

Police Powers

Power of Arrest

Whether X was lawfully arrested?

LEPRA establishes two preconditions that must be satisfied for a person to be arrested without a warrant (s 99(1)).

(1): Whether the police officer had **reasonable suspicion** 'that the person is committing or has committed an offence' (s 99(1)(a))?

- Reasonable suspicion must have 'some factual basis' and requires 'less than a reasonable belief but more than a possibility' (**Rondo**). This is a prospective test that considers the officer's subjective knowledge (**Rondo**).
- Here,...

Potential extras if relevant:

- 'some factual basis' (**Rondo**)
- 'may be based on hearsay material or materials which may be inadmissible in evidence'
- **Rondo**:
- trial judge: **appellant's reaching across to the passenger's side of the Supra + appearing to place something in the glovebox** (after the car was stopped) might reasonably raise a suspicion
 - held: this was borderline case but did not oppose trial judge's finding

(2): Whether the arrest was '**reasonably necessary** for any one or more of the following reasons' (s 99(1)(b))?

- (i) 'to **stop the person committing or repeating the offence or committing another offence**'
 - (ii) 'to **stop the person fleeing from a police officer or from the location** of the offence'
 - (iii) 'to **enable inquiries to be made** to establish the person's identity **if it cannot be readily established or if the police officer suspects on reasonable grounds** that identity information provided is false'
 - (iv) 'to **ensure that the person appears before a court** in relation to the offence'
 - (v) 'to **obtain property in the possession** of the person that is connected with the offence'
 - (vi) 'to **preserve evidence of the offence or prevent the fabrication** of evidence'
 - (vii) 'to **prevent the harassment of, or interference with,** any person who may give evidence in relation to the offence'
 - (viii) 'to **protect the safety or welfare** of any person (including the person arrested)'
 - (ix) 'because of the **nature and seriousness of the offence**'
 - **arrest must be conducted for a proper purpose** (**McClellan**)
 - arrest for the purpose of investigation or interrogation is unlawful
- Here, the arrest could be considered reasonably necessary' due to...

Arrest must be used a last resort (**Carr**).

- **circumstances as to whether arrest was used as last resort** (**Carr**):
 - Is it a trivial offence?
 - in Carr- arrest was for offensive language

- Do the police know who + where the person lives?
- Would a court attendance notice be sufficient?

If unlawfully arrested

Since the arrest was unlawful, must now consider: Whether the evidence should be admitted (**s 138**)?

- When evidence is obtained 'improperly', as is the case here, the court must take into account the factors set out in s 138(3) to determine whether 'the desirability of admitting the evidence outweighs the undesirability' (s 138(1)).
- Here, ...
 - the **court will take into account (s 138(3))**:
 - (a) **probative value of the evidence**
 - (b) **importance of the evidence** in the proceeding
 - (c) **nature of the relevant offence**, cause of action or defence and the nature of the subject-matter of the proceeding
 - (d) **gravity** of the impropriety or contravention
 - (e) **whether** the impropriety or contravention **was deliberate or reckless**
 - (f) whether the impropriety or contravention was **contrary to or inconsistent with** a right of a person recognised by the **International Covenant on Civil and Political Rights**
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention
 - (h) difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law

Search Powers

Whether the search was lawful (LEPRA s 21)?

A search will be legal if the police officer has reasonable suspicion that any of the circumstances set out in s 21 of LEPRA exist.

- Reasonable suspicion must have 'some factual basis' and requires 'less than a reasonable belief but more than a possibility' (**Rondo**). This is a prospective test that considers the officer's subjective knowledge (**Rondo**).
- Here, ...
 - (a) 'person **has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained**'
 - (b) 'person has in his or her possession or under his or her control **anything used or intended to be used in or in connection with the commission of a relevant offence**'
 - (c) 'person has in his or her possession or under his or her control **in a public place a dangerous article that is being or was used in** or in connection with the commission of a relevant offence'
 - (d) 'person has in his or her possession or under his or her control, a **prohibited plant or drug**'
- **A PO can seize + detain (s 21(2))**:
 - any 'prohibited drug or plant'
 - anything stolen or unlawfully obtained

- evidence for the commission of an offence
- any danger article
- A PO may require the person to 'open his or her mouth' or move 'his or her hair' if there is reasonable suspicion (**s 21A**)

Drug dogs

Whether or not the dog's conduct constituted a search?

- **Darby:**

- **search:** if the dog doesn't **know where the drugs** are or if the officer is directing the dog to search people
- **not a search:** if the dog **knows where the drugs are** (e.g if the dog puts its nose exactly where the drugs are- merely showing the police officer specifically where the drugs are)

- **Harris:**

- although dogs may incidentally but lawfully touch people, the police must take all reasonable precautions to avoid sniffer dogs making contact with anybody
 - dog touching can establish a battery
- A police officer must 'take all reasonable precautions to prevent the dog touching a person' (s 150(1)) + the officer must feel the dog under control (s 150(2))

Whether the sniffer dogs search was legal?

- sniffers dogs can be used 'to carry out drug detection' to the following persons seeking to enter or leave (s 148):
 - Premises for the consumption of liquor
 - Public place (sport, concert, artistic performance, party, parade, entertainment)
 - Public passenger vehicles
 - Tattoo Parlours
 - Any public place in the Kings Cross precinct
- **general:** officer is entitled to use a dog if s/he 'is authorised to search a person for the purpose of detecting a drug offence' (s 146(1))
- **with a warrant:** 'may use a dog to carry out general drug detection if authorised to do so by a warrant' (s 149(1))

Consent

- if persons gives consent- do not have to comply with LEPRA requirements (s 34)
- however, before consent is given the officer must prove that they are an officer, state their name + place of duty
- consent needs to be real + have substantial freedom + liberty (**S and J**)