

MLL218 CRIMINAL PROCEDURE EXAM NOTES 2019

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CRIME CLASSIFICATION/
COURT HEIRACHY/
COMMENCEMENT OF CRIMINAL PROCEEDINGS

SUMMARY OFFENCES	INDICTABLE OFFENCES
<p>S 112(2) any further offence is (unless contrary appears) to be tried in the Magistrate’s Court as a summary offence (s28 CP Act)</p> <p>S27 CP Act (2009) a charge for a summary offence is to be heard summarily...</p> <p><u>Can be heard in the absence of the accused</u></p>	<p>S 112(1) Penalty/Punishment level between levels 1 – 6 (inclusive) = to be tried in either the County Court or the Supreme Court (s160 CP Act)</p> <p>Usually first heard in the Magistrates' court for a <i>committal hearing</i>.</p> <p>The accused may then be committed to trial before a judge and jury in the County Court or Supreme Court</p> <p><u>Cannot be heard in the absence of the accused (failure to attend may result in the issue of a warrant to arrest)</u></p>
INDICTABLE OFFENCES HEARD SUMMARILY <i>(see below)</i>	SERIOUS INDICTABLE OFFENCES
<p>Must be eligible offence <i>(level 5 or 6 or CP Act Schedule 2)</i></p> <p>PLUS must satisfy procedural requirements s29 CP Act</p>	<p>s325(6) Crimes Act 1958 These are indictable offences which carry a statutory maximum sentence of five years' imprisonment or more</p>
PROCEDURE FOR IOTS: s29 CP ACT	
<ol style="list-style-type: none"> 1. Prosecutor or accused must apply to Ct for case to be heard summarily OR Ct may decide to deal with matter summarily 2. Ct must be satisfied that matter suitable for hearing summarily (seriousness of offence, adequacy of sentencing orders, D’s priors, any co-accused...)) 3. Accused must consent to matter being dealt with summarily <p>S29 CP Act - CRITERIA</p> <ul style="list-style-type: none"> ○ The seriousness of the offence including ○ The nature of the offence ○ The manner in which the offence is alleged to have been committed, the degree of organization and the presence of aggravating circumstances ○ Whether the offence forms part of a series of offences being alleged against the accused whether the offence has a racial or religious motivation. ○ The complexity of the proceeding ○ The adequacy of sentences available to the court, having regard to the seriousness of the offences and the criminal record of the accusedAny other relevant matter (Criminal Procedure Act 2009 s 29(2)). <p><i>BENEFITS OF HEARING IOTS - Less delay - Less costly (no committal, hearing quicker) - Less stress - Legal aid - Lower penalties: Max. fine for IOTS: 500 penalty units: s112A Sentencing Act 1991 (Vic) (\$77,730) - Max. term of imprisonment for IOTS: 2 years: s113 Sentencing Act 1991 (Vic)</i></p>	

MAGISTRATES COURT

TYPES OF OFFENCES (<i>Sum off, IOTS, Committal proc, warrants</i>)	PROCESS TO COMMENCE PROCEEDINGS – VICTORIA
<p>COMMON OFFENCES:</p> <ul style="list-style-type: none"> ○ Drive vehicle in unregistered in toll zone ○ Theft ○ Drive whilst disqualified/authorisation suspended/cancelled ○ Exceed speed limit ○ Unlawful assault ○ Obtain property by deception ○ Intentionally/recklessly cause injury ○ Possess a drug of dependence ○ Contravene Family Violence intervention order 	<p>s. 6 (1) A criminal proceeding is commenced—</p> <ul style="list-style-type: none"> (a) by filing a charge-sheet containing a charge with a registrar of the Magistrates' Court; or (b) if the accused is arrested without a warrant and is released on bail, by filing a charge sheet containing a charge with a bail justice; or (c) if a summons is issued under section 14, at the time the charge-sheet is signed. <p>s. 6(3) A charge-sheet must—</p> <ul style="list-style-type: none"> (a) be in writing; and (b) be signed by the informant (the PO or official who bringing charge) personally; and (c) Contain required information (name, particulars of offence etc) ...
COMMITTAL HEARINGS	SUMMONS
<p>Usually first heard in the Magistrates' court for a committal hearing. The accused may then be committed to trial before a judge and jury in the County Court or Supreme Court. Examples of indictable offences include:</p> <ul style="list-style-type: none"> · Theft · Rape · Burglary · Manslaughter · Murder (Supreme Court) · Treason (Supreme Court). 	<p>s461(2) CA : police not bound to arrest if proceedings can be brought by summons or Notice to Appear.</p> <p>s12(5) CPA : Warrant to arrest should not be issued at first instance by reg unless it is prob that the accused:</p> <ul style="list-style-type: none"> ○ will not answer a summons; or ○ has absconded/likely to abscond/ is avoiding service of a summons or ○ a warrant is required or authorized by another Act <p>Summons is particularly favored for children and young offenders. A warrant to arrest a child or young person must not be issued in the first instance unless 'the circumstances are exceptional'.</p> <ul style="list-style-type: none"> - Children, Youth and Families Act 2005 (Vic) s345 ∅ Commenced in the same manner BUT in the Children's Court
CHARGE & SUMMONS	
<p>Police may commence criminal proceedings by preparing a document called a charge-sheet and a summons - written documents.</p> <ul style="list-style-type: none"> ○ Charge-sheet = a document which alleges an offence against the accused. ○ Summons = a document that tells the accused to come to court on a particular date to answer a charge. The charge and summons are in one doc called a "Charge and Summons". <p>Less serious criminal offences are usually commenced by way of charge sheet and summons. However, a summons may be issued in relation to both summary and indictable offences.</p> <p>A summons may be issued:</p> <ul style="list-style-type: none"> ○ By police: s14(1) CP Act). Police may issue a charge-sheet and then a summons and then file both with a registrar of the Magistrates' Court within 7 days. ○ By registrar of Magistrates' Court: (s12(1) CP Act) after police have filed a charge sheet with the court 	

CHILDREN'S COURT	
JURISDICTION (s516 Children, Youth and Families Act 2005)	PROCESS
<p>Hears cases involving young people aged 10 or older and less than 18 years at time of offending.</p> <p>BUT if person has turned 19 at time their case comes to Ct, it will go to Magistrates Ct rather than Children's Ct: Children, Youth and Families Act 2005 s516</p> <p>The Children's Court hears and determine all summary charges against children (s516) and all indictable charges EXCEPT for the following 5 offences ('the 5 death offences') (s356 CYF Act 2005):</p> <ol style="list-style-type: none"> (1) murder/ attempted murder; (2) manslaughter; (3) child homicide; (4) arson causing death (5) culpable driving causing death 	<p>The Children's Court Conducts Committal proceedings into all charges against children for indictable offences (s516) and bail applications, variations et (s516).</p> <p>s356 (3) If child charged with an indictable offence, other than 5 death offences, the Court must hear and determine the charge summarily unless-</p> <ol style="list-style-type: none"> (a) before the hearing of any evidence the child objects; or (b) the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily- (matter would then go to committal proceeding)

COUNTY COURT	
TYPES OF OFFENCES	FACTS
Indictable offences (except murder, attempted murder and certain conspiracies)	<ul style="list-style-type: none"> ○ 71% cases resolved by plea of guilty ○ 8% convicted at trial ○ 7% accused found not guilty ○ Average length of criminal trial: 12 days Appeals from Magistrate's Court ○ 3,061 criminal appeals finalized
APPEALS PROCESS	
From Magistrate's Court against conviction or sentence	

SUPREME COURT (Trial)		SUPREME COURT (Appeal)
TYPES OF OFFENCES	APPEALS PROCESS	APPEALS PROCESS
Murder, treason, complex indictable offences	On points of law from the Magistrate's Court	From County Court AND Supreme Court (Trial) Interlocutory: ss295, 297 Appeal against conviction/sentence

STATUTORY POWER TO ARREST *(Common Law abolished)*

Arrest *WITH* Warrant

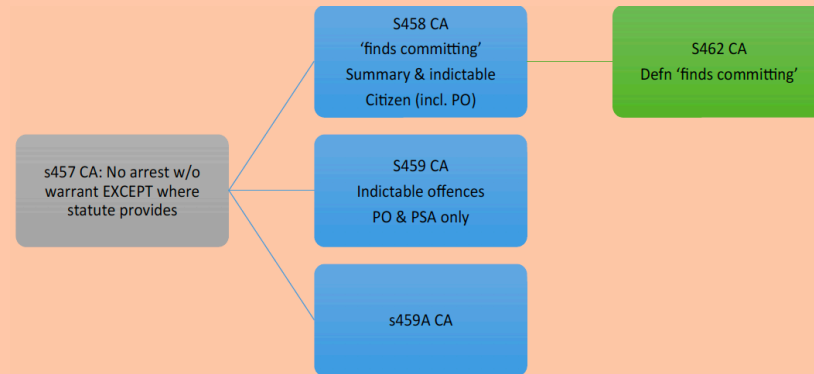
Warrant – document issued by a court which authorizes conduct that would otherwise be unlawful.

In Victoria, relevant warrants based in CP Act and Magistrates’ Court Act.

S 57 Magistrate’s Court Act Authorizes different types of warrants:

- To arrest, Remand, Search, seize property, Imprison, Detain in YTC, Infringement

Arrest *WITHOUT* a Warrant



Arrest: ss 458, 459 Crimes Act 1958 (Vic)

APPLICATION FOR WARRANT TO ARREST BY POLICE

Proceedings for summary offences and nearly all indictable offences commence in the Magistrates Court.

Magistrates Court issues warrant to arrest ‘in first instance’

1. PO applies for warrant to arrest: CPA s12(2).
2. Application must be supported by evidence on oath or affidavit: CPA s12(5).
3. After application for arrest warrant made, registrar/magistrate issues warrant to arrest or summons to appear (CPA s 12(4)).

S458 Crimes Act 1958: ‘Finds Committing Offence’ + Reason

(1) Any person, may without a warrant apprehends a person ... (any citizen PLUS PO able to carry out arrest)

- a. he finds committing any offence ...where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons:
 - i. to ensure the attendance of the offender before a court...
 - ii. to preserve public order
 - iii. to prevent the continuation or repetition of the offence or the commission of a further offence
 - iv. for the safety or welfare of members of the public or of the offender.

‘finds committing’ – De Moor v Davies [1999] (hotel manager lawfully did)

1. Caught red-handed (‘in the act’)
2. D is ‘behaving or conducting’ him/herself in such a way so as to create a reasonable belief of guilt’
3. D is in ‘such circumstances’ so as to create a reasonable belief of guilt

Limit on holding person arrested under s458

Person arrested under s458(1) in relation to summary offence shall be detained only as long as the reason for apprehension remains. If they don’t = becomes ‘unlawful arrest’

WARRANT TO ARREST – FAMILY VIOLENCE	S. 459 Crimes Act 1958
<p>In Victoria, a magistrate or registrar may issue a warrant for arrest on an application for a protection order on the basis of a reasonable belief that it is necessary to achieve certain objects, including:</p> <ul style="list-style-type: none"> o ensuring the safety of the victim and the protection of child victims; o preserving the property of a victim; or o ensuring a person’s attendance at court for a mention: <p>Family Violence Protection Act 2008 s50</p>	<p>(1) In addition to exercising any of the powers conferred by section 458 or by or under any other Act a member of the police force, or a protective services officer on duty at a designated place, may at any time without warrant apprehend any person—</p> <ul style="list-style-type: none"> • (a) he believes on reasonable grounds has committed an indictable offence in Victoria (including any indictable offence which may be heard and determined summarily) ... <p>‘Reasonable grounds’ for suspecting and reasonable grounds for believing mean: “the existence of facts which are sufficient to induce that state of mind in a reasonable person” – need factual basis for believing crime was committed (however does not need to be beyond reasonable doubt)</p> <p>George v Rockett (1990)</p> <ul style="list-style-type: none"> - An objective test (facts would give rise to belief in a reasonable person). - Reasonable ground for believing requires higher level of factual support than reasonable ground for suspicion.
CONSEQUENCES OF UNLAWFUL ARREST	RESISTING UNLAWFUL ARREST
<ul style="list-style-type: none"> • Suspect may take civil action against police and recover damages for unlawful imprisonment. Adams v Kennedy (2000); Myer Stores Ltd v Soo [1991] • Illegality of unlawful arrest may taint any subsequent admissions or confession. s138 Evidence Act; Foster v The Queen (1993) • Unlawful detention may trigger a writ for habeus corpus. Supreme Court (General Civil Procedure) Rules 2005 O 57 • If arrest unlawful, this could form basis of defence to charges of escaping from lawful custody, resisting arrest, assaulting police in the execution of their duty. R v Inwood (1973) 	<p>As a general rule, a person subject to an unlawful arrest is entitled to use <u>reasonable force</u> to free himself.</p> <p>Police v Dafov [2008]</p>

ELEMENTS OF AN ARREST

SUFFICIENT ACT OF ARREST (MUST CONVEY DEPRIVATION OF LIBERTY)

A sufficient act of arrest involves the acts and statements that must be performed by the person making the arrest to deprive the suspect of their liberty.

Words and act: a valid arrest can be constituted by police telling a suspect that s/he is under arrest and physically touching them. Words of arrest do NOT have to be technical but the loss of liberty has to be made clear.

Words alone – can constitute a valid arrest if the suspect submits. If person does NOT submit – may not be valid arrest.

Police v Thomson

- Police officer observed erratic driving by D. Stopped his car, ordered him out. D complied. Officer then informed D he was under arrest. While officer was locking D's car, D absconded. D was charged with escaping from lawful custody.
- **Key issue:** was D in lawful custody when he absconded? Supreme Ct NZ: there was **never a valid arrest because officer only used words and D did not submit. Hence, not guilty of escaping from lawful custody.**
- **The suspect must understand that they have lost their liberty – this imposes obligation on police to convey this clearly and unambiguously to suspect.**
- An arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion... Alderson v Booth [1969] 2 QB 216.
- If suspect accompanies police because they think they are doing so voluntarily, there may be no valid arrest.

R v Inwood [1973]

- D voluntarily accompanied police to station to help police with their enquiries into some thefts. After some questioning, the PO said:
- "I propose to charge you with theft... and dishonest handling" and then began formalities (preparation of charge sheet, empty pockets) and fingerprinting. D then said: 'I understand. I don't want to be awkward.' D later tried to leave and in the process assaulted 2 police officers. Charged with assaulting PO in the execution of their duty.

Issue: was D lawfully arrested? (arrest without warrant). If he wasn't lawfully arrested, he was free to leave....

Trial judge: directed jury that words of police & their actions meant that D no longer free to leave and had been adequately placed under arrest. D convicted. Appealed.

Court of Appeal: lawful arrest required that it was made clear to the D that he was under arrest. This was a question of fact – on the facts it was impossible to conclude that it had been made clear to D that he was arrested. Accordingly, the issue had been wrongfully withdrawn from jury – appeal allowed.

ARRESTEE MUST BE TOLD REASON FOR ARREST

Person being arrested must be told reason for arrest i.e. suspected offence or factual basis for arrest. Also see Charter s21(4). Why important?

- a. Deprivation of liberty requires sufficient cause
- b. Gives suspect chance to explain innocence
- c. May give suspect justification to lawfully resist arrest
- d. Prevents police from arresting on vague, general suspicion
- Failure to inform the suspect of the reason for arrest could make the arrest unlawful.

Christie v Leachinsky [1947]: General Principles (Viscount Simon)

1. Arrest without warrant - PO must 'in ordinary circumstances' inform suspect of the true ground of arrest.
2. If suspect not informed and arrested, PO liable for false imprisonment.
3. Requirement to inform does not exist if suspect 'must know the general nature of the offence for which he is detained'.
4. Requirement that suspect be informed does not require technical or precise language.
5. Suspect cannot complain that he was not informed of reason for arrest if he produces the situation which makes it practically impossible to inform him.

Exceptions

- 'Caught red-handed': Christie v Leachinsky [1947].
- 'Important to secure violent criminal': Christie v Leachinsky [1947].
- NB: If circumstances exist which may excuse the requirement to inform of reason for arrest, PO still has duty to give the information to the person being arrested at the first reasonable opportunity after the arrest: Christie v Leachinsky [1947].

Failure to inform: Adams v Kennedy (2000)

- Adams was in front garden; police officer asked him to come to station to discuss incident earlier that day involving a car. Adams declined (and, according to PO, threatened assault).
- PO later returned with other officers and went to front door of Adams home- he refused to let them in. Violent altercation followed in which Adams sustained severe injury to his shoulder due to force employed while he was being handcuffed. Adams charge with assaulting police and resisting arrest.

Charges dismissed - court found that at no point did officers inform Adams why he was being arrested.

REASONABLE FORCE MAY BE USED

S. 462A of the CA provides that person making arrest may use force that is 'not disproportionate to the objective as he believes on reasonable grounds to be necessary'.

Eg – motorist runs away to avoid arrest, PO shoots him = not proportionate

- **Requires both subjective and objective elements to be satisfied:**
- **Subjective element:** actual belief of person making arrest
- **Objective elements:** 'Not disproportionate to objective' and 'reasonable grounds'
- **Slaveski v Victoria [2010] VSC 441** – must take into account the exigencies (pressures) of the moment

Factors: R v Turner (1962):

What is reasonable depends on two factors:

1. **Reasonably necessary for purpose:** He [the arrestor] is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to affect his purpose,
2. **Reasonably proportionate:** provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented...

NOTICE TO APPEAR

Introduced in Victoria by Div. 2 of Part 2.3 of the Criminal Procedure Act 2009, ss 22 - 26, existed in other jurisdictions for many years.

1. **Primary purpose:** to provide an efficient, speedy mechanism to bring a person to court in a reasonable period of time after an alleged offence is detected.
2. Person is given a document, telling them of offence, other matters and date they have to come to court.
3. Usually issued 'on the spot' or soon after an offence detected.
4. Gets a person before a court more quickly than if a summons had been issued – effectively an implied summons procedure
5. Used for less complicated matters *eg simple traffic offences*.

Notice to Appear: CP Act (Vic) ss21-26

Who can issue a notice to appear?

- Police & other govt officials

What types of alleged offences it can be given for?

- Summary offences & indictable offences triable summarily

How the offence(s) are described?

- Offence must be described as well as circumstances

What information the notice must contain?

- name of PO, date & time person must appear in ct

How it must be given?

- hand it to D or put it down in his/her presence

What does it contain?

- directs person to appear at Mag Ct on specified date (at least 28 days after service)

Does a NTA commence a criminal proceeding?

- No – NTA + charge-sheet+ evidence of service must be filed with registrar of Mag Ct within 14 days of service of NTA (if not, lapses)

REQUESTING NAME AND ADDRESS DETAILS s456AA Crimes Act 1958

o police can require a person to state his/her name and address if they believe on reasonable grounds that the person has committed or is about to commit an offence (indictable or summary); or may be able to assist in the investigation of an indictable offence.

S 59 Road Safety Act 1986

o Driver/person in charge of motor vehicle must state name, address, produce licence when requested to do so by police.