanation which he wishes to put before the court and the court may then dispose of the case in his absence or alternatively, if the sheriff thinks fit, continue the case and require the accused to attend court at a later date with a view to pronouncing sentence in his presence. If the accused intends to plead not guilty, he is not required to attend personally at the first calling as the court will appoint a diet for the trial of the case at a later date. If the procurator fiscal required the personal appearance in every case of this kind it would place an increased

burden on the already overburdened summary courts and could only result in further delays.[11]

In those jurisdictions where written pleas of guilty may be tendered, failure of the accused to tender such a plea or to appear in court on the scheduled date will result in the adjournment of the case while the court takes steps to secure the defendant's appearance before the court. In other jurisdictions, however, the procedure is a little different: unless the accused positively elects to appear in court, the case will be disposed of in his absence as if he had entered a plea of guilty.

New Zealand introduced a summary procedure for minor offences in the Summary Proceedings Amendment Act, 1973.[12] The Act defines "minor offences" as those that do not carry a liability to imprisonment or to a fine in excess of $500. Where a charge of this kind is laid, the prosecutor, instead of filing an information, proceeds on the basis of a "notice of prosecution in the prescribed form" in which the offence alleged and the relevant circumstances are set out, together with a full statement of the accused's rights. When the defendant receives his notice, he is able to decide whether he agrees with the facts as set out or whether he wishes to contest the matter. If he chooses to plead guilty he may do so by letter and avoid the necessity for appearing in court. He may also write to the court setting out any factors he wishes to be taken into account in mitigation of the offence. The Act further provides:

> If the defendant pleads guilty...or if, in any case, the defendant does not, by the date specified in the notice...give written advice to the Registrar...a Magistrate may, on the basis of the summary of facts contained in the notice...deal with the defendant as if he had appeared before a Court and pleaded guilty.

Only when he pleads not guilty are witnesses required to attend to give evidence in court. This step in the procedure represents a major improvement so far as traffic officers in particular are concerned. With an ordinary summons or where a fixed penalty procedure was in operation, when a defendant took no steps in relation to the summons he received, the officer who had detected the offence was required to attend court and give what was known as formal proof, that is, evidence on oath of the circumstances of the offence. In most Magistrates' Courts, this meant that on traffic court days a procession of traffic officers might have to line up to give their purely formal evidence when they could have been more usefully performing their

ordinary traffic enforcement duties.[13]

One perhaps unfortunate side effect of the introduction of this minor offences scheme is that it has subsumed the fixed penalty system existing in New Zealand. In 1968 an "infringement fee" procedure was established under the Transport Act, 1962. Scales of fees were attached to certain traffic offences and offending motorists would be issued with a notice setting out particulars of the offence and the amount of the prescribed infringement fee. If the motorist paid the penalty, the case never went into court. Since January 1, 1975, when the new minor offence procedure came into operation, all minor offences, including those which were dealt with by standard fines, are dealt with under the new procedure. Thus, cases which were previously disposed of without recourse to a magistrate are now appearing in court. As a result, the amount of time required of magistrates or justices of the peace and court staff is greatly increased. Far from saving the time of the court, an already difficult situation is exacerbated.[14]

As to the general use of the minor offence procedure: in Auckland, justices of the peace dispose of an average of 4000 cases "on the papers" each month; in approximately 400 cases a not guilty plea is entered or there are appearances for pleas in mitigation of penalty.[15]

A similar system exists in Queensland under the Decentralisation of Magistrates' Court Act, 1965, as amended. A summons for a minor offence to which this Act applies will contain a note to the effect that if the defendant does not admit the offence alleged, he is requested to inform the court to that effect at least seven days before the scheduled date of the hearing. If he does so inform the court, he is not required to appear on the scheduled date, the court must instead set up another appearance. If the defendant does not inform the court that he intends to plead not guilty, he is liable to be convicted. In these circumstances the hearing will be conducted in the absence of both the complainant and the defendant and shall be deemed to be a hearing of the matter of the complaint by a Magistrates' Court *ex parte* under section 142(1)(a) of the Justices Act, 1886, as amended. As a measure of protection for the accused, the magistrate must adjourn the hearing and arrange for his attendance if he intends to imprison the defendant, suspend or cancel a licence or disqualify him from holding one.[16]

One of the major impediments to the prompt and efficient disposal of business in the lower criminal courts is the sheer volume of work of a relatively minor nature which has to be dealt with. By allowing cases to

be disposed of in the absence of defendant, prosecution and witnesses, that is, purely "on the papers", at the option of the accused, the processing of such cases is speeded up. It is, however, most important that the offender retains the right to have the charge against him determined in court in the ordinary way and that the information given to him make his options very clear.

Footnotes

[1]Western Australia Justices Act (reprinted 1977), section 135.

[2]*Id*, at section 136A.

[3]South Australia Justices Act, 1921-36, as amended, section 62(b).

[4]New South Wales Justices (Amendment) Act, 1973, (Act No. 11, 1973), inserting section 75B(2) into the original legislation.

[5]A.O. Obilade, *The Nigerian Legal System* (1979), p. 247.

[6]English Magistrates' Courts Act, 1957, c. 29, section 1. For commentary see C. Hampton, *Criminal Procedure* (2d ed.) (1977), p. 310 and R.M. Jackson, *The Machinery of Justice in England* (1977), p. 227.

[7]Correspondence from the Attorney-General's Chambers, Nairobi, dated March 5, 1979.

[8]Malawi Criminal Procedure and Evidence Code, cap. 8:01, section 93.

[9]South Australia Criminal Law and Penal Methods Reform Committee (Third Report), *Court Procedure and Evidence* (Adelaide, 1975), pp. 65-66.

[10]Criminal Procedure (Scotland) Act, 1975, section 334.

[11]Scotland, Committee on Criminal Procedure in Scotland (Thomson Committee), *Criminal Procedure in Scotland (second report)* (Edinburgh, 1975), para. 14.15.

[12]See section 20A of the New Zealand Summary Proceedings Act, 1957, as amended.

[13]New Zealand, Royal Commission on the Courts, *Report* (Wellington, 1978), para. 434.

[14]*Id.* para. 444.

[15]New Zealand Department of Justice, *Report of the Department of Justice 1975-76*, (Wellington, 1978), p. 7.

[16]A substantially similar provision exists in Victoria under the Magistrates' (Summary Proceedings) Act, 1975, (No. 8731), and in Western Australia under the Justices Act Amendment Act, 1979.