

## ASSAULT

### I. COMMON ASSAULT:

s 61 of the Crimes Act 1900 (NSW) provides that whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

#### A. Common Assault by Threat

- a psychological assault or threat to bring about a non-consensual contact.

AR: Threats which put a reasonable person in fear of apprehension of physical violence (Mostyn)

MR: A desire to create the fear of violence (MacPherson v Brown)

\* a subjective test. Actual knowledge of creating the fear of violence is necessary. Students did not desire to create fear but know it will likely happen. Such is not enough because actual intent and knowledge is required.

### ISSUES:

#### 1. FRIGHT / FEAR?

- It is uncertain as to whether the victim must be frightened.
  - o (Brady v Schatzel) said it was irrelevant; the victim need not actually fear.
  - o (Ryan v Kuhl) said it was relevant.
- However, Victim must be aware of the threats. (Pemble)

#### 2. IMMEDIACY:

- How immediate does the threat need to be? – depends on whether or not it reasonably instills a fear of immediate violence, or there would be an expectation of a physical contact.
- Distant victim
  - o (Mostyn) victim was hiding, D was hunting for her.
  - o 'A threat to strike a person even at such distance as to make contact impossible may constitute assault if it instills a fear of immediate violence in the mind of the hearer.
  - o 'It has long been held that threats which put a reasonable person in fear or apprehension of physical violence may constitute an assault even though the victim did not know when that physical violence may be effected'
- Threats over the Telephone
  - o (Knight): no evidence of threats of immediate violence; too distant, violence not expected.
  - o (Barton v Armstrong): it was ruled that depending on the circumstances, such threat could be an assault because of the expectation of a physical contact, thus there could be a threat of immediate violence.
- Threats of Future harm
  - o (Zanker v Vatzokas): This created an apprehension of imminent harm. There was no escape, no reasonable possibility of an intervening act to break the causal link between the threat and the expected infliction of harm.

#### 3. CONDITIONAL:

- Is a conditional threat assault? – depends upon the lawfulness of the threat. (Rozsa v Samuels)
  - o If it cannot actually be done – no assault.
  - o If it is an unlawful condition – assault
  - o If it is beyond what is lawful or reasonable – assault
- Rozsa: Taxi cut in line. A got mad and said he would punch him in the head, D got a table knife saying I will cut you into bits *if you try it*.
  - o It would have been that he was defending himself over the threats to him. But in this case, although it seems impossible to expect him to actually cut him to bits with a table knife, he intends to convey that he would use the knife to stab A. What he did was beyond the ordinary bounds of self-defence. The conditional threat to use violence was a threat to use more force than what is reasonable.



## B. Common Assault by Battery

- A voluntary act, which directly and immediately results in violent, offensive, or otherwise non-consensual contact.
- There was only contact, but there was no injury.

AR: the non-consensual contact (Collins v Wilcock)

- Any touching may amount to battery
  - EXCEPT: there are exceptions to this principle to “allow for the exigencies of everyday life” such as shaking hands, or accidentally bumping into someone on a busy train or bus, jostling in street, pat on back, taking hand in friendship)
  - Can touch someone to gain attention but continued touching may be wrong

MR: 1. Intent / Desire to make contact,

- Intent: Must be really specific as to cause the contact or harm. Subjective mind of the accused determined. (Zaburoni v R)

2. or Recklessness

- Recklessness: The foresight of *possible* injury, not probability. (R v Williams)
- (Venna): where the Defendant was struggling with a group of police officers who were trying to arrest him. The Defendant was lying on the ground, and lashing out with his legs. He struck the hand of a police officer, breaking a bone in the hand. = reckless.

### COINCIDENCE / CONTEMPORANEITY OF THE ACTUS REUS AND MENS REA

- ‘It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed on an existing act.’ (Fagan, Miller)
- Fagan
  - o where the Defendant drove his vehicle onto the foot of a police officer without realising at first. When he did realise, he did not take it off right away.
  - o James J: Although an assault must involve a physical act beyond “mere inaction or inactivity”, must look at the whole transaction to see if it involves a “continuing act”.
- Miller
  - o he fell asleep with his cigar lit. Fire started to break out. He got up, went to the other room and slept. Arson. [not an assault case but it just shows that intent can be created later]

NOTE – If there was contact, and there was injury: Check what type of injury was caused – ABH or GBH.

### ASSAULT CAUSING ACTUAL BODILY HARM (s 59)

- s 59 only provides for the penalty but does not actually define “Actual Bodily Harm”
- Bodily harm has an ordinary meaning and includes any hurt or injury that interferes with the health of the victim. an injury more than a very minor injury (or threat of violence) which is common assault under Section 61, but less than GBH under Section 33 or 35.
- The definition at common law is “any hurt or injury calculated to interfere with the health or comfort of the victim, but such hurt or injury must be more than merely transient or trifling” (R v Donovan).

AR: contact causing ABH (Donovan)

- ABH May include psychiatric injury of some identifiable clinical condition, not just mere emotions of fear, distress, panic, hysterical or nervous shock. Expert evidence should be given and question as to whether psychiatric injury had been occasioned by assault should not be left for the jury. (R v Chan Fook)
- Includes cutting a person’s hair (DPP v Smith)

MR: Only need the mens rea for common assault.

- No need to prove a specific intent to cause actual bodily harm (Coulter).
- It is enough that the victim recklessly or intentionally assaults the victim and bodily harm results (Williams; Venna)



**I. STALKING**AR – s 8 Crimes (Domestic and Personal Violence) Act 2007

Stalking includes:

1. Following of a person
2. Watching or frequenting the vicinity of or
3. an approach to a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.

The court may have regard to any pattern of violence for working out if it amounts to stalking.

MR – s 13 Crimes (Domestic and Personal Violence) Act 2007

- intent to cause fear of mental or physical harm
  - o intent to cause fear if he knows such conduct will likely cause fear (s 13(3))
  - o actual fear on person not necessary (s 13(4))

R v Strong

- While in prison, he sent out numerous letters to V stating explicit sexual matters he would do to her. Upon release out of prison, he rented a house just across the street to V. There was stalking and intimidation.

**II. INTIMIDATION**AR – s 7 Crimes (Domestic and Personal Violence) Act 2007

- a. Conduct amounting to harassment or molestation of a person, or
- b. an approach made to the person by any means (including telephone, text, email and other technologically assisted means) that causes the person to fear for his or her safety
- c. Any conduct that causes a reasonable apprehension of injury to a person... or of violence or damage to any person or property.

The court may have regard to any pattern of violence in a person's behaviour in working out if it is intimidation

MR – s 13 Crimes (Domestic and Personal Violence) Act 2007

- intent to cause fear of mental or physical harm
  - o intent to cause fear if he knows such conduct will likely cause fear (s 13(3))
  - o actual fear on person not necessary (s 13(4))

Veness v Hodge – There was a dispute between 2 ladies. D Photographed her while she was working thus asserted that she was being stalked and she became intimidated.

HELD: According to s 19(3), a conduct may amount to intimidation of the person even though it does not involve actual or threatened violence to the person or it consist only of actual or threatened damage to property belonging to, in the possession of, or used by the person.

S 7 defines intimidation. Molestation is not defined in the law. Its ordinary meaning refers to behaviours that are found to be ongoing and unwanted and of a pestering, interfering or sexual nature. One single incident would be likely to reach the standards required under s 19 for harassment and molestation, the accumulation of incidents led the court to say that there was intimidation.

## s 9 and s 10 Objects of the Act

The object of the Act in relation to personal violence is to ensure the safety and protection of all persons who experience personal violence outside a domestic relationship.

Apprehended Domestic Violence Order (ADVO) – s 16Apprehended Personal Violence Order (AVO) – s 19

- The court may make an ADVO or AVO if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears:
  - a) the commission by the other person of a personal violence offence
  - b) The engagement of the other person in conduct of stalking or intimidation
- Matters to be considered by court – s 20
  - 1) safety and protection of the person seeking the order and any child affected
  - 2) the effects and consequences on the protected person and any children if access to a property is topped
  - 3) the accommodation of the needs for all persons
  - 4) Any hardship that may be caused by making or not making the order



**SEXUAL ASSAULT**

s 61 I of the Crimes Act 1900 (NSW) provides for the offence of sexual assault as follows:

- Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

AR:

1. sexual intercourse; (defined in s 61H(1))
2. was without the complainant's consent (Consent means – s 61HA(2) + Wilkes and Briant)

MR:

1. Intent to have sexual intercourse without the consent of complainant
2. accused knew that the complainant was not consenting.
  - Knowledge consist of: (s 61HA(3))
    - a. A knows that V does not consent, or; (s 61HA(3)(a))
    - b. A is reckless as to whether V consents, or; (s 61HA(3)(b) + Banditt: Kitchener)
    - c. A has no reasonable grounds for believing that V consents. (s 61HA(3)(c) + Morgan)
      - Reasonable ground = regard to all the circumstances of the case and particularly any steps that the defendant took to ascertain whether the complainant was consenting (s 61HA(3)(d)).

AR:

1. Sexual intercourse
  - S 61H(1)"sexual intercourse" means:
    - (a) penetration to any extent of the genitalia or the anus of any person by:
      - (i) any part of the body of another person, or
      - (ii) any object manipulated by another person,
 except where the penetration is carried out for proper medical purposes, or
    - (b) by the introduction of any part of the penis of a person into the mouth, or
    - (c) cunnilingus, or
    - (d) the continuation of sexual intercourse.
 

NOTE: Continuation of sexual intercourse which is at first consensual, but consent is withdrawn, falls within the definition in Section 61H (Section 61H (1) (d))
  - (R v Preval): the touching of the penis in between the lips is sufficient for the act of sexual intercourse even when it does not enter the mouth.
  - Statutes now abolish the immunity possessed by a spouse at common law.
2. Without consent
  - Consent – 61HA(2)
    - (2) A person "consents" to sexual intercourse if they freely and voluntarily agree to sexual intercourse.
  - "Free and Voluntary" meaning:

Wilkes and Briant – Mere submission is not enough. If non-resistance proceeds merely from being overpowered or intimidated the crime is complete. The failure of the victim to physically resist, or tell the offender to stop, does not mean that consent has been freely and voluntarily given. Words are not required.

Question of Law (No 1 of 1993) – "rougher than usual handling" if consensual would not vitiate consent. No doubt in some relationships a degree of rough handling or horseplay might be regarded by both parties as an acceptable prelude to sex. But those that are induced by force or duress, against the will of the victim, would negate consent.

Papadimitropoulos v R (1957) 98 CLR 249

She thought she was married to D. Thus obtained consent through fraud of marriage. Will this fraud of marriage negate consent? – (in the case, no. there was free and voluntary consent from V in having sex. BUT NOW, crimes act provides otherwise. See NO CONSENT.)

NOTE:

- s 61HA(7) removes the old requirement that a woman must resist to her utmost to demonstrate that the sexual intercourse was 'against her will'. Instead, it expresses a definition of consent based on a communication model: s 61HA(2): freely and voluntarily agrees.



LARCENYs 117 Crimes Act

Whosoever commits larceny, or any indictable offence by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years.

Definition of Larceny: (Illich v R)

Wilson and Dawson JJ: “A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.”

## AR:

1. (D) Took and carried away
2. Property capable of being stolen
3. Which belonged to another; and
4. Without the consent of the owner

## MR:

*At the time of taking:*

1. (D) acted with the intention of permanently depriving the owner;
2. Without a claim of right
3. Fraudulently.

Coincidence – Must have *mens rea* at the time of *actus reus*

## “TAKING AND CARRYING AWAY”

- Must be asportation – physical removal of the property said to be stolen.
- Slightest movement is enough but there must be some movement. (Lapier)
- Passive retention of the property not enough

Lapier – The offender tried to steal an earring, and moved it to the point where the earring became entangled in the owner’s hair. It was held that it was sufficient asportation.

Wallis v Lane – The accused was making deliveries of boxes to one of his employer’s clients. One of the boxes, which contained bicycle toe clips, was opened. The accused moved two pairs of toe clips from the box and left them on the tray of the truck while he delivered the rest of the boxes to the client. Herring CJ: It would appear that any movement of goods with an intent to steal them is sufficient to constitute asportation... it is sufficient asportation if there is a removal of the property from the spot where it was originally placed with an intention to steal.

## “PROPERTY CAPABLE OF BEING STOLEN”

- ‘Property’ is defined under s 4 of the Crimes Act 1900 (NSW)
- Property must be of some value; even slightest value is sufficient (R v Perry)
- A piece of paper is of sufficient value (R v Daley)
- Property must be moveable (i.e. can’t be land)
- Can be tangible or intangible:
  - o title deeds to land - √ (s 134)
  - o gas - √ (R v White; Low v Blease)
  - o Electricity - √ (Electricity Supply Act 1995 (NSW) s 64)
  - o Stealing of animals – √ (special provisions: ss126-32, 505, 506, 512)
  - o information – X (R v Lloyd)
  - o Choses in action – X (Croton v R)
    - Croton v R: While it is possible to steal paper money, it is not possible to be guilty of larceny for illegally removing money from a bank account. This is because the money in that bank does not exist as a physical possession, but merely a chose in action; that is, a debt owed by the bank to the original owner of that account.
- Prosecution need not prove which precise objects have been stolen.
- Clerk or servant – prosecution need only prove a general deficiency in the accounts (s 161)
- Property must have an owner. Things which cannot have an owner or be possessed cannot be stolen. Abandonment occurs when the owner intentionally gives up any interest in the property. (Hibbert v McKiernan).
- Abandonment will not lightly be inferred (Donaghue v Coombe)



**FRAUD**  
s 192E

AR:

1. Deception; and
2. Causation: obtaining of property, financial advantage; or disadvantage

MR:

1. the actions of the accused were intentionally or recklessly deceptive; and
  2. With intent to permanently deprive
  3. it was dishonest to cause that consequence.
- \* If an accused had a claim of right, then they will not be dishonest.

Actus Reus:

DECEPTION

- meaning:(s 192B(1))
  - o means any deception, by words or other conduct, as to fact or as to law, including:
    - (a) a deception as to the intentions of the person using the deception or any other person, or
    - (b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.
- Deception can be
  - o by Words,
  - o by conduct, or
  - o by conduct which makes a computer, machine or device to make an unauthorized response.
- WORDS:
  - o False statements /lies. These statements might be completely or partially false. This includes past, present and future deceptions.

R v John Bryan

Claiming a spoon was made of the 'best material' and had 'as much silver on them as Elkington's' was mere puffery or exaggeration.

At Common law, exaggerations are NOT considered deception. This is a question of fact for the jury to decide if the words would constitute deception

Patmoy – stating that a diamond was 7 ½ carats, when it was actually only 4 carats = deception.

- CONDUCT:
  - o Conduct without words, implied representations, can amount to deception.

DPP v Ray

D ordered a meal in a restaurant with the intent of borrowing money from one of his mates to pay for it. However, at the end of the meal he and his companion decided to run away from the restaurant without paying.

There was dishonesty obtaining pecuniary advantage by deception. By ordering his meal, his conduct showed and assumed the role of an ordinary customer with intent to pay. This representation covered the whole transaction continuing and still active at the time he changed his mind and did not pay.

R v Benli

D, a driving instructor, had had his license to drive suspended. He continued to provide lessons and obtain fees. He was charged with obtaining property by deception. Students believed he was licensed and would not have had continued to use his services if they had known he was not licensed.

Although there was no express representation, his continuing to provide the service was an implied deception by conduct.

Barnard – Deception was found where D obtained credit from a tradesman by entering his shop dressed in an Oxford cap and gown.

- CONDUCT MAKING MACHINES TO MAKE UNAUTHORIZED RESPONSE:
  - o s 192B(1)(b) now would include many forms of ATM frauds.



**ROBBERY**(s 94)

Whosoever: robs or assaults with intent to rob any person, or steals any chattel, money, or valuable security from the person of another, shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

- AR: 1. same as larceny  
2. taken from the person or  
done in the presence of the custodian of the property

MR: Same as larceny

what constitutes “in the presence”?

- Smith and Desmond
  - o tied up and blindfolded watchman. They were taken to a lavatory far away from office.
  - o Held: robbery is an aggravated form of theft. It is carried out by using violence against the person from whose possession the goods are stolen or by putting in him the fear of violence. This violence or putting in fear is the criterion distinguishing robbery from larceny.

The essence of the offence is that violence is done or threatened to the person of the custodian who stands between the robber and the property in order to prevent or overcome his resistance and oblige him to part with the property and submit to the thief stealing it. Thus, it is not carried out in 2 stages. The offence against the person and theft are combined. It is one planned transaction we must regard the events as a whole. It is not relevant whether or not the victim perceived the actual stealing. It is not relevant how great he is removed.

It is a question for the jury to decide whether the victim of the violence was sufficiently the custodian of the property stolen and whether he had sufficient possession and care of it, to constitute the stealing as in his presence.

Effect of claim of right – no mens rea.

- R v Langham  
Crossbow case, wanted his money back. The policy of the store was not to give cash in exchange but would give credit instead. So he purchased a shotgun using part of his credit, leaving a balance of \$301. He later that day used the shotgun and manaced the store manager demanding his \$301. The accused asserted that he believed he had been legally entitled to have the money which he had taken.

**AGGRAVATED ROBBERY:**

- Robbery with violence (s 95)
- Robbery with wounding (s 96)
- Armed robbery and Robbery in company (s 97)

**BURGLARY**(ss 109 – 113)

- Breaking – whenever an opening is made in a part of the building which is closed.
  - o The removal of a pane of glass from a window is a breaking.
  - o Opening of a closed door by turning the key in the lock, or by lifting a latch.
  - o If a window is unlatched and is lifted up, or being slightly open, is further opened to permit entry, there is breaking.
  - o Entering through an open space is not breaking but, at common law, it is counted as breaking if one enters a house down a chimney.
- Constructive breaking – accused gains admission to a building without the use of force, but by trick or by intimidation. (R v Boyle) – accused gained admission to a house from which he stole a handbag by means of false representation that he was an employee of the BBC send to examine a wireless set.
- Breaking is done when any part of the breaker’s body, or any part of any instrument held by him or her, projected into the building.

105A. Definitions

109 Breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence

110 Breaking, entering and assaulting with intent to murder etc

111 Entering dwelling-house

112 Breaking etc into any house etc and committing serious indictable offence

113 Breaking etc into any house etc with intent to commit serious indictable offence

114 Being armed with intent to commit indictable offence

115 Being convicted offender armed with intent to commit indictable offence



**COMPLICITY**

Offender may be a:

- principal in first degree – actual perpetrator
- principal in second degree – present, aided and abetted, but not actual perpetrator
- accessory before the fact – not present, helps before hand
- accessory after the fact – after the offence and in order to help main offenders

**A. PRINCIPAL IN FIRST DEGREE**

- There are 3 main ways in which D is a PRINCIPAL OFFENDER:
  1. D is actual perpetrator
  2. D is acting in concert/joint parties/joint criminal enterprise
  3. innocent agency

*Where D is actual perpetrator – principal offender (PO)*

- where D directly performs the physical elements of the criminal offence – shoots, stabs V
- there can be more than one PO

*D is acting in concert/joint parties/joint criminal enterprise*

Requisites:

1. There must be agreement or pre-conceived plan (Lowery; Osland)
  - The agreement
    - need not be long-standing; (Lowery; Osland)
    - can be reached just before the criminal act; (Lowery)
    - need not be in words / expressed; (Miller; Osland)
    - can be by conduct. (Osland)
    - An assent may amount to an agreement (Russel; Clarke and Wilton)
2. And Both must be present at the criminal act pursuant to the agreement.

- 'Agreement' cases:

**R v Lowery and King (No 2)**

'Acting in Concert' is sometimes also known as joint criminal enterprise or common purpose.

The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene and one or the other does, or they do between them all things that are necessary to constitute the crime, they are equally guilty of the crime regardless of the part they played.

**Osland v R**

Wife and son planned to murder the father.

McHugh J: Person who is at scene of crime and acting in accordance with pre-conceived plan, understanding or arrangement has attributed to him or her the actus reus of all others at the scene, if she has mens rea for the crime, then is a principal offender under doctrine of joint criminal enterprise. It is irrelevant that the other participant is found not guilty due to lack of mens rea, self defence, provocation, duress or insanity.

- 'Assent may amount to agreement' cases:

**R v Russell**

wife and 2 children died by drowning in a public swimming pool. he just stood by. This is an omission of his parental duty.

His standing by and doing nothing constitutes conniving to the act. If a person present at the commission of a crime, and evidence shows his assent to such commission as determined by the jury, he is guilty as a principal. Assent may in some cases be properly found by the jury to be shown by the absence of dissent, or in the absence of what may be called an effective dissent.

**R v Clarke and Wilton**

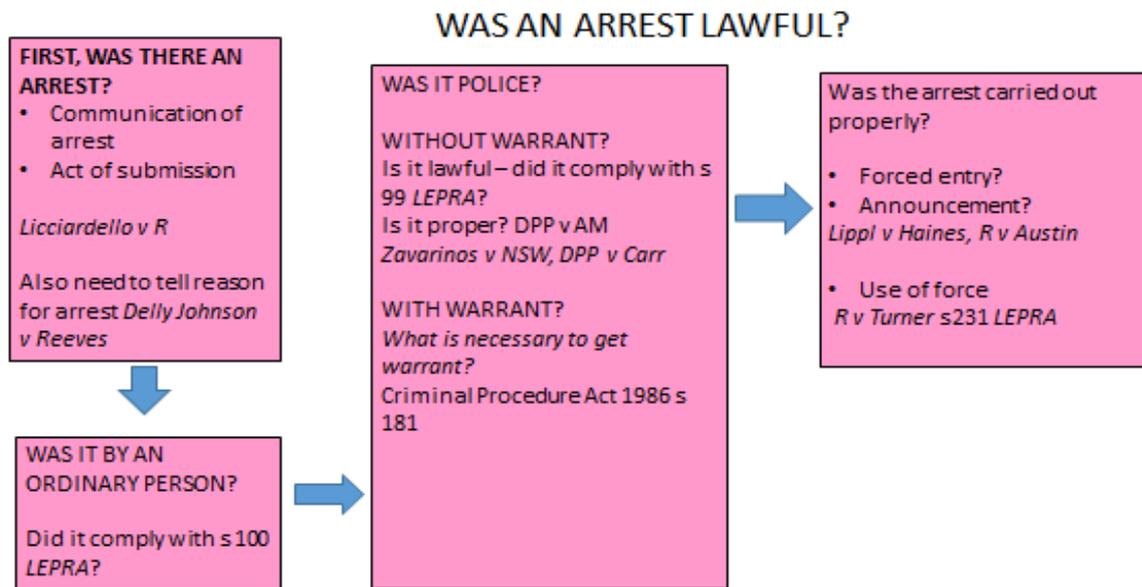
Child died from beating by his parents. Although evidence failed to establish which blow was fatal, each of them was present on each occasion of the beating.

Held: they acted in concert in beating the child or that each had failed in his or her parental duty to protect the child from harm inflicted unlawfully by the other.



CRIMINAL PROCEDURE

I. ARREST

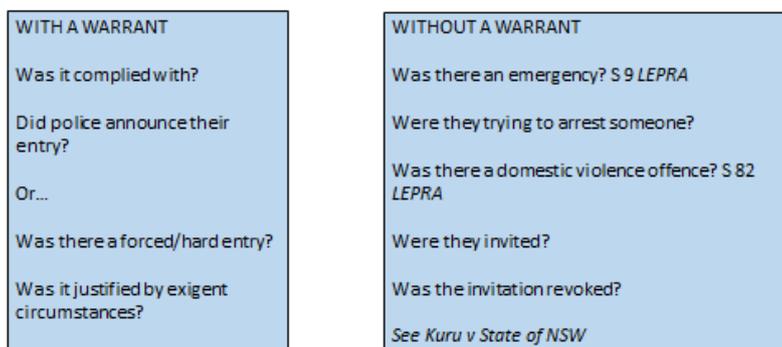


- R v O'Donoghue: out of own freewill volunteered to go to the police. But if he believes he is not free to leave or the police induced that belief that he is a suspect. He may be held to be under arrest
- DPP v Carr: arrest is to be used of last resort because it interferes liberty. Ex. In minor offences.

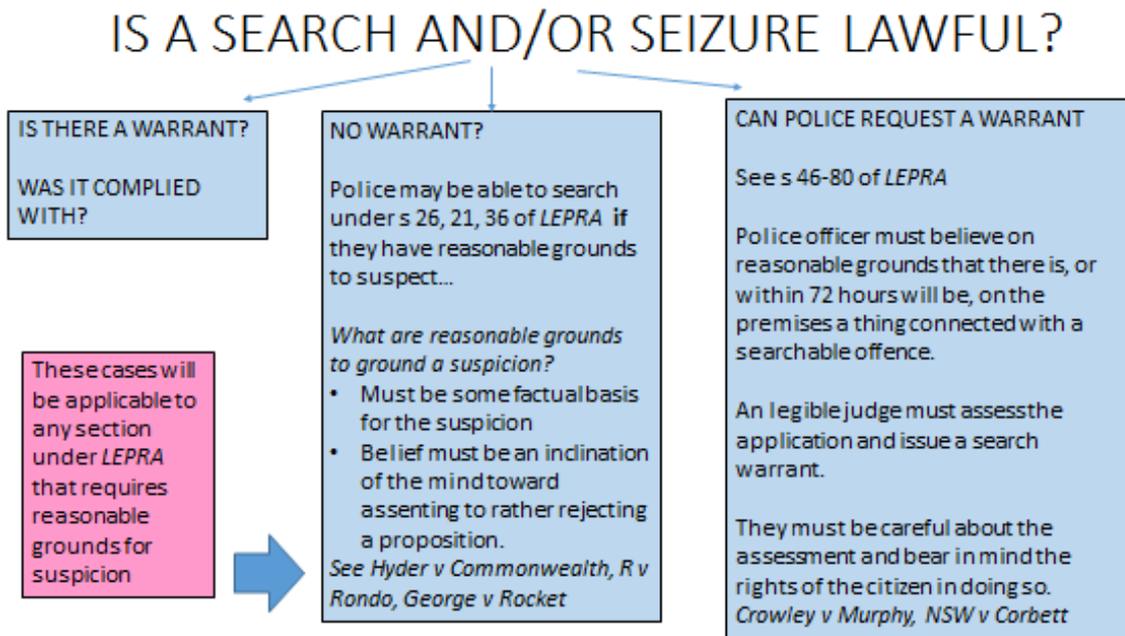
WHO can carry out an arrest?

- Police
  - o With a warrant – s 181 of the Criminal Procedures Act 1986 NSW
  - o Without a warrant – s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002*
- Citizens without a warrant
  - o s 100 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

IS A POLICE ENTRY ONTO PRIVATE PROPERTY LAWFUL?



II. SEARCH AND SEIZURE



- R v Rondo: police saw a young adult driving a smart car. Police stopped him and searched the car. Glove compartment showed that there were drugs in it. It was held that these were not enough to constitute reasonable grounds to conduct the search without warrant.

