Refusing to enter a Plea

Peine forte et dure was a method of torture formerly used in the common law legal system, in which a defendant who refused to plead ("stood mute") would be subjected to having heavier and heavier stones placed upon his or her chest until a plea was entered, or he/she died. Many defendants charged with capital offences would refuse to plead in order to avoid forfeiture of property. If the defendant pleaded either guilty or not guilty and was executed, their heirs would inherit nothing, their property escheating to the Crown. If they refused to plead their heirs would inherit their estate, even if they died in the process**.** Peine forte et dure was abolished in Great Britain in 1772, with the last known actual use of the practice having been in 1741. From 1772 refusing to plead was deemed to be equivalent to pleading guilty, but this was changed in 1827 to being deemed a plea of not guilty – which is now the case in all common law jurisdictions.

These days things are much more humane, despite the fact that many OPCA adherents think refusing to enter a plea will prevent the court from proceeding with a trial.

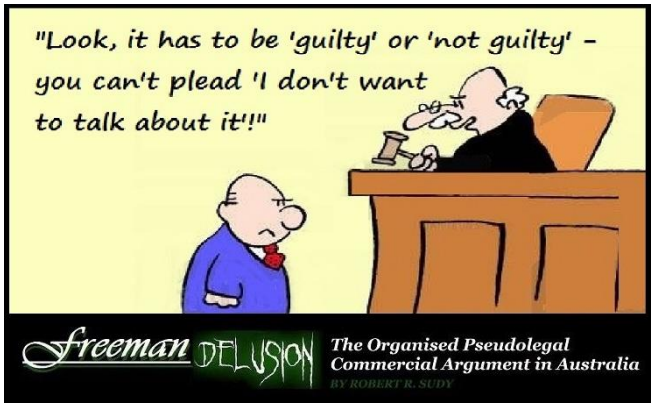
Denying joinder...

Theorists insist that entering a plea is contractual, and therefore, if one does acquiesce to the courts authority, it gives the court jurisdiction. The obligation to follow due process and court procedures is statutory not contractual. The magistrates, court staff, prosecution, and defendant, are all likewise equally bound by the same statutory obligations to follow rules of evidence and procedure as directed by the provisions of the relevant legislation.

If you refuse to enter a plea, it is simply taken as a plea of not guilty, and the case proceeds to trial. The magistrate is empowered to enter this plea on your behalf by the relevant states criminal procedures legislation.

In New South Wales, it is ***Section 155 of the Criminal Procedures Act 1986***:

"Refusal to plead: If an accused person who is arraigned stands mute, or will not answer directly to the indictment, the court may order a plea of "not guilty" to be entered on behalf of the accused person, and the plea so entered has the same effect as if the accused person had actually pleaded "not guilty".



In Queensland, it is ***Section 601 of the Criminal Code 1899***

"Standing mute: If an accused person, on being called upon to plead to an indictment, will not plead or answer directly to the indictment, the court may, if it thinks fit, order a plea of not guilty to be entered on behalf of the accused person. A plea so entered has the same effect as if it had been actually pleaded."

In South Australia, it is ***Section 129(2) of the Criminal Procedure Act 1921***

"If any person, being so arraigned, refuses or fails to enter a plea to the information, it is lawful for the court to order a plea of not guilty to be entered on the person's behalf and the person will be treated as if the person had pleaded not guilty."

In Victoria it is ***Section 64 of the Criminal Procedure Act 2009***

"(1) If, when an accused is asked to plead to a charge, the accused will not answer directly to the charge, the Magistrates' Court may order that a plea of not guilty be entered on behalf of the accused. (2) A plea of not guilty entered under subsection (1) has the same effect as if the accused in fact had pleaded not guilty."

In Tasmania, it is ***Section 59 of the Justices Act 1959***

"(2) If the defendant, on being asked to plead under section 55 or 58 , stands mute or refuses to, or does not, answer directly to the charge, he or she is taken to plead not guilty. (3) If the defendant, on being asked to make an election under section 55 or 58 , stands mute or refuses to, or does not, make a definite election, he or she is taken to elect for the charge to be determined by justices."

In the Northern Territory, it is ***Section 345 of the Criminal Code 1983***

> *"Standing mute - If an accused person who has been committed for trial or proceeded against by way of section 300, on being called upon to plead to an indictment, will not plead or answer directly to the indictment the court may, if it thinks fit, order a plea of not guilty to be entered and a plea so entered has the same effect as if it had been actually pleaded."*

In the Australian Capital Territory, it is ***Section 282 of the Crimes Act 1900 (ACT)***

> *"Refusal to plead: If any person being so arraigned stands mute, or will not answer directly to the indictment, the court may order a plea of not guilty to be entered on behalf of the person, and the plea so entered shall have the same effect as if he or she had actually pleaded not guilty."*

Rossiter v Adelaide City Council [2020] SASC 61 (from 15):

> *"It has long been recognised that a defendant's right to attend a criminal trial is a right capable of being waived, with the result that a trial judge has a discretion, to be "exercised with great care" in the case of unrepresented defendants, to proceed ex parte, (See Stusser v Police [2013] SASC 73, [13] (Gray J).) whether the absence is due to the misconduct of the defendant in the courtroom, or a deliberate refusal to attend at, or participate in, the trial. (See R v Hayward [2001] QB 862, [6] (Rose LJ), citing R v Jones, Planter and Pengelly [1991] Crim LR 856.)*
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> *According to Archbold, the English practice requires that a jury be empanelled to determine in a hearing whether the defendant was "mute of malice or by the visitation of God", because this cannot be determined by the court. (See Mark Lucraft (ed), Archbold: Criminal Pleading, Evidence and Practice (Sweet & Maxwell, 2019) [4-228], citing R v Scheleter (1866) 10 Cox 409.) If the finding is that the defendant is "mute of malice", the court may, under the relevant statute, direct that a plea of "not guilty" be entered, otherwise, if "mute by visitation of God" (perhaps because of deafness), (See R v Halton (1824) Ry & M 78, or deaf and dumb, R v Pritchard (1836) 7 C & P 303.) the court must then determine whether there exists a disability that prevents the defendant from being tried. (See R v Governor of His Majesty's Prison at Stafford; Ex parte Emery [1909] 2 KB 81.)*
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> *In 1971 in R v Hall [1971] VR 293, 294 (Winneke CJ, Little and Gowans JJ). the Full Court of the Supreme Court of Victoria described the direction of a trial judge that a plea of "not guilty" be entered, after the defendant said that he could not plead, as a "well-established practice". [12] In South Australia, the issue is addressed by the Criminal Procedure Act 1921 (SA), portions of which were known as the Summary Procedure Act 1921 (SA) until 2018. (See Summary Procedure (Indictable Offences) Act 2017 (SA), s 5, commencing 5 March 2018.) Section 129 of the Act, which is found in Part 5 "Indictable offences", Division 6 "Pleas and proceedings on trial in superior court," provides:*
>
> *129—Plea of not guilty and refusal to plead*
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> *(1) A person arraigned on an information who pleads not guilty will, by that plea, without any further form, be taken to have put themself on the country for trial (and the court must, in the usual manner, proceed to the trial of that person accordingly).*

(2) If any person, being so arraigned, refuses or fails to enter a plea to the information, it is lawful for the court to order a plea of not guilty to be entered on the person's behalf and the person will be treated as if the person had pleaded not guilty.

Thus, where the defendant remains "mute" it is lawful for the superior court to order that a plea of "not guilty" be entered. If the defendant is under a mental impairment this is separately addressed by the provisions of Part 8A in the Criminal Law Consolidation Act 1935 (SA).

*In summary proceedings, where it is proved that the defendant has had notice of the proceeding, and a reasonable opportunity to attend and participate, the trial may proceed. (See **Adelaide City Council v Lepse [2016] SASC 66**, [51]-[52] (Peek J): in the Magistrates Court, the procedure for trying defendants on criminal charges in their absence is governed by ss 62(1)(b) and 62BA of what was then the Summary Procedure Act 1921 (SA). The procedure is, as one might expect, simplified so that where the defendant does not respond, the adjudication may proceed "as fully and effectually … as if the defendant had personally appeared" and, indeed, the Magistrates Court may "in so doing regard any allegation contained in the summons, or information and summons, (as served upon the defendant) as sufficient evidence of the matter alleged". (See **Re Magistrate M M Flynn; Ex parte McJannett [2013] WASC 372**, [14] (McKechnie J)*

Whilst it is not made explicit by s 62BA(1) of the Criminal Procedure Act 1921 (SA), it appears that the trial may proceed as if the Magistrate has ordered that a plea of "not guilty" be entered. I was told by the respondent on the hearing of this appeal that this is often done in Magistrates Court trials in this State.

In this case, the Magistrate directed that a plea of "not guilty" be entered after the appellant refused to participate in the trial. As might be clear from the terms of s 62BA(1), and what appears to be long-established practice, the decision to proceed in the absence of any plea from the appellant did not, therefore, detract from the Magistrate's power to adjudicate the question of guilt.

The prosecution then proceeded to prove guilt beyond reasonable doubt at the trial in the ordinary way, with the assistance of statutory aids to proof, rather than utilising the assistance of s 62BA(1) of the Criminal Procedure Act 1921 (SA), which treats the allegations "as sufficient evidence of the matter alleged". That the Magistrate's adjudication in this case proceeded with the benefit of the calling of evidence was, if anything, a precaution which merely reinforced the absence of any miscarriage of justice to the appellant.

Whilst the respondent suggested on this appeal that the Magistrate required that the matter proceed on evidence, that is not how I read the transcript. The summary trial can be considered in terms of three distinct steps. The first concerned the procedure to be applied when the appellant refused to participate. The Magistrate saw that the appellant was in the courtroom and, after questioning him, exercised the first discretion conferred by s 62BA(1) and decided to proceed, effectively ex parte. It is primarily that discretion which it has been said should be exercised "with caution", (See Kyriacou v Police [2007] SASC 341, [74] (Gray J).) as Bray CJ explained in Walker v Eves (1976) 13 SASR 249, 255:

… the vital word is "may", not "shall". It is not mandatory for a court of summary jurisdiction to proceed ex parte under this section whenever a complaint has been made by a police officer and the summons is served as authorized by the Act and the defendant does not appear. It should not automatically do so. It should consider the seriousness of the offence and the possibility of a satisfactory explanation for the failure to appear. Requests for adjournment should not be lightly refused.

The second step involved the taking of a plea. As I have explained, in the absence of participation from the appellant, the Magistrate directed that a plea of "not guilty" be entered, as was appropriate. It is for that reason that this first appeal ground must be rejected.

The third step involved the form in which the trial would proceed. There was in fact no argument on that point at trial, and the Magistrate was not invited to proceed in accord with the second discretion conferred by s 62BA(1), on the basis that he could treat the allegations "as sufficient evidence of the matter alleged". As Bray CJ went on to explain in Walker v Eves (1976) 13 SASR 249, 2556

The Court has not only a discretion whether to hear the case ex parte at all, but another discretion once it has been decided to hear it ex parte whether or not to regard the allegations in the complaint or summons as sufficient evidence of the matter alleged.

Whilst there may in some cases be good reason to be cautious and proceed with proof in the ordinary way, that inevitably involves time spent on matters that may not genuinely be in issue. In the circumstances of this case, where the appellant was present but refusing to participate, there seems to have been no good reason not to take advantage of this statutory aid."

https://freemandelusion.com/wp-content/uploads/2020/05/rossiter-v-adelaide-city-council-2020-sasc-61.pdf

There are many cases in which the defendant has refused to enter a plea, you can find them on this website under the Tag "***Refusal to Enter a Plea***".

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