



Law Society
of Ontario

Barreau
de l'Ontario

TAB 11

The Six-Minute Criminal Court Judge 2020

Sentencing and the Absconding Offender

The Honourable Iona Jaffe
Ontario Court of Justice

January 25, 2020






Sentencing and the Absconding Offender



Section 475 (1) of the *Criminal Code*

(1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, **absconds** during the course of his trial,  And this includes sentencing

(a) he shall be deemed to have waived his right to be present at his trial, and

(b) the court may

- continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, impose a sentence on him in his absence, or
- if a warrant in Form 7 is issued for the arrest of the accused, adjourn the trial to await his appearance,
- but where the trial is adjourned pursuant to subparagraph (b)(ii), the court may, at any time, continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.

The meaning of “Abscond”

R. v. Garofoli (1988), 41 C.C.C. (3d) 97 (Ont.C.A.), reversed on other grounds but upheld on this point by [1990] 2 S.C.R. 1421:

“ The word "absconds" in s. 431.1 means more than mere failure to appear. In my view, the word "absconds" imports that the accused has voluntarily absented himself from his trial for the purpose of impeding or frustrating the trial, or with the intention of avoiding its consequences. Proof that the accused deliberately absented himself from the trial would, of course, permit the drawing of an inference as to the necessary intent.” [emphasis added] per Martin J.A.

Onus and Burden of Proof.....

- The onus is on the Crown to prove that the defendant absconded;
- What is the burden of proof? Is it a balance of probabilities or beyond a reasonable doubt?.....



Defence lawyer can stay.....

- In many cases, defence counsel will seek to be removed from the record, but they are not required to do so.
- Section 475(4) provides that defence lawyer can continue to represent the accused at trial (or sentencing) even though the accused has absconded.



R. v. Correa, [2011] O.J. No. 3980 (C.J.)

- Caldwell J. was persuaded to sentence Mr. Correa *in absentia* after she had found him guilty on two counts of sexual assault.
- Her Honour felt that the victim of these serious offences deserved some finality in the proceedings and with no indication that the accused would reappear.
- The accused did not testify at trial and did not have counsel to make submissions on sentence.
- “Given my lack of knowledge of Mr. Correa's particulars, it is difficult to determine a sentence which is tailored to meet the needs of his rehabilitation and that addresses effective specific deterrence. The nature of the offences, however, requires that a strong emphasis be placed on both general deterrence and denunciation.”

R. v. Bayani, [2011] O.J. No. 4369 (S.C.J)

- Clark J. found the accused guilty of various drug offences.
- Clark J. warned the accused that if he did not appear for his sentencing hearing, he would proceed in his absence and would consider his failure to appear as an aggravating factor on sentence.
- Mr. Bayani did not appear and Clark J. proceeded with his sentencing.
- Defence counsel stayed on the record and assisted at the sentencing.
- Clark J. noted that while it would have been desirable to know somewhat more about Mr. Bayani for sentencing purposes, he had sufficient information with which to craft a fit sentence.

R. v. Maxwell, [2013] O.J. No. 3776 (S.C.J.)

- DiTomaso J. sentenced an offender *in absentia* who he had found guilty after trial for an ‘over 80 offence’ and for impaired driving causing bodily harm.
- The sentencing judge had the benefit of a PSR which provided some important details about the offender and which was prepared with the full cooperation of Mr. Maxwell before he absconded.
- It appears that Mr. Maxwell had the continued representation of defence counsel.

R. v. Singh, [2015] O.J. No. 691 (S.C.J.)

- The accused had been convicted by a jury of importing 69 kilograms of cocaine but failed to appear for his sentencing.
- Not knowing much about the offender other than his age and the fact that he had no prior criminal record, Pomerance J. declined to proceed with this sentencing in his absence.
- Pomerance J. suggested that the “absconding accused” provisions of the *Code*, operate differently in the context of an ongoing trial than they do at a sentencing.

R. v. Singh cont.'

- Pomerance J. noted that a fit sentence is one that is tailored not only to the circumstances of the offence, but to the offender, including his or her background, experience and personal circumstances. How then will a court craft a fit sentence if the offender is not present and able to provide the court with such details?
- Pomerance J. concluded that while Mr. Singh may have forfeited his right to have input into his sentence, he did not forfeit his right to a fit sentence.

R. v. Kiddinar, [2017] O.J. No. 5463 (C.J.)

- Following the Singh decision Bhabha J. sentenced Mr. Kiddinar *in absentia* after she had found him guilty of numerous violent offences against the same victim.
- The accused had testified at trial and consequently there was more information about the offender available to Bhabha J. a factor Her Honour found distinguished the case before her from *Singh*.

R. v. Akhtar and Dero, [2018] O.J. No. 5493 (S.C.J.)

- Garton J. sentenced Mr. Dero *in absentia* after he returned to his home country after a jury found him guilty of criminal negligence causing death and two counts of criminal negligence causing bodily harm.
- Though there were no sentencing submissions made on behalf of Mr. Dero, he had testified at trial and provided extensive evidence relating to his background.

R. v. Okereke, [2019] O.J. No. 5499 (S.C.J.)

- Mr. Okereke absented himself from sentencing but reappeared and appealed his sentence.
- Amongst the grounds of appeal, he argued that the sentencing judge should have taken into consideration his mitigation efforts (he apparently attended two counselling sessions)
- LeMay J. upheld a sentencing judge's decision to proceed with sentencing and on the issue of whether the accused was nonetheless entitled to a sentence that took into account mitigating factors, said this at para. 49:

“ It is the appellant's failure to come to court on July 6th, 2015 that results in the sentencing judge not considering the appellant's mitigation efforts. The appellant is responsible for the fact that this information was not before the sentencing judge. Therefore, it is not open to the appellant to argue that, although he had absconded and did not attend Court, the sentencing judge was still obligated to consider what the appellant had done as if he had not absconded.”

CASE	Defence Counsel Removed from Record	Accused testified at trial	Sentenced in Absentia
<i>R. v. Correa</i> , [2011] O.J. No. 3980 (C.J.)	Yes	No	Yes
<i>R. v. Bayani</i> , [2011] O.J. No. 4369 (S.C.J.)	No	Not clear	Yes
<i>R. v. Maxwell</i> , [2013] O.J. No. 3776 (S.C.J.)	No	Not clear but PSR	Yes
<i>R. v. Singh</i> , [2015] O.J. No. 691 (S.C.J.)	Yes	No	No
<i>R. v. Kiddinar</i> , [2017] O.J. No. 5463 (C.J.)	Yes	Yes	Yes
<i>R. v. Akhtar and Dero</i> , [2018] O.J. No. 5493 (S.C.J.)	Yes	Yes	Yes
<i>R. v. Okereke</i> , [2019] O.J. No. 5499 (S.C.J.)	No	Guilty Plea	Yes

Absconding is Aggravating or not?.....

- A trial court may draw an adverse inference from the fact that the accused absconded during his trial [s. 475(2)]. BUT.....
- Can it be an aggravating factor on sentence?
- In *Bayani*, Clark J. considered it an aggravating factor.
- In *Singh*, Pomerance J. said it is not.

Absconding is aggravating or not?.....

Per Pomerance J. at para. 19 “One of the fallacies in the Crown's approach is that it purports to treat the absconding behaviour as an aggravating factor on sentence..... It is not an aggravating factor as it relates to Mr. Singh's importation of cocaine. Mr. Singh's failure to attend court is serious misconduct, representing an affront to the administration of justice. But it is a separate delict, representing a separate offence (s. 145 of the *Criminal Code*), for which Mr. Singh may receive separate punishment. To treat it as an aggravating factor on the importing offence is to risk imposing excessive punishment, and worse, double punishment.”