

TOPIC 3: SEARCH AND SEIZURE

Chapter 6: Search, Seizure, Forensic Procedures and Fingerprinting

Introduction

- **Police have a common law power upon arrest to search people and the possessions and the area within their immediate control**
- This is to allow police to find implements that may be used to harm the arrestor or arrestee, effectuate an escape and to find and secure evidence before it is lost, concealed or destroyed
- This power only applies where there has been a lawful arrest
- **The Charter of Human Rights and Responsibilities Act**
 - S 21(1): every person has the right to liberty and security
 - S 13(a) person has a right 'not to have his or her privacy, family, home or correspondence, unlawfully or arbitrarily interfered with
 - S 20 a person must not be deprived of his or her property other than in accordance with law

Entry onto Land to Search and Arrest – Search of Land and Premises

Consent

- Common law rule states that you cannot enter someone's property without consent (can be occupier not just the owner)
 - Express consent
 - Implied consent
- **Express consent**
 - Warrantless arrest: no force can be applied
 - Arrest with warrant: reasonable force can be applied
- **Implied licence to enter:**
 - Premises up to the front door, if no signs and/or locked gate:
 - **Halliday v Neville**
 - **Issue: was the arresting police officer trespassing on the time of the arrest**
 - This is dependent on whether the PO had an implied license to enter
 - **Held: if it was an open driveway with no signs or obstructions, then there is an implied licence**
 - **The license is broad enough in scope that the PO can carry out their duty without trespassing**
- **Express consent may be revoked**
 - If it involves entry to property, the occupier must give police reasonable time to leave the premises (unless right can be based on other authority)
 - **Nicholson v Avon**
 - **Noise complaint occurred**
 - **PO arrived at the house and asked to come in**

- Occupier said they could enter but then quickly changed her mind and ordered them to leave
- PO refused to leave and asked her of her name and address
- The lady refused and the PO arrested her as a result of this and took her to the station
- HELD: even though she revoked her consent, the power to enter the property can be based on the common law power to enter and search and stop the breach of peace
 - Thus, the police relied on this common law power and the admission was lawfully obtained
- Implied licence to enter can be expressly or impliedly revoked;
 - ; if so, a person who enters, or remains on, the property trespasses (if they don't otherwise have legal authority)
 - Plenty v Dillon; Robson v Hallett

Entry to Premises to Arrest without a Warrant

- See page 24 for more information
- S 459A of the Crimes act codifies the entry and search of premises without a warrant

CRIMES ACT 1958 - SECT 459A Entry and search of premises

(1) A police officer may, for the purpose of arresting under section 458 or 459 or any other enactment a person whom he—

(a) **believes on reasonable grounds—**

(i) to have **committed in Victoria a serious indictable offence;**

(ii) to have committed an offence elsewhere which if committed in Victoria would be a serious indictable offence; or

(iii) to be **escaping from legal custody;** or

(b) **finds committing a serious indictable offence—**

enter and search any place where the police officer on reasonable grounds believes him to be.

(2) In order to enter a place pursuant to subsection (1), a police officer may, if it is necessary to do so, **use reasonable force.**

(3) In this section serious indictable offence has the same meaning as it has in section 325.

Entry to Premises to Arrest with a Warrant

- Authority to conferred by warrant to arrest
- An arrest warrant authorises police to break, enter and search any place where the person named in the warrant is suspected to be and to arrest the person named or described in the warrant → **section 64(1) Magistrates' Court Act 1989 (Vic).**

Search of a Person and Possessions

Types of Body Searches – Personal

- **Ordinary search** – PO may examine suspect and items in suspect's possession – CANNOT request clothing to be removed. Involves emptying the suspect's pockets, searching anything carried or worn by the suspect as long as it does not involve the removal of the suspect's clothing (strip searching); also permits the patting down or running of the hands over the outer clothing of the suspect (frisk search)
- **Pat down search / frisk** – PO may use their hands to feel over the outside of clothes. PO can ask person to empty their pockets, display inside of bag, remove their external jacket or jumper, hat, gloves- can take off a top layer of clothing
- **Strip search** - A search of the person that may include requiring the person to remove clothing, search/examination of outside of body and inside of mouth (but not of the person's other body cavities) and of those clothes and things in possession of person
 - **External examination of the body that requires removal of clothing is under ss 464 and 464R-T of Crimes Act**
 - a strip search power is also contained in ss 219L -219ZE of the Customs Act

1. Search by Consent

- Common law gives police a power to search
- Consent must be genuine – not obtained by deception → *R v Jamieson [2003]*.
- An individual has the right to not give consent
 - They then do not have any authority or power to search you – unless they have a warrant
- Onus of proving consent is on prosecution, on balance of probabilities: *R v Meyers (1987)*.
- Victoria Police Manual recommends that police obtain a signed authority from the person consenting to the search, including details of the police officer who conducted the search.

1. Common Law Search Upon Lawful Arrest

- A person who has been arrested may be searched as part of the exercise of arrest
- this appears to apply for arrest for summary and indictable offences
- **a search may be necessary to:**
 - Find/preserve items of evidence indicating suspect is guilty of offence e.g. housebreaking implements: *Bessel v Wilson (1853)*
 - Seize weapons or implements which could be used to escape: *Leigh v Cole (1853)*
 - Prevent the suspect harming self, police or others while in custody: *Lindley v Rutter [1981]*
 - “What measures are reasonable in the discharge of this duty [of search pursuant to arrest] will depend upon the likelihood that the particular prisoner will do any of these things [“not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime”] unless prevented.”
- **DPP V Tupper**
 - PO arrived at T's house and searched his home for stolen goods
 - They had a warrant
 - They placed him under arrest

- At some point, T informed them he needed to go to the toilet, but the PO told him to pee against the fence
- PO said he looked suspicious whilst adjusting his underpants and assumed that he might be concealing drugs
- Accused also had trouble going to the toilet
- PO contacted snr sergeant to conduct a strip search → the permission was grounded
- Strip search led to the finding of drugs
- It was stated that the drugs were inadmissible due to the unlawful strip search
- This decision was appealed and granted:
 - “In all cases the appropriate balance must be struck between observing a person’s privacy and dignity, on the one hand, and the duty to ensure safety and the preservation of evidence, on the other. But given that the range of possible circumstances in which a search might need to be conducted on an arrested person is impossible to predict and almost limitless, it is inadvisable to impose arbitrary limits which must apply in every case on the specific means by which the safety and evidence search power may be exercised.”
 - “Despite the fact that in none of the reported cases [e.g. *Lindley v Rutter*] has a court approved a search that involved the removal of underclothing, I do not interpret authority as laying down any principle that the common law power of search can never extend to that degree. **To the contrary.**”
- **Police must provide arrestee with a reason for the search**
- **Brazil v Chief Constable Surrey**
 - **Facts:** PO took Ms. Brazil from pub to police station.
 - She complied with request to empty handbag & pockets but refused search (she was told it was for ‘safety’), she hit PO.
 - PO formed suspicion on reasonable grounds that D in possession of prohibited drugs, told her she had to be searched but did not tell her why (2nd search).
 - Forcible search, D assaulted another PO.
 - D was charged with two counts of assault.
 - **HELD: Court of Appeal (England) held that both searches were unlawful:**
 - **Search 1: PO relied on general policy, did not consider appropriateness to this case**
 - **Search 2: police did not inform D of reason for search. Just as D must be informed of reason for arrest, must also be informed of reason for search**
- **Cloutier v Langlois**
 - A lawyer was stopped by police who discovered that a warrant had been issued against him for unpaid traffic fines
 - Police carried out a frisk search prior to placing Cloutier in the police car
 - This involved putting C’s hands on the bonnet of the police car while his legs were spread, and his body was patted down
 - C instigated a private prosecution for assault
 - This was dismissed by CA
 - **COURT HELD: searches consequent to lawful arrests are valid, provided they are conducted in order to achieve one or more of the objective set forth above. Police need not have reasonable suspicion that such a search is necessary to further one or more of the above objectives, although they must have some basis for conducting the search**
 - The search must be as minimally invasive as possible and should be limited in scope by the above factors which serve to justify it

- Thus, while pockets can be searched, no clothing can be removed, and no physical force can be applied
- This type of search as explained above is often referred to as an ordinary search
 - It is limited in scope to a search of the person as well as the area and possession within his or her immediate control
- Thus, if an arrestee is in a police car and handcuffed, this type of search cannot extend to any area or possession that is not realistically within the suspect's reach,
 - it can only be for the purpose of:
 - uncovering items that could be used to harm someone
 - conceal or destroy evidence of a crime
 - or effectuate an escape from lawful custody
- **what items can be seized?**
 - Search pursuant to arrest allows seizure of items 'in the possession' or 'under the control' of D as evidence tending to show the guilt of D: *Elias v Passmore*
- **Jeffery v Black**
 - D stole sandwich from pub; taken to police station and charged.
 - Before being on bail, PO told him they were going to search his lodgings.
 - D took them to the premises where he boarded, opened his room and PO searched
 - Found cannabis & charged him with 2 further offences.
 - Trial CT found D not guilty of drug offences because search unlawful è evidence illegally obtained.
 - Appeal by prosecution.
 - **Held: search of D's room was unlawful – no consent, no warrant and the lawful arrest did NOT give police power to search D's room (at another location from crime) for evidence relating to another offence.**