

# LAWS1021: Crime and the Criminal Process

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- Sentencing judges encouraged to quantify effect of plea on sentence insofar as they believe appropriate to do so – may encompass any or all matters to which plea is relevant including contrition, witness vulnerability and **utilitarian value**.
  - Where other matters regarded as appropriate (e.g. assistance to authorities), a single quantification will often be appropriate.
- Utilitarian value of plea to criminal justice system generally assess in range of 10-25% discount on sentence.
- Primary consideration is **timing of the plea** – what is regarded as ‘early’ will depend on circumstances and is matter for sentencing judge determination.
- In some cases, plea and other factors will change nature of sentence imposed – may lead to no discount.

These principles were also reaffirmed in *Borkowski*, where it was held that the trial erred by allowing a full 25% discount to a defendant who entered a plea of guilty on arraignment.

- In *Thomson v Houlton*, in relation to discount for utilitarian value of plea, Chief Justice provided two circumstances which generally effect appropriate level of discount in particular case:
  1. **Time at which plea is entered** – plea entered at committal has significant utilitarian benefit compared to plea entered at first listing, which is more beneficial than plea entered at beginning of trial.
  2. **Complexity of issues** about which evidence will have to be gathered/adduced affects the value of the plea – greater the difficulty of assembling the relevant evidence and the greater the length/complexity of the trial, the greater the utilitarian value of a plea.
- However, statements by trial judge to prosecutor failed to reflect the first consideration about time.
  - Judge applied regional practice adopted in his court (Penrith District Court) whereby maximum discount was available when plea came at arraignment regardless of when that occurred or whether there were committal proceedings in the Local Court. Hence, **insufficient consideration given to true utilitarian value of plea**.
  - While regional practices encouraged for case management and other issues, cannot be founded upon rewards for compliance such as sentencing discounts which are inconsistent with State law.
- Outlined some relevant principles (including those set out in *Thomson*):
  - Utilitarian discount not affected by considerations other than timing, complexity/length of trial – i.e. does not consider saving witnesses from giving evidence or post-offending conduct.
  - Does not take into account strength of prosecution case.
  - No component in discount for remorse, nor is there a separate discount for this.
  - Utilitarian value considered separately where multiple offences
  - Some offences so serious that no discount given
  - **The amount of discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise** (applied in this case).

### **BD (2001)**

#### Facts:

- The accused was stopped for a random breath test and found to be driving a vehicle containing 27,180 Sudafed tablets and various other ingredients and equipment for use in the manufacture of methamphetamine.

#### Legal Reasoning (Bell J):

- The court held that acts 'leading to, preparatory to, or with a view to' manufacture illicit substances were not within the scope of the offence, as defined by the DMTA.
- In the present case, as there is no evidence that BD had actually gone beyond the mere preparation for manufacturing an illicit drug, the Crown has not satisfied their evidentiary burden.

#### Further cases:

- In *R v Spicer*, the NSWCCA found that a courier of illicit substances partway through the process of refinement into an illicit drug was not taking part in manufacture.
- Popping tablets from their blister packs may be seen as a step in the process (*Parker*)
- An accused will not be found guilty of manufacture if the process in which they are engaging cannot yield an illicit drug, though this may amount to an attempt (*R v McCoy*).

## 6.2.6 Inciting supply

Under **s 27** it is an offence to aid, abet, counsel, procure or incite a person to commit any of the indictable offences, punishable with the same maximum penalty as the offence of supply.

### **Eade (2002)**

#### Hodgson JA:

- A mere request by an addict to the addict's supplier for drugs would not normally amount to the offence of inciting (compare *Castle v Olen*).
- Incitement only occurs when a person is seeking a supply of drugs from another person not understood by the former to be ready, willing and able forthwith (immediately) to supply the drugs as sought.

## 6.2.7 Offences involving prohibited plants

Plants prohibited under **s 23** of the Act are specified in **s 3**, and include the cannabis, coca, opium poppy, oriental poppy or Persian poppy plants.

- It is an offence to cultivate, supply or possess these plants other than for authorised scientific research (**s23(4)(b)**) or as part of a police controlled operation (**s 39RA**).
- Cultivate includes planting, nurturing and harvesting plants.

#### Case examples:

- **Eager**: watering seed in order to keep it alive until planted, with the intention of producing from it fully grown plants, amounts to cultivation.

# Crime Problems Guide

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together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section, a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places.

#### **93D Mental element under sections 93B and 93C**

(1) A person is guilty of riot only if the person intends to use violence or is aware that his or her conduct may be violent.

(2) A person is guilty of affray only if the person intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.

(3) Subsection (1) does not affect the determination for the purposes of riot of the number of persons who use or threaten violence.

#### **Breakdown:**

- Riot **Actus Reus** elements:

1. 12 or more persons were present together (see notes); and
2. used or threatened to use unlawful violence for a common purpose; and
3. their conduct taken together was such that it would cause a person of reasonable firmness present at the scene to fear for their personal safety; and
4. the accused was one of those present who used unlawful violence for a common purpose.

- Affray **Actus Reus** elements:

1. The accused used or threatened to use unlawful violence towards another person; and
2. The conduct of the accused (or group taken together) was such as would cause a person of reasonable firmness present at the scene to fear for their personal safety.

- **s 93D** provides the **Mens Rea** for both offences.

- Max penalty: 15 years

#### **Notes:**

- The extended definition of 'violence' under **s 93A** is circular – violence is not restricted to conduct causing injury or damage '*but includes any other violent conduct.*'
- The mental element in **s 93D** includes a **recklessness-type** provision, as an alternative to intent, where the person '*is aware that his or her conduct may be violent.*'

In *Parhizkar* (NSWCCA), the appellant argued that he could not be convicted because the definition of riot requiring 12 people and that he was too far away from the other purported rioters. Himself and less than 12 others were on the roof but other protestors were on the ground. The appeal was dismissed.

- **Price J** held that the phrase '**present together**' (**s 93B**) should be given its ordinary meaning and it was not necessary for the prosecution to establish that the alleged participants in the riot were in close proximity, noting that 'mutual assistance' is not part of the statutory definition of riot.

In *Colosimo* three men were involved in a fight with security staff at a casino and charged with affray.

- Held it is sufficient that the persons have engaged in unlawful violence even if the specific acts committed by the individuals cannot be precisely identified.

Additionally, the **Summary Offences Act 1988** provides:

- **s 11A** – offence of '**violent disorder**', this offence is committed when (1) **three or more** persons together (2) use or threaten unlawful violence towards a person or property such as would (3) '*cause a person of reasonable firmness present at the scene to fear for [their] personal safety.*'
- **s 11A(5)** – must be proved that the accused person intended to use or threaten violence or was '*aware that [their] conduct may be violent or threaten violence.*'
- **s 11A(3)** – it is not necessary that any person of reasonable firmness was actually or was likely to be at the scene.
- Maximum penalty: 10 penalty units (\$1100) or imprisonment for 6 months.