A scary change in the attitude of the courts means trials in absentia are now more likely than ever, to go ahead.

Whilst historically courts have been extremely reluctant to try a defendant in their absence, save where the defendant obviously absconded, we are now seeing a more hard-nosed approach from the courts, specifically, in relation to adjourning cases due to medical unfitness. It appears the objective of the courts is shifting from fairness to efficiency.

When a trial in absentia may go ahead

The right to a fair trial is found in Article 6 of the European Convention on Human Rights, which was ratified by the UK in 1951 and brought directly into British Law by the Human Rights Act 1998. Article 6 states that individuals have a right to be present at their hearing. However, this right is not, unqualified.

In the 2001 case of (R v Jones (Anthony)) the House of Lords affirmatively decided that trials in absentia were both part of the common law and compatible with a defendant's Convention rights under the Human Rights Act however the discretion to conduct proceedings in the absence of the defendant 'should be exercised with the utmost care and caution.'

In (R v Jones (Anthony)) a 2-stage framework was agreed. The first stage is that whilst a defendant has a right to be present at their trial, they may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise their discretion as to whether the trial should proceed in absence of the defendant.

How can a defendant waive their right to be present?

How a defendant waives their right to be present is open to the interpretation of the court. The most obvious way is if the defendant deliberately absconds during their trial, in this circumstance the authorities make it clear that a court has power to proceed a trial, without the defendant. Even in such cases, the power to proceed in absentia should still be exercised by the trial judge with great care (R v Jones (Anthony)).

Previous authorities confirm that a court has a discretion in law to proceed in absentia if the defendant voluntarily absents himself from his trial however, that discretion should always be exercised with great reluctance, and with a view rather to the due administration of justice than to the convenience or comfort of anyone (R v Abrahams 21 VLR).

Defendants requesting adjournment due to medical illness

If the defendant cannot attend for another reason, the situation is slightly more complicated. The common question of whether a defendant is entitled to adjourn due to medical illness was discussed in (R v Bolton Justices Ex parte Merna [1991] 155 J.P. 612, Crim LR 848). In this case the Divisional Court endorsed the previous authorities and adopted the position that the discretion to proceed in a defendant's absence should be exercised with upmost fairness. A claim of illness with a doctors' letter, detailing unavoidable absence should not be rejected without the court first satisfying itself that it is proper to do so, and that no unfairness

will result. The court should, when a defendant is unfit to stand due to medical reasons, seek to adjourn hearings to allow a defendant to recover and attend their trial.

The changing view of the courts

The more recent case of (Smith v Royal Society for the Prevention of Cruelty to Animals (unreported)) is a stark contrast to the courts previous reluctance to proceed with a trial in absentia and arguably exposes a more cut throat approach in line with the overarching objective of making the criminal justice system more efficient.

In (Smith) one of the defendants committed suicide during the trial. The court adjourned for several months in order to allow the remaining defendants to emotionally recover from the trauma.

Before the new hearing date two defendants requested a further adjournment supported by letters from a GP stating that the defendants were continuing to suffer from a variety of symptoms following the death. On the day of the hearing the defendants did not attend. The district judge held that the GP's letters did not comply with the procedural requirement that medical certificates must state clearly how the relevant medical issues affect the defendants' ability to stand trial, and that it was in the interests of justice to conclude the matter sooner rather than later. The two defendants were convicted of 12 charges in their absence.

On appeal, Mr Justice Choudhury agreed that the district judge had been entitled to conclude that the medical evidence in this case did not establish unfitness. He explained that the decision in (Merna) did not mean that a court was always obligated to adjourn in the defendants favour when it was presented with credible medical evidence. The court was entitled to consider whether that evidence genuinely demonstrated unfitness.

Conclusion

The recent case of (Smith v Royal Society for the Prevention of Cruelty to Animals *(unreported))* shows a clear shift in how the courts will address the subject of defendants being unfit to stand trial. What appeared to be a lower threshold in (Merna), to establish medical illness is now a much stricter threshold following (Smith). It seems that, even if the defendant provides "credible medical evidence" the court is entitled to proceed in absentia, if it deems the medical illness irrelevant to the defendant's unfitness to stand trial.

Whereas historically courts were extremely careful to proceed in absentia and if they had to do so, the discretion was exercised with reluctance - the case of (Smith) shows a far sterner approach to trials in absentia and arguably an insightful benchmark for how courts will address the issue of defendants being unfit to stand trial going forward.

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