

Trial in Absentia: England & Wales

An Outline

1. Background: More Crime, More Punishment

The political consensus that held crime to be a technocratic problem collapsed in 1993.

Both main political parties have canvassed for more and more convictions, longer and longer prison terms.

In the past 11 years, 3021 new criminal offences were created (as of 16 June 2007: now still more).

Sadly, the Courts at all levels have responded with some enthusiasm.

The Court of Appeal Criminal Division is the engine of the criminal justice system.

It has sanctioned and driven both the rush to convict and to incarcerate.

Current prison population: 82,105, of whom 4430 are female (18 April 2008)

In January 1993: 41,561.

2. New Ways to Convict

In theory:-

Criminal procedure is adversarial and unequal.

The inequality arises through the burden and standard of proof, which should act as a barrier against wrongful conviction.

The judge is akin to an umpire; objective and impartial.

In practice:-

The defendant is penalised should he fail to comply with new procedures designed to convict him, e.g.

The admission of hearsay and multiple hearsay;

Inference of guilt because of his silence in interview;

Inference of guilt because of his failure to spell out his defence in advance of trial;

Inference of guilt because of his silence at trial;

Inference of guilt arising because of any previous convictions.

Judges have a discretion to disallow such inferences but routinely admit them.

3. Trial in Absentia

Prior to 2001, trial by jury in absentia did not exist, save where a defendant absconded during the trial process. Even then, it was rare that the trial would continue.

In 2001, the House of Lords decided that such trials were both part of the common law and compatible with a defendant's Convention rights: *Jones (Anthony) [2003] 1 AC*

However, '*the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution*' per Lord Bingham, para 13, *ibid*.

This caveat has been (mis)interpreted so as to permit the trial of a defendant whose absence from a Magistrates Court was occasioned by the prison service failing to produce him (resulting conviction quashed on appeal).

There are no published statistics for the number of such trials in the Crown Court. However, in 2004/5, 170,000 (one hundred and seventy thousand) defendants (15% of all those charged) failed to attend their trial in the Magistrates Court and the charge was proved in their absence. The overwhelming majority of these were motoring offences (*National Audit Office 10/02/2006 'CPS: Effective Use of Magistrates Courts Hearings'*).

4. Appeals

Crucially, any defendant convicted in the Magistrates Court has a right to a rehearing in the Crown Court. Few exercise this right & fewer still succeed.

However, a defendant convicted by a jury at the Crown Court has no right to a rehearing. The Court of Appeal (Criminal Division) *may* order a retrial but only if the Court concludes that the conviction is *unsafe*. Importantly, the Court requires that there be a reasonable explanation for the failure to call

cogent evidence at the first trial: *S.23(2) Criminal Appeal Act 1968*. So far, the Court has not ruled upon an application for a retrial based upon the absence of evidence from the absent defendant.

5. Representation: Ethical Problems

Professional rules of solicitors and barristers make the lawyer ‘*an officer of the Court*’.

This formula means that the lawyer owes twin duties: to his client, and to the Court. The ‘*Overriding Objective*’ within the *Criminal Procedure Rules* (www.justice.gov.uk/criminal/procrules) enjoins the defending lawyer to assist in the ‘*conviction of the guilty and the acquittal of the innocent*’. Recent guidance from the Court of Appeal (*Ulcaý & Toygun 2007 EWCA Crim 2379*) exhorts lawyers to assist the Court by continued representation even where in the lawyer’s judgment, he is inadequately prepared for the task.

Applied to jury trials in absentia:

- i. The likelihood of conviction is high.
- ii. Defending counsel has little credibility in the eyes of the jury.
- iii. Unless mentioned in interview, there is no guarantee that any known defence on the facts may be admitted in evidence.
- iv. Inference of guilt from absence is inevitable.
- v. The lawyer may well conclude that his presence is to provide a ‘fig-leaf of respectability’ for the resulting conviction, in that the proceedings comply with the form if not the substance of Article 6.

6. Conclusion

Trial in absentia sits uncomfortably within an adversarial process which, unlike inquisitorial jurisdictions, seeks neither certainty nor truth. The problems identified reflect in part the development of the common law as distinct from an inquisitorial system, exacerbated by the politicisation of the means to convict.

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