Legal Aid
NEW SOUTH WALES

Not intended to produce injustice

A practical guide to Section 4 annulment applications

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Introduction

A person who has been convicted in their absence in the Local Court may make an application to annul that conviction (known as either an "Annulment Application" or a "Section 4 Application").

Section 4(1) of the *Crimes (Appeal and Review) Act 2001* ('CARA') reads:

> (1) An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Local Court sitting at the place at which the original Local Court proceedings were held.[1]

That application must be in writing and lodged with the registrar of the relevant court.[2]

The Test

The circumstances in which applications can be granted are outlined in s 8 of the *Crimes (Appeal and Review) Act 2001*:

8 Circumstances in which applications to be granted

(1) The Local Court must grant an application for annulment made by the prosecutor if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so.

(2) The Local Court must grant an application for annulment made by the defendant if it is satisfied:

- (a) that the **defendant was not aware of the original Local Court proceedings** until after the proceedings were completed, or
- (b) that the defendant was otherwise **hindered by accident, illness, misadventure or other cause** from taking action in relation to the original Local Court proceedings, or
- (c) that, having regard to the circumstances of the case, **it is in the interests of justice** to do so.

Note that the language is mandatory – if satisfied of (1) or (2) (a) (b) or (c) above, the Court *must* grant the application.

[1] Part 2 *CARA*.

[2] Section 4(4) *CARA*.

Section 8 Circumstances – Principles from Case Law

A wide construction

***Miller v Director of Public Prosecutions* (2004) 145 A Crim R 95**

Section 8 should be given a wide construction. The intention of the legislature was to liberalise circumstances in which convictions before magistrates where the accused had not appeared could be annulled.

> [24] It is clearly part of a scheme to avoid the obvious injustice to a defendant who is unable, properly, to defend the case against him, on the day he is convicted in his or her absence, because of an accident, illness or misadventure or other cause.
>
> [36] As Sheller JA has pointed out, the Second Reading Speech gives the clear impression that the aim of the amendments was to liberalise the circumstances in which convictions before magistrates where the accused had not appeared could be annulled.

Hindrance by accident, illness, misadventure or other cause

***Miller v Director of Public Prosecutions* (2004) 145 A Crim R 95**

Hindered means something less than prevented. It means making something more or less difficult but not impossible. Alternatively, "the general sense of in any way affecting to an appreciable extent" the activity in question.

> [25] The use of the word "hindered" is instructive. It does not only mean "prevented" but also "impeded" or "obstructed". There are no doubt many ways in which this can happen and it is not desirable, even if possible, to catalogue them here.
>
> [40] Further, it is significant that the word "hindered" is used. Although Martin J said in *Hogben v Chandler* [1940] VLR 285, 288, that "hindered" "is a somewhat vague term", it nonetheless clearly means something less than prevention, namely making something more or less difficult but not impossible (per Lord Atkinson *Tennants (Lancashire) Ltd v Wilson (CS) & Co Ltd* [1917] AC 495, 518). Alternatively, as Lord Dunedin put in the same case, the word has "the general sense of in any way affecting to an appreciable extent" the activity in question, a statement which was approved by Mason J in the High Court in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32, 45.

The fact that a defendant did not call or write to the court is not usually significant.[3]

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[3] However, where the applicant was doubtful about the date upon which the hearing was to take place, and chose not to make an appropriate inquiry, this would have had bigger impact: See also *Rukavina v Director of Public Prosecutions* [2008] NSWDC 214 at [64].

> [25] It is not to my mind, significant or any answer to such a claim that the appellant was well enough to telephone his solicitor or write a letter. To conclude otherwise defeats the intention of the legislation.

The word "misadventure" should be read widely. Cases where there was some problem with communication of the adjourned date or a date was wrongly written down in somebody's diary have ceased to be matters explicitly mentioned in statute.

> [37] Under the 1967 legislation, the Act covered a series of discrete situations including where the accused was not aware of the adjourned hearing date.
>
> [38] However, under s 100K(2)(a), the defendant can apply if he or she was not aware of the relevant proceedings until after their completion, but cases where there was some problem with communication of the adjourned date or a date was wrongly written down in somebody's diary ceased to be matters explicitly mentioned in the statute.
>
> [39] This must lead to the view that the general paragraphs of subsection (2)(b) and (c) of s 100K(2) or s 8(2) of the 2001 Act should be widely construed. Thus in (b) the word "misadventure" should be read widely.

Boulghourgian v Ryde City Council [2008] NSWDC 310

The appellant was in court when his matter was adjourned to a later date. He said that he failed to attend the next time because he mixed up the dates. He had it in his mind that he was to appear on 22 June 2008, not 20 June 2008. He said the confusion arose because there were a number of matters that came about as a result of parking and driving offences for which the vehicle in question was used. English was not his first language.

Where an accused was operating under a genuine but mistake belief as to what day his or her matter was in court, he or she has been hindered by misadventure.

> [80] Failure of an accused wishing to defend the charges against them to attend court, through mere oversight, should not result in a finding of guilt and conviction as a matter of course. Where an accused person has made an error, such as by losing the note on the date of hearing and operating under the genuine but mistaken belief that his day in court was to be on a day other than the day upon which the matter was in fact to be heard, he or she has been hindered by misadventure or otherwise from doing an act in relation to the proceedings, namely, from attending on the appointed day.[4]

Willis v The Queen [2014] NSWDC 325

The reason given by Mr Willis for missing the hearing is that his life was in disarray … because of his addiction to ice. He had lost the bail slip which contained the date. He in fact was regularly reporting as he was required to do … But as soon as he realised that he had missed the date, he left town. He was concerned about being arrested.

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[4] See also *Rukavina v Director of Public Prosecutions* [2008] NSWDC 214 at [65]

A disordered life brought about by self-induced intoxication can be “illness, misadventure or other cause.”

> [10] Minds may differ over whether a disordered life brought about by self-induced addiction to a powerful drug of addiction should qualify as a hindrance by way of illness or misadventure. I am inclined to think that it would.
>
> [11] I agree with his Honour Judge Bennett where his Honour said as [77] (324-325) by reference to the Court of Appeal, that there is a “proposition that the word ‘hindered’ meant something less than prevented, namely, making something more or less difficult but not impossible, or alternatively, affecting to an appreciable extent the activity in question.” Self-induced drug intoxication could well be regarded as an illness or a misadventure and certainly as an “other cause.”
>
> [12] I am satisfied by the explanation of Mr Willis that although his missing his court appearance was culpable in the sense that it was his own fault, it resulted from “illness, misadventure or other cause.” In any event, I would also be of the opinion that “having regard to the circumstances of the case, it is in the interests of justice” to allow the application in this case.

Interests of justice

***Boulghourgian v Ryde City Council* [2008] NSWDC 310**

The legislation was not intended to produce injustice.

> [78] The merit of these provisions, which allow for the expeditious disposal of proceedings before magistrates where an accused person chooses not to appear cannot be questioned. Their implementation saves the cost and inconvenience that would otherwise be incurred by requiring the use of resources and the presence of witnesses to present evidence to prove offences, in respect of which an accused person may properly submit to a finding of guilt without the formalities that might otherwise be imposed.
>
> [79] However, as the Court of Appeal has made abundantly clear, the legislation was not intended to produce injustice. Those accused who wish to defend the charges brought against them must be permitted to do so.[5]

***Rukavina v Director of Public Prosecutions* [2008] NSWDC 214**
The applicant thought the court date was 6 May 2008 not 5 May 2008.
He suffered from ‘effects of head injury/headaches, poor memory’

Strength of the Crown case is an irrelevant consideration as to whether to grant the annulment.

> [27] … her Honour took the view that the case was strong. This was included as a reason for rejecting the application. I am of the opinion that this was an error.

[5] See also *Rukavina* at [63].

> [63] The strength of the Crown case was an irrelevant consideration to the question whether the annulment ought to have been granted.

***NSW v Gavrilov* [2015] NSWLC 6**

The phrase 'interests of justice' includes the interests of the prosecution.

> [45] The phrase 'interests of justice' should be construed widely, and is not only concerned with the interest of an accused. There are the interests of the complainant and the prosecution to consider, as well as the interest of the community generally in having allegations of domestic violence heard at the earliest opportunity.

***Chapman v Gentle* (1986) A Crim R 29**

However, the phrase 'in the interests of justice' has, in another context, been interpreted so as to carry "as a paramount consideration … that an accused person should have a fair trial"

Interests of Justice – The Right to a Fair Trial

***Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 per Deane J:**

> The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law. As a matter of ordinary language, it is customary to refer in compendious terms to an accused's "right to a fair trial". I shall, on occasion, do so in this judgment. Strictly speaking, however, there is no such directly enforceable "right" since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.

Article 14 of the International Covenant on Civil and Political Rights:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Being convicted of a crime, any crime, is a serious matter, even if the person is not sentenced to a term of imprisonment. As Gleeson CJ said in *R v Ingrassia* (1997) 41 NSWLR 447 at 449: "The legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a Court."

There are onerous consequences that apply if someone fails to comply with the conditions of a bond, including the risk of further imprisonment or being refused bail in the future: see the remarks of Harrison J in *R v Maugher* [2012] NSWCCA 51 at [37].

Interests of Justice – Even if pleading guilty?

Even if an accused person intends to plead guilty, there may be a public interest in annulling their conviction so that they can enter a plea of guilty.

A Formal Admission of Guilt

A plea of guilty is a formal admission of the facts and law constituting the offence charged.[6]

In *Weston v The Queen* [2015] VSCA 354 Redlich JA said at [109]:

> 1. The basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt.
>
> 2. The plea of guilty constitutes an admission of all of the legal ingredients of the offence and is the most cogent admission of guilty that can be made. Its significance rests in part upon the high public interest in the finality of legal proceedings.

This public acknowledgment of guilt is important for finality of proceedings, as well as for the victims and community as a whole. It is also an opportunity for the offender to express remorse.

The Purposes of Sentencing

Section 3A *Crimes (Sentencing Procedure) Act* 1999 sets out the purposes of sentencing:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and to the community.

Three of those purposes: (d) (e) and (g) are directly served by allowing offenders who have been convicted in their absence to annul their conviction and voluntarily enter a plea of guilty.

[6] *R v Maitland* [1963] SASR 332; *R v O'Sullivan* (1975) 13 SASR 68 at 73 per Bray CJ.

Procedural Requirements – Section 4

The application must be in writing and lodged with the Registrar.[7]

It must be made to the Local Court sitting at the place where the original Local Court proceedings were held (i.e. where the person was convicted or sentenced).[8]

An application must be made within 2 years after the relevant conviction or sentence is made or imposed.[9]

Section 4A – The Court's Own Motion

Section 4A provides that: 'Without limiting section 4, the Local Court may, on its own motion in the interest of justice, decide to annul a conviction or sentence made or imposed by the Court if the defendant was not in appearance in proceedings before the Court when the conviction or sentence was made or imposed.'

This can be useful to rely on in situations where the formal requirements are unable to be met and the magistrate is clearly minded to grant the application.

Applications to the Minister – Section 5

If a person wishes to annul his or her conviction but is outside the 2 year time period, he or she may make an application to the Minister.[10]

If the Minister is satisfied that there is a doubt as to their guilt or liability to pay a penalty, they may refer the application back to the Local Court.

The defendant then has 2 years in which to make a s 4 application.[11]

Appealing to the District Court – Section 11A

If a defendant's s 4 application is refused by the Local Court, he or she can appeal against the refusal to the District Court. It is an appeal as of right.[12]

The appeal must be lodged within 28 days after the Local Court notifies the defendant of its refusal of the application.[13]

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[7] Section 4(4) *CARA*
[8] Section 4(1) *CARA*
[9] Section 4(2)(a) *CARA*
[10] Section 5 *CARA*
[11] Section 4(2)(b) *CARA*
[12] Section 11A *CARA*
[13] Section 11A(2) *CARA*

The District court may either dismiss the appeal or grant the appeal, in which case it is remitted back to the Local Court to be dealt with afresh.[14]

No more than one appeal may be made under s 11A in respect of any particular conviction.[15] So if your client successfully appeals against the refusal of a s 4 application and it goes back to the Local Court, they fail to appear again, are convicted, and a second annulment application is refused, they cannot appeal again under s 11A.

However, they can still appeal against the conviction with leave under s 12 or appeal against sentence by right under s 11.

Fail to appear charges – Section 79 of the *Bail Act 2013*

Section 79 Bail Act 2013

(1) A person who, without reasonable excuse, fails to appear before a court in accordance with a bail acknowledgment is guilty of an offence.
(2) The onus is on the person granted bail to prove reasonable excuse.
(3) The maximum penalty for an offence against this section (a fail to appear offence) is the maximum penalty for the offence for which bail was granted, subject to this section.
(4) A penalty of imprisonment for a fail to appear offence is not to exceed 3 years and a monetary penalty for an offence against this section is not to exceed 30 penalty units.

Comparison with s 4

The requirement for a "reasonable excuse" creates a higher threshold than "hindered by accident, illness, misadventure or other cause". Therefore, just because the Court accepts that your client was hindered by accident, illness, misadventure or other course and annuls his or her conviction on that basis, does not mean the prosecution cannot still bring (and succeed on) a charge of fail to appear.

Whether an excuse is "reasonable" is likely to depend on the circumstances of the individual case. *R v Crofts* (unrep, 10/3/1995, NSWCCA) considered the term "reasonable excuse" in the context s 316 *Crimes Act 1900,* concealing a serious indictable offence. Gleeson CJ stated "… depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was 'without reasonable excuse'". Although in a charge of fail to appear, that assessment may be more straightforward, it is important to remember that the person's individual circumstances are relevant to the judgment of what is reasonable.

The onus is on the defendant to demonstrate a reasonable excuse.

It is likely that if the defendant was "unaware" of the original proceedings, this be a defence to the charge. The "interests of justice" consideration is irrelevant to a charge of fail to appear under s 79.

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[14] Sections 16A and 9 CARA
[15] Section 11A(3) CARA

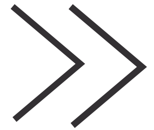
Conclusion

It is no small thing to convict someone of a criminal offence for failing to show up to court. The rules that allow this to happen should not produce injustice, and magistrates should be reminded of this. The legislation and caselaw, including principles of fairness and justice should be carefully and consistently applied to these applications.

Acknowledgements

I am particularly indebted to my brother, Silas Morrison, whose ideas and 2012 paper, "Playing my Guitar down by the River… s 4 Annulment Applications of the *Crimes (Appeal and Review) Act 2001* and the cases of *Miller, Rukavina, Boulghourgian* and *McKenzie*" I freely borrowed from.

Section 4 Annulment Applications



The Test – s 8(2) of the *Crimes (Appeal and Review) Act 2001*

The Local Court must grant an application for annulment made by the defendant if it is satisfied:

a. that the defendant was not aware of the original Local Court proceedings until after the proceedings were completed, or

b. that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or

c. that, having regard to the circumstances of the case, it is in the interests of justice to do so.

Summary of principles – s 8(2)(b) – Accident, illness or misadventure

1. Hindered means something less than prevented. It means making something more or less difficult but not impossible; affecting to an appreciable extent.[1]
2. The fact that a defendant did not call or write to the court is not usually significant.[2]
3. The word “misadventure” should be given a wide construction.[3]
4. Where an accused was operating under a genuine but mistake belief as to what day his or her matter was in court, he or she has been hindered by misadventure.[4]
5. A disordered life brought about by self-induced intoxication can be “illness, misadventure or other cause.”[5]

Summary of principles – s 8(2)(c) – Interests of justice

1. The legislation was not intended to produce injustice.[6]
2. ‘Interests of justice’ must be read widely and includes the interests of the prosecution.[7]
3. The strength of the Crown case is an irrelevant consideration as to whether to grant the annulment.[8]
4. The accused’s right to a fair trial should be a paramount consideration.[9]

Formal requirements – s 4

1. The application must be made where the original Local Court proceedings were held: s 4(1)
2. The application must be in writing and lodged with the Registrar: s 4(4)

1 *Miller v Director of Public Prosecutions* (2004) 145 A Crim R 95 at [25], [40].
2 *Miller at [25]; Rukavina v Director of Public Prosecutions* [2008] NSWDC 214 at [64].
3 *Miller* at [37]-[39].
4 *Boulghourgian v Ryde City Council* [2008] NSWDC 310 at [80]; Rukavina at [65].
5 *Willis v The Queen* [2014] NSWDC 325 at [10]-[12].
6 *Boulghourgian* at [78]-[79]; Rukavina at [63].
7 In *NSW v Gavrilov* [2015] NSWLC 6 at [49].
8 *Rukavina* at [63].
9 *Chapman v Gentle* (1986) A Crim R 29.