

LAWS1021 Crime and the Criminal Process Problem Question Notes

Bail

Bail is defined in s7 of the Bail Act 2013 as the authority to be at liberty for an offence. Section (c) of the Preamble outlines the common law presumption of innocence. However, given this is in a preamble and has deliberately been moved out of the purpose section (s3) of the Act, it is understood that the right to be at liberty is weakened. This must be considered when making any decisions concerning bail. The four bail decisions that can be made are set out in s8(1).

- (a) Release without bail for the offence.
- (b) Dispense with bail for the offence.
- (c) Grant bail for the offence (with or without conditions).
- (d) Refuse bail for the offence.

A court will rarely hear the same application for bail again. There are only a few grounds:

- (a) No legal representation in the first application and now they are represented.
- (b) Material information was not presented in the first application.
- (c) Relevant circumstances have changed since the first application.
- (d) The person is a child.

Certain offences require the accused to 'show cause' before a bail hearing is proceeded with. These offences are outlined in s16B(1). These include:

- (a) An offence punishable by life imprisonment.
- (b) A serious indictable offence involving:
 - a. Sexual intercourse with a person under the age of 16 (where accused is over the age of 18).
 - b. Infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 (where accused is over the age of 18).
- (c) Serious personal violence offence if accused has been previously convicted of a serious personal violence offence.
- (d) Any of:
 - a. Serious indictable offence that involves use of firearm.
 - b. Serious indictable offence that involves use of firearm in public place.
 - c. Serious indictable offence that involves acquiring, supplying, or manufacturing a firearm.
- (e) Any of:
 - a. Serious indictable offence involving use of military-style weapon.
 - b. Indictable offence involving possession of military-style weapon.
 - c. Serious indictable offence involving buying, selling, or manufacturing military-style weapon or selling, on 3 or more occasions, any prohibited weapon.

- (f) An offence under DMTA that involves cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant.
- (g) An offence under Cth Criminal Code that involves cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant.
- (h) Serious indictable offence committed whilst:
 - a. On bail
 - b. On parole
- (i) Indictable offence or failing to comply with supervision order by person under supervision order.
- (j) Serious indictable offence of attempting to commit offence under this section.
- (k) Serious indictable offence of assisting, aiding, abetting, counselling, procuring, soliciting, being accessory to, encouraging, inciting, or conspiring to commit an offence under this section.
- (l) Serious indictable offence committed whilst subject of arrest warrant.

Here, ... committed the show cause offence of ... This requires ... to show cause why their detention is not justified. To show cause, circumstances which demand the accused's presence away from detention are required to be brought to the courts attention. For ..., these would include ... A court would likely interpret these to be ... Hence, a court would likely *accept/not accept* the accused's reasons for bail consideration.

A court must refuse to grant bail if during an assessment of bail concerns, there arises an unacceptable risk (s19) (Lago/Hawi). A court must assess the bail concerns set out in s17.

- (a) Fail to appear at any offence proceedings.
- (b) Commit a serious offence or endanger safety.
- (c) Interfere with witnesses or evidence.

In the consideration, the court must consider the matters outlines in s18. The particularly relevant matter in this case include:

- (a) The accused's background, criminal history, circumstances, and community ties.
- (b) Nature and seriousness of offence.
- (c) Strength of prosecution case.
- (d) Accused's history of violence.
- (e) Whether the accused has committed a serious offence while on bail.
- (f) Accused's history of compliance or non-compliance, including any warnings of non-compliance with:
 - a. Bail acknowledgement
 - b. Bail conditions
 - c. AVO's
 - d. Parole orders
 - e. Good behaviour bonds
 - f. Intensive correction orders
 - g. Home detention orders
 - h. Community service orders
 - i. Non-association and place restriction orders

- j. Supervision orders
- (g) Criminal associations.
- (h) Length of time the accused will spend in custody if bail is refused.
- (i) Likelihood of custodial sentence after successful conviction.
- (j) Likelihood of success of appeal if matter is on appeal.
- (k) Special vulnerability including because of youth, ATSI, impairments.
- (l) Need to be free to prepare for court.
- (m) Need to be free for any lawful reason.
- (n) Conduct of the accused towards victim and family of victim after the offence.
- (o) For serious offence, views of victim, or victim's family, held by accused which could endanger safety.
- (p) Bail conditions that could be imposed to address bail concerns.
- (q) Association with terrorist organisations.
- (r) Statements or activities in support of terrorist organisation.
- (s) Association with person or group in support of terrorist organisation.

Here, the circumstances which would warrant an assessment of release include ...

The circumstances which warrant an assessment of refusal of bail include ...

Taking these into account, ... *presents/does not present* an unacceptable risk. This is because

...

Therefore, bail must be *granted/refused*.

If granted, the court would likely impose bail conditions under s20A. Here, these would likely take the form of conduct requirements. Some examples of conditions which may be imposed in this case include:

- Reporting to police every day
- Living at a specific address
- Surrendering passport
- Not associating with certain people
- Not going within a distance of a certain place
- Obeying a curfew

Police Powers

Move on Powers

The issue is whether the police exercised their move on powers lawfully.

The police lawfully exercised this power if they followed the conditions in LEPR: A:

- 1) They identified themselves and provided reasons for the direction BEFORE giving the direction (s202)
- 2) They warned the person that they are required to comply with the direction (s203)
- 3) They believed on reasonable grounds that the person's behaviour satisfied a condition in s197(1)
 - a. The test for reasonableness is in Rondo. The information to be considered is that in the mind of the police officer given the circumstances.
- 4) The direction is reasonable in the circumstances for the purposes in s197(2)

1. Here, the police *did/did not* identify themselves to ...
2. They subsequently *did/did not* warn ... of the need to comply.
3. The belief for giving the direction was that the person's behaviour:
 - (a) *Is obstructing another person or persons or traffic*
 - (b) *Constitutes harassment or intimidation of another person or persons*
 - (c) *Is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness*
 - (d) *Is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug*
 - (e) *Is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.*

Note: Persons referred to in the above need not be in the place but must be near the place during the time of the conduct (s197(3)). No person of reasonable firmness in (c) need actually be, or be likely to be, present at the scene.

Here, the information includes...

Therefore, the suspicion *was/was not* more than a possibility and *was/was not* arbitrary.

Therefore, the police officer's belief *was/was not* on reasonable grounds.

4. The direction was given for the purpose of:
 - (a) *Reducing or eliminating the obstruction, harassment, intimidation or fear*
 - (b) *Stopping the supply, or soliciting to supply, of the prohibited drug*
 - (c) *Stopping the obtaining, procuring or purchasing of the prohibited drug.*

The direction was reasonable in achieving this purpose since ...

Therefore, a court would likely find that the police *did/did not* lawfully exercise their power under s197.

Powers of Arrest

The issue is whether the arrest without warrant was lawful.

The common law principle is arrest should be a last resort (DPP v Carr).

The police lawfully exercised this power if they followed the conditions in LEPRA:

- 1) They suspected on reasonable grounds that the person is committing or has committed an offence (s99(a)).
 - a. The test for reasonableness is in Rondo. The information to be considered is that in the mind of the police officer given the circumstances.
- 2) They are satisfied that the arrest is reasonably necessary for one or more of the reasons in s99(b)
 - a. Reasonableness test in Rondo.
- 3) Used such force as is reasonably necessary to make the arrest or to prevent the escape of the person after the arrest.

1. Here, the offence *committed/being committed* is ...

Here, the information includes...

Therefore, the suspicion *was/was not* more than a possibility and *was/was not* arbitrary.

2. The reason for the arrest is:

- (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.

Note: A police officer may arrest if directed to by another police officer who satisfies the above tests.

The police officer believed the arrest would achieve the purpose because ... Therefore, the belief *was/was not* more than a possibility and *was/was not* arbitrary.

3. The reasonable force is the minimum amount of force appropriate for the safe and affective performance of duties and proportionate to risks faced (NSW Police Force Handbook).

Here, the force used involved ... This *was/was not* required because ... Therefore, there *was/was not* alternate methods, using less force, to achieve the same result.

Therefore, a court would likely find that the police *did/did not* lawfully exercise their power under s99.

Powers to Detain and Interview

The issue is whether the detention was lawful.

The police lawfully exercised this power if they followed the conditions in LEPRA:

- 1) Detention for investigating the offence for which they are arrested (s114(2)).
 - 2) If a reasonable suspicion arises as to the person's involvement in another offence (s114(3)).
 - a. The test for reasonableness is in Rondo. The information to be considered is that in the mind of the police officer given the circumstances.
 - 3) The investigation period is 4 hours unless extended by a detention warrant.
 - 4) The person must be released within the investigation period *or*
 - 5) The person must be brought before a court within the investigation period or if it is not practicable to do so, as soon as practicable after the end of that period.
1. The offence under which ... has been arrested is ... The PO *is/is not* detaining the person for this same offence.
 2. The PO suspects the offence committed by ... to be ... The detention *is/is not* for this same offence.

Here, the information includes...

Therefore, the suspicion that ... was involved in ... *was/was not* more than a possibility and *was/was not* arbitrary.

3/4. The PO *released/did not release* ... within 4 hours. There *was/was not* an extension given to the detention period.

3/5. The PO *brought/did not bring* ... before a court within the investigation period.

Therefore, a court would likely find that the police *did/did not* lawfully exercise their power under s114 and s115.

Powers to Search

The issue is whether the search was lawful.