

*CRIME AND THE
CRIMINAL
PROCESS NOTES*

Semester 1 2018

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Week 6B: Powers of Arrest

- A defendant comes before a criminal court in one of three ways
 - o By arrest without warrant
 - o By arrest under warrant
 - o In response to a summons or more technically now 'a court notice'

ARREST AS A LAST RESORT

- The consequences of arrest are more significant and potentially punitive than those of being summonsed:
 - o forcible removal to a police station, detention there for some period of time, searching, fingerprinting, interrogation by the police
- Even if the accused person is subsequently acquitted, the whole process of arrest involves the assertion of police authority and control which may entail physical violation and engender humiliation, shame and discomfort
- Arrest is at least in part, in itself, punitive and disciplinary
- *Lake v Dobson* (1981) 5 PS Rev 2221
 - o 'Arrest, for the great majority of people, is equivalent to an additional penalty. It is a means of setting the criminal process in train which should be reserved for situations where it is clearly necessary, and should not be employed where issues of summons will suffice'
- The principle of arrest as a last resort was affirmed forcefully by the NSW Supreme Court in *DPP v Carr* [2002] NSWSC 194
 - o In that case, the DPP appealed Magistrate Heilpern's decision to dismiss the familiar series of charges (resisting arrest, assaulting police and intimidating police) against an Aboriginal man, Lance Carr
 - o The Magistrate ruled that evidence from the police officers relating to these charges should be excluded under s 138 of the *Evidence Act 1995* because it had been obtained as a result of an improper act – the *arrest* of Carr for offensive language in circumstances where it would have been appropriate to proceed by way of summons or field court attendance notice
 - o 'Thus the evidence is that at the time of the arrest officers intention as to arrest a drink, hostile, aggressive swearing man, take him by force to the vehicle and issue him with a roadside, field court attendance notice. A process not requiring immediate arrest was not chosen because it was 'far quicker to arrest and then issue a field court attendance notice'

WHAT AMOUNTS TO 'SUSPECTS ON REASONABLE GROUNDS?'

- The *LEPRA Amendment Act* introduced two tests that a police officer must meet before an arrest is lawful
- The first test is that the police officer suspects on 'reasonable grounds' that the person is committing or had committed an offence (s 99(1)(a))
- The second test is that the officer is 'satisfied that the arrest is reasonably necessary' for any of the reasons set out in 99(1)(b)
 - o Sentas and McMahon (2014) argue that "*the shift away from mandatory language that makes arrest a last resort (from 'must not arrest' to 'may arrest') reflects Parliament's intention that the statute expand police discretion*"

- Reasonable suspicion – very important: *R v Rondo* [2001] NSWCCA 540
 - Key principles that you can test against reasonable suspicion
 - A reasonable suspicion involves *less than a reasonable belief but more than a possibility*. There must be something which would create in the mind of a reasonable person an apprehension or fear of the state of affairs covered by s 357E.
 - A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence
 - Some factual basis for the suspicion must be shown.
 - The materials used for this factual basis must have some probative value
 - The information afforded *reasonable grounds for the suspicion* which the police officer formed in answering such a question, must have regard to the source of the information and its content

s 99 Power of police officers to arrest without warrant

(1) A police officer may, without a warrant, arrest a person if:

(a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and

(b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

- 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.

CROWD CONTROL AND PUBLIC DISORDER

- The imperative of maintaining 'control' of groups of people in public places has long been a mainstay of public order laws, police powers and police practice

Riot

Riot and affray are non-trivial, serious public order offences – they attract penalties of 15 and 10 years imprisonment. They are dealt with in Part 3A, Division 1 (ss 93A - 93D) of the *Crimes Act 1900*:

- s 93A - defines violence as both to person and property. Includes cases where there was no actual injury (eg, throwing a rock and missing).
- s 93B - deals with riot offences (where there are 12 or more people):
 - o Where 12 or more persons who are present together **use or threaten unlawful violence for a common purpose** and the conduct of them (taken together) is such as **would cause a person of reasonable firmness** present at the scene **to fear for his or her personal safety**, each of the persons...is guilty of riot and liable to imprisonment for 15 years.
- s 93C - deals with affray offences (a single person):
 - o A person who **uses or threatens unlawful violence** towards another and whose conduct is such as **would cause a person of reasonable firmness** present at the scene **to fear for his or her personal safety** is guilty of affray and liable to imprisonment for 10 years.
- s 93D - sets the mens rea requirements for both offences as **intent or recklessness**.
 - o Note: When working out mens rea for riot, the person must have intended to use violence/was reckless to the fact his conduct may be violent. For affray, the person will satisfy the mens rea requirement even if he only intended to use violence/was reckless to the fact that his conduct might **threaten** violence.
- Parkishar (2014)
 - o 'present together' given its ordinary meaning, not necessary to prove that alleged participants were in close proximity to each other

There are also offences of **violent disorder**, which are provided for in s 11A of the *Summary Offences Act 1988*:

- Where three or more persons together **use or threaten unlawful violence** towards a person or property such as would 'cause a person of reasonable firmness present at the scene to fear for his or her personal safety'.
- It must be proved that the accused person intended to use or threaten violence or was 'aware that his or her conduct may be violent or threaten violence'.
 - o This means a mens rea standard of intent or recklessness.
- It is not necessary that any person of reasonable firmness was actually or was likely to be at the scene

The maximum penalties for riot and affray were increased (from 10 to 15 years, and 5 to 10 years respectively) following significant 'social panic' following the events of the Cronulla riots.

- However, it is questionable whether increasing penalties for affray was an effective approach.

Affray

- “A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety is guilty of affray and liable to imprisonment for 10 years”
- *Davidson* (1992)
 - Person of ‘reasonable firmness’ is an objective standard, defined as someone that is unduly nervous
- *Colosimo* [2005] NSWSC 854
 - “elements may be satisfied where a finding is open that persons charged with affray have engaged in unlawful violence even if the specific acts committed by each individual cannot be precisely identified”
- In the past 2 decades affray has become a high volume offence charged in the thousands every year
 - 2009-2013 an average of 2955 affray charges were finalised in NSW courts every year including 3361 in 2010 and 2567 in 2013 (BOCSAR)
 - There is no evidence however that over this period there has been a marked increase in the incidence of crowd disorder
- J Sanders and E Eliot “Affray: What is it, what is it not?” (2012) 36 *Crim LJ* 368
 - ‘The offence of affray is either misapplied or, alternatively, has become a weapon of prosecutorial policy at the expense of its proper and prescribed use’
 - ‘Research suggests that in choosing offences for public order incidents, three criteria guide police discretion:
 - (1) administrative reasons
 - (2) a wish to maximise the certainty of conviction
 - (3) a wish to maximise the severity of sentence awarded

Political Marches and Protests

- Peaceful assembly
- The rights of citizen to hold public meetings and processions (often referred to as the right of peaceful assembly) is generally regarded as of fundamental importance in a democratic society
- In Australia, in the absence of constitutional or legislative protection of the right to peaceful assembly, it is necessary to turn to the common law, although the common law often employs the language of “rights”, although it provides no positive guarantee of the right of persons to assemble in a public place, or participate in a public procession, for political or other purposes
- In NSW the move-on powers contained in LEPR Pt 14 cannot be used in relation to “(a) an industrial dispute, or (b) an apparently genuine demonstration or protest, or (c) a processions, or (d) an organised assembly” (s200)
 - By contrast in Victoria move-on powers have recently been expanded to allow them to be used to manage political protests
- Unlawful Assembly
- Unlawful assembly is defined by s 545C(3) as “any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to

do what the person is not legally bound to do or to abstain from doing what the person is legally entitled to do”

- Organisers of a public assembly or procession may seek prior “authorisation” of their proposed event by notifying the Police Commissioner in writing (a form) of the details, including matters such as time, date, venue, anticipated numbers of participants and purpose
- Where notice is timely (at least 7 days in advanced) the Police Commissioner may inform the organisers that they “do not oppose” or may go to the Supreme Court to apply for an order prohibiting the holding of the assembly
 - o The SC will consider the rights of citizens to enjoy the freedom of demonstration but also the freedom of citizens to feel safe
- The benefit of receiving authorisation is that, if the public assembly is held substantially in accordance with its notified plans, under s 24
 - o “A person is not, by reason of anything of anything done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place”
- *Commissioner of Police v Langosch* [2012] NSWSC 499
 - o Protest for the day Palestinians were disposed from Israel
 - o Was going to be at Town Hall square during the peak hour evening traffic
 - o Judge said yes the fact that the protest and its nature and location and time will have an impact on people trying to get home
 - o Although denied the police officers was because the protest was held at that day and time because that was the actual date of the dispossession and were doing it at that time in that location to facilitate as many people as possible to join in

ANSWERING LEGAL PROBLEM QUESTIONS

How to answer an issue in a paragraph LOOK AT LECTURE SLIDES W6B BLUE BLUE RED

M – Material facts

Up to that point

I – Issue

Based off of the facts where does an issue arise?

R – Relevant authority

A – Apply facts to legal rules/tests

How do the facts and the rules work or don’t work

C – Conclusion

Public Order Flow Chart

