Fitness for Trial

You have been empanelled to decide whether the defendant is capable of understanding the proceedings at this trial so as to be able to make a proper defence. There is reason to think that because of [mental illness; or an inability to communicate; or intellectual impairment], the defendant may not be so capable. You are to decide that question. If you find that the defendant is not so capable, you are to say what the reason is.[1]

The question must be decided before the trial proceeds. It would be unfair to the defendant to put him on trial if he is unable to take a sufficient part in the proceedings. A defendant must be able to answer the charge brought against him. He cannot do so unless he is capable of understanding the proceedings, so as to be able to make a proper defence.

The test of fitness is not a demanding one but it does require that the defendant be able to understand the proceedings and the substance of the evidence to be led [or which has been led] against him.

The defendant must be able to understand that he is on trial, ie that a charge of [name offence] has been made against him by a prosecuting authority which will call [or has called] evidence in an attempt to prove guilt. The defendant must be able to understand the difference between guilt and innocence and to understand, in a general way, the nature of the offence. He must be able to understand that he has a right to challenge the jurors, even though in practice the challenging is usually done by defence counsel.

It is also necessary that the defendant be able to make sense of the evidence, so as to be able to contest it or to provide an answer to it. It is not necessary that the defendant understand the law or the various formalities and procedures of the court. It is enough that he understands the substantial effect of the evidence that may be given against him, so that he can give his counsel instructions for conducting the defence. The defendant must have a sufficient capacity to be able to decide what defence he will rely on and to

[1] Section 613(3) *Code*.

make his version of the facts known to the court and to his counsel. When he is called upon to decide whether to give evidence, he must be capable of making an informed election, after receiving legal advice.

If the doubt about fitness arises from a defendant's lack of powers of communication the suggested direction is:

Is the defendant capable of communicating with his advisors and with the court? [He may not be able to communicate by word of mouth. But if you are satisfied he could communicate by some other means, [eg in writing or signs], that is enough if it allows the defendant to tell his advisors and the court what his defence is and to give his version of the facts.] The question is whether the evidence to be led against the defendant may be communicated to him so that he can clearly understand it and be able to make his defence known.

Whether a defendant is fit to stand trial is usually determined by the Mental Health Court. However, the *Code* makes provision for a determination of that question by a court of criminal jurisdiction. Two provisions in the *Code* may apply, depending upon the time at which the question arises. Section 613 is applicable to a defendant's state of mind at the time he is called upon to plead to the indictment. Section 645 applies when a question of fitness arises later during the trial.

Although the two sections appear to describe different criteria to determine whether a defendant should be put on trial, the phrase "not of sound mind" when used in s 645 refers to the same concept as a defendant being "capable of understanding the proceedings … so as to be able to make a proper defence". The High Court so construed "insane" in the cognate provision in the (Victorian) *Crimes Act* 1958: *Kesavarajah* (1994) 181 CLR 230 at 244.

The requirement in s 645 must be complied with if there is reason to believe that the defendant is unfit. It does not matter what stage the trial has reached, or what inconvenience or cost will be occasioned by a finding that the defendant is unfit for trial. See *Kesevarajah*; cf *Mailes* (2001) 53 NSWLR 251 at 297.

Presser [1958] VR 45 at 48 sets out the most frequently cited exposition of fitness for trial.

> *"The question … is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. … He needs to be able to follow the course of proceedings so as to understand what is going on in court in a general sense, … he needs to be able to understand … the substantial effect of any evidence that may be given against him; and he needs to be able to make a defence or answer to the charge. Where he has counsel he needs to be able to do this … by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not … have the mental capacity to make an able defence; but he must … have sufficient capacity to be able to decide what defence he will rely upon to make his defence and his version of the facts known to the court and to his counsel."*

See also *Ngatayi v The Queen* (1980) 147 CLR 1 at 9; *Topp* [2000] QMHT; *R v Sexton* (2000) 77 SASR 405; *Eastman v The Queen* (2000) 203 CLR 1; *R v Wilson* [2000] NSWSC

1104; *R v Miller (No 2)* (2000) 209 LSJS 20; [2000] SASC 152; and *A-G v B* [2003] 1 Qd R 114;; *Mailes* at 273ff.

Generally speaking, it is enough if a defendant can understand that he is on trial and what that means, and can understand the evidence led by the prosecution in support of the charge so that he can put forward whatever answer he has to it.

A lack of capacity to stand trial may arise "for any reason", including:

(a) mental disease such as schizophrenia;

(b) gross intellectual impairment or retardation;

(c) any physical condition rendering communication with the defendant extremely difficult, ie a deaf mute;

(d) inability to speak English where no interpreter can be found to translate the proceedings into the defendant's language;

or a combination of these conditions.[2]

There is authority for the proposition that the standard of proof varies with whether defence or prosecution alleges unfitness. The onus on the defence is to prove lack of capacity on the balance of probability. If the prosecution alleges unfitness it must prove it beyond reasonable doubt. See *R v Podola* [1960] 1 QB 325 at 329-330; *R v Robertson* [1968] 1 WLR 1767; *R v Donovan* [1990] WAR 112; *R v P* (1991) 1 NTLR 157.

This rule appears unsatisfactory. It was criticised in *Re Walton* [1992] 2 Qd R 551 at 557-8, where it was pointed out that in *Podola* the reference to proof beyond reasonable doubt occurred in the context of the prosecution undertaking to prove that a defendant was *fit* to stand trial. The view in *Presser (*at 49) has much to commend it. It was that the inquiry directed by ss 613 and s 645 "is not to be regarded in the same way as a trial of an issue joined between the parties … considerations of onus … would seem to be foreign to an inquiry of the kind in question". On this approach, if a jury is satisfied on the balance of probabilities that a defendant is unfit for trial, the sections will be satisfied whichever side initiates the inquiry.

The direction does not address the dilemma posed by the authorities as to standard of proof. If *Podola* is to be followed, the direction will have to include an instruction on the question which will depend upon whether the defence or the prosecution raised the issue for determination. If the opinion expressed in *Presser* is adopted, it will be sufficient to tell the jury that they must be satisfied on the balance of probabilities before they can find a defendant is fit for trial.

The direction borrows from the summing-up in *Sharp* [1960] 1 QB 357 at 360-361.

[2] See *Ngatayi v The Queen* (1980) 147 CLR 1 at 7.