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CRIMINAL PROCEDURE

All statutory provisions mentioned are from the Crimes Act 1958 (CA).

ARREST

[D] has a right to liberty and should not face arbitrary arrest or be deprived of their liberty (s21 Charter). Any deprivation of liberty must occur solely on established grounds and in accordance with the procedures set forth by the CA. OTF, the police arrested D for [name of offence].

Arrest with a warrant

Issue of arrest warrant

Generally, no person shall be arrested without a warrant (s457). For a warrant to be issued, certain conditions must be met. Upon the filing of a charge sheet (s6 CPA), an application may be made to the registrar of the Magistrates' Court for the issuance of a summons or an arrest warrant. The registrar must issue a summons or warrant to arrest if satisfied that the charge discloses an offence (s12(4) CPA). However, the registrar must not issue a warrant unless satisfied by sworn or affirmed evidence, whether oral or by affidavit, that:

- It is probable that D will not respond to a summons (s12(5)(a) CPA).
- D has absconded, is likely to abscond, or is evading service of an issued summons (s12(5)(b)).
- A warrant is required or authorised by any other Act, or there is other good cause (s12(5)(c) CPA).

If the accused fails to appear when required, the Magistrates' Court may issue a warrant for their arrest (s80-81 CPA).

Content of warrant

A summons or warrant must include a copy of the charge sheet, a notice that contains a summary of charges, advice that D should seek legal advice and contact details for Victoria Legal Aid (s13 CPA). The warrant may also specify that D be released under certain bail conditions (s62 MCA).

Executing a warrant

A warrant may be directed to a specific police officer or PSO (s63).

A warrant to arrest authorises the officer to:

- Break, enter, and search any place where D is suspected to be (s64(1)(a) MCA).
- Arrest D (as named or described in the warrant) (s64(1)(b) MCA).

Police officers must ensure that D is:

- Brought before a bail justice or the Court within a reasonable time after being arrested (s64(2)(a) MCA).
- Released on bail in accordance with the conditions specified in the warrant (s64(2)(b) MCA).

Arrest without warrant

By any person

D will argue that they were unlawfully arrested by [police/Y] when...

Any person has the power to arrest under s458. However, for such an arrest to be lawful, it must fall within one of the three specific situations s458.

OTF, [police/Y]

- found [D] committing an offence +
 - doing any act' by [holding a boxcutter]
 - so behaving by [standing over the victim]in a manner that would allow the [citizen/PSO/PO] to believe, on reasonable grounds, that [D] is guilty of an offence (s462)
- 'find committing' does not require [D] to be caught red-handed – it's enough D is engaging in conduct or found in circumstances which lead PO to believe that on reasonable grounds [D] has committed an offence.
- and believe on reasonable grounds that their apprehension is needed to (s458(1)(a))
 - ensure the attendance of [D] before a court.
 - preserve public order
 - prevent the continuation or repetition of the offence or the commission of a further offence.
 - For the safety of the public or [D].
- were instructed to do so by a police officer (s458(1)(b))
- believed on reasonable grounds [D] is escaping from legal custody or helping someone else do so (s458(1)(c))

On balance, it is likely/unlikely that the arrest was lawful under section 458. Even if [D] did not actually commit the alleged crime, the apprehension may still be considered lawful, as the belief was formed on reasonable grounds (s461(1)).

By police officer / PSOs

In addition to the powers granted under s458, [police] possesses further powers to arrest for indictable offences that are not subject to the criteria in s458. A police officer or protective services officer (PSO) may, without a warrant, apprehend an individual whom they believe on reasonable grounds:

- Has committed an indictable offence in VIC (s459(1)(a))
- as committed an offence elsewhere which if committed in VIC would be indictable (s459(1)(b)).

Note, all offences under the CA are unless the contrary intention appears deemed to be indictable offences (s2B).

PSOs can only exercise this power when [D] is at, or in the vicinity of a designated place (s459(2A)).

Even if [D] did not actually commit the alleged crime, the apprehension remains lawful as the belief was formed on reasonable grounds (s461(1)). Since the arrest was made by a PSO, they must transfer the offender to the custody of a police officer as soon as practically possible after the arrest (s459(2)).

Use of force

[Y/police] may use force that is proportionate to their objective, based on a reasonable belief that such force is necessary to prevent an offence or to effect the lawful arrest of an individual suspected of committing an offence (s462A). OTF, the force used by [PO/PSO/citizen] to:

- prevent the [commission/continuance/completion] of an indictable offence;
- effect the lawful arrest of [D] (who [was/was suspected of] committing an offence);
- assist in effecting the lawful arrest of [D] (who [was/was suspected of] committing an offence)

was not disproportionate on reasonable grounds because [reason – D was resisting arrest/PO needed to bend D's arm to prevent D from hurting someone else] (s462A).

However, [D] will argue that the force was disproportionate because [reason – D dropped a weapon/facts do not indicate D intended to complete a further indictable offence/D cried out in pain].

- There does not appear to be an obvious alternative use of force that could have been applied in place of [bending D's arm].
- Perhaps [insert alternative force, e.g., a slight pinch on the wrist would have been sufficient].

Therefore, s462A is [likely/unlikely] to have been breached. These facts are [comparable/distinguishable] from the example provided under s462A concerning a police officer using lethal force to prevent a person from committing an indictable offence that involves causing serious injury or death.

Entry & search of premises

- PSOs or citizens have no general power to enter or search private premise to implement a warrantless arrest.
- Based on these facts, the police have obtained an arrest warrant for [D]. Arrest warrants grant the authority to break, enter, and search any place where [D] is suspected to be located (s64(1)(a) MCA).

When a police officer arrests a person whom they believe, on reasonable grounds, has committed or is in the process of committing an indictable offence, they have the authority to enter and search private premises if necessary (s459A). For it to be lawful, s459A(1) must be met. In this case, the police officer will assert that they:

- Believed on reasonable grounds that [D] has committed a serious indictable offence in Victoria (s459A(1)(a)(i)).
 - A serious indictable offence is one that is punishable on first conviction with imprisonment for life or for a term five years or more (ss325(6), 459A(3)).
 - All offences in this course are punishable five years or more
- Believed on reasonable grounds that [D] committed an offence elsewhere that would be classified as a serious indictable offence if committed in Victoria (s459A(1)(a)(ii)).
- Believed on reasonable grounds that [D] escaped legal custody (s459A(1)(a)(iii)).
- Found D committing a serious indictable offence (s459A(1)(b)).

[Police officer] may exercise reasonable force, if necessary, when entering premises (s459A(2)).

- **If reasonable grounds exist:** At the time of the search of [D], it is strongly arguable that the police believed on reasonable grounds that... Consequently, any evidence obtained during the search will likely be admissible in court.
- **If no reasonable grounds exist:** Conversely, if it is determined that [D] was not under arrest at the time and was merely assisting the police with their inquiries, the search would be deemed illegal, and any evidence obtained may not be admissible. However, P could argue that the police, under these circumstances, had a suspicion based on reasonable grounds. Accordingly, the search may be found lawful in accordance with these statutory powers, and the evidence would then be admissible against [D].

On balance, it is likely/unlikely that the entry and search would be lawful.

Seizure

Under **s75 MCA** or **s465(1)**, the Magistrate may issue a search and seizure warrant if there are reasonable grounds to suspect that something relevant to an offence has been, is being, or is about to be committed on the property.

While the warrant only applies to the specific property listed, there is a common law power that allows police to search the person and premises of an arrested individual without a warrant. The offence in question must be indictable, and the police are authorized to seize any property they reasonably believe to be material evidence.

Conclusion

On balance, it is therefore likely that D [was/was not] lawfully arrested. [Therefore/Assuming I am wrong], the judge will have discretion regarding the admissibility of any evidence subsequently obtained relating to the offence committed by D (**s464J**). Additionally, D may commence civil action against the police for false imprisonment. Lastly, D may have a valid defence against charges of escaping from legal custody, as well as resisting arrest and assaulting/hindering/obstructing police in the execution of their duties.

CUSTODY / QUESTIONING / INVESTIGATION

The police do not have any general power to question individuals against their will. However, since [D] was lawfully arrested, they can be detained for questioning (**s464I**). Given that [D] is suspected of [offence], the [police officer] is permitted to question and investigate them under **s464A(2)(b)**. Nevertheless, [D] may argue that the [police officer] did not comply with their legal protections during the questioning process.

[D] is in custody because they are:

- Under lawful arrest by warrant (**s464(1)(a)**)
- Under lawful arrest without warrant (**s464(1)(b)**)
- In the company of an investigating official (**s464(1)(c)**)

Once taken into custody, [D] must be afforded certain legal protections under **s464A** to **s464J**.

Potential breach – held in custody for unreasonable time

[D] may contend that they were held in custody for an unreasonable period of time, in breach of **s464A(1)**. OTF, [D] was in custody from [time A] to [time B]. The total period was [time period]. It must be determined whether this amount of time is reasonable, having regard to the factors in **s464A(4)**.

Arguably, the [time period] of custody was [unreasonable/reasonable] as:

- There are [few/many] offences, specifically [offences] (**s464A(4)(b)**).
- The offences are [fairly straightforward and simple/complex] in nature (**s464A(4)(b)**).
- There was [only/more than] one person to be questioned (**s464A(4)(e)**).
- [No/A small/A large] amount of time was required to prepare for the questioning or investigation (**s464A(4)(c)**).
- A [small/no/large] amount of time was spent communicating with [D]'s [lawyer/friend/relative/guardian/independent person] (**s464A(4)(g)**).
- There was [no time/little time/insert large time period] for which questioning was suspended or delayed allowing D to receive medical attention (**s464A(4)(i)**).
- The time [was not/was] necessary to allow [D] to 'rest' [facts – D needed to sober up/given they were intoxicated/overnight rest] before questioning (**s464A(4)(j)**).
- Transport time [was not/was] necessary to arrive at the place of questioning, as [D was already at the station/D needed to be driven to the police station] (**s464A(4)(h)**).
- The time [was not/was] necessary to transport D from the place of apprehension to a place where facilities were available to conduct an interview or investigation (**s464A(4)(d)**).
- There [was not/was] time afforded to visit the place where the offence is believed to have been committed or any other place reasonably connected to the investigation (**s464A(4)(f)**).
- There was [no time/little time/insert large period of time] for which D has been in the company of an investigating official [before/after/before and after] the commencement of custody (**s464A(4)(k)**).

Hence, the time spent in custody [was/was not] unreasonable.

Other factors to consider include:

- The time reasonably required to bring [D] before a bail justice or the Magistrates' Court (**s464A(4)(a)**).
- Any other matters reasonably connected with the investigation of the offence (**s464A(4)(l)**).

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Is D fit to stand trial?

All sections mentioned are from the Crimes (Mental Impairment and Unfitness to be Tried) Act.

[D] cannot be tried unless they are fit to stand trial (*Eastman*). There is a presumption (s7(2)) that [D] is fit to stand trial (s7(1)). An investigation into fitness must occur when there is a real and substantial question (ss8, 9). The party raising this question bears the onus of rebutting the presumption (s7(4)) (ie D).

[D] must demonstrate incapacity due to disordered or impaired mental processes. Though [D] has memory loss, this alone is insufficient (s6(2)). It appears that [D] is unable to [instruct counsel] (s6(1)(f)), and this incapacity is caused by [intellectual disability/acquired brain injury]

Ultimately, it is for the jury to determine, on the BoP, whether the presumption can be rebutted (ss 7(3); 11(6)).

If the jury finds the accused fit to stand trial, the trial must commence or resume (s14F(1)). If the jury finds the accused unfit to stand trial, the judge must determine whether they are likely to become fit within 12 months:

- If recovery is likely, the judge must adjourn the matter (s14F(2)).
- If recovery is unlikely or if the accused remains unfit after 12 months, a special hearing will be held to determine whether [D] committed the charged offence (ss12(5), 14F(5),15). The possible verdicts are that [D] is (1) not guilty, (2) not guilty because of mental impairment, or (3) [D] committed the offence charged.

Discuss any legal issues arising out of D's arrest, detention and questioning

All sections mentioned are from the Crimes Act.

Introduction

The police officer (PO) arrested [D] and took him in for questioning.

Arrest

Key point: whether PO have reasonable grounds to arrest

The police officer (PO) did not have a warrant for the arrest – they must have arrested D pursuant to the CA (ss458, 459) or any act that permits such an action to be lawful (s457).

- Per s458, PO can arrest any person they find committing an offence without a warrant if they have *reasonable grounds* to believe that the arrest is necessary to prevent the continuation or commission of an offence. ‘Find committing’ does not require [D] to be caught red-handed. OTF, the PO found [D] [doing X / behaving strangely] (s462 – ‘find committing’ definition), which could lead them to reasonably believe that [D] was committing a crime. This element can be satisfied.
- Per s459, a PO can arrest any person whom they believe on reasonable grounds has committed an indictable offence.
 - Since the offensive behaviour in question is a summary offence, only the s458 ‘find committing’ general right of arrest applies.

Even if [D] did not actually commit the crime, the apprehension may still be considered lawful if PO’s belief was reasonable (s461(1)).

Entry and search

PO can only enter and search any place without warrant if they believe on *reasonable grounds* that a person has committed or is committing a serious indictable offence – carries a penalty of five years or more (s325(6), s459A). Here, upon observing [D] [doing ...], the PO would reasonably conclude that [D] was committing [serious indictable offence].

If relevant:

- PO can therefore seize all documents and articles that under D’s control that are reasonably believed to be material evidence to prove the commission of the offence
- PO may use reasonable force, if necessary, when entering premises (s459A(2)).

On balance, it is likely/unlikely that the entry and search would be lawful. Consequently, any evidence obtained during the search will likely be admissible in court.

Use of force

OTF, there is nothing contentious about the use of force, so it is assumed to be appropriate and proportionate (s462A)

PO can use force that is proportionate, if they believe on reasonable grounds that such force is necessary to prevent an offence or to effect a lawful arrest (s462A). ‘

OTF, it appears D intended to escape, so the PO may use proportionate force to effect a lawful arrest under s462A. However, it appears that PO’s use of [force] was disproportionate under s462A. Since [D] did not intend to resist arrest, the action of [kicking D] could be considered excessive. Instead, the PO could have employed alternative, less forceful measures, such as a light grip on [D]’s wrist.

- These facts are distinguishable from the example provided under s462A - using lethal force to prevent a person from committing an indictable offence that involves causing serious injury or death.

Search [D]

- There is a CL power to search an arrested person (ie D) - only pat down search though. It does not appear that the PO conducted the search in an excessively invasive, publicly degrading, or unnecessarily humiliating manner.
- OTF, the search appears [excessively invasive, publicly degrading or unnecessarily humiliating], which may render the search unlawful. D has an action for trespass.

No longer at liberty

Moreover, it appears that PO did not convey to [D] that they were no longer at liberty, nor did they inform [D] of the specific crime for which they were being arrested (s21(4) charter). Though, arguably, [D] could presume the crime from the surrounding circumstances, given that [D] was arrested while committing [the offence].

Name and address

- [D] must provide their name and address to the PO upon request (s456AA). Failure to do so, or providing false information, constitutes a summary offence and is punishable by a level 11 fine.
- While [D] lied about being a lawyer, this is not an offence per se (cf failure to provide correct name and address: s456AA).

Conclusion

- On balance, it is likely that D was lawfully arrested.

- On balance, it is unlikely that D was lawfully arrested. The judge will have discretion regarding the admissibility of any evidence subsequently obtained (s464J). D may commence civil action against the police for false imprisonment. *Lastly, D may have a valid defence against charges of escaping from legal custody, as well as resisting arrest and assaulting/hindering/obstructing police in the execution of their duties.

Detention

- [D] is in custody per s464(1), as they are in the company of an investigating official and being questioned to determine their involvement in an offence – so they have right/protections in custody.
- Since [D] was legally arrested, they can be detained for questioning (s464I). PO must comply with the procedures and protections afforded to [D] under s464A to s464J, including informing D of the circumstances of the offence (s464A(2)(a)).

D must be either released unconditionally or released on bail or brought before a bail justice/Mags' court within a 'reasonable time' of detention (s464A). Matters listed in s464A(4) should be considered. [...]

On balance, [D] has been held in custody for [an unreasonable/a reasonable] amount of time. Since P has the onus to prove that admissions were voluntary and the court can exclude improperly obtained evidence (s464J), unreasonable detention may invoke this discretion (Fox).

Questioning

PO can question and investigate D per s464A(2)(b). It is not an issue that [D] refused to answer any questions from PO because s464J preserves [D]'s right to remain silent and not cooperate in the investigation.

Informing of the right

For the questioning to be lawful, [D] must be informed that they do not have to say or do anything, but anything [D] says or does may be given in evidence (s464A(3); s464J), and be informed of their right to communicate with a friend, relative, and lawyer (s25(2)(b) charter) (s464C).

- Since there was no conversation in which [D] was informed of their rights pursuant to s464A(3) and s464C(1), so there is no recording of such an occurrence, contravening s464G(1).
- PO failed to record the conversation in which they informed [D] of their rights pursuant to s464A(3) and s464C(1) (s464G(1))

Right to communicate with lawyer

Questioning must also be deferred for a reasonable time to allow [D] to communicate or attempt to communicate with their lawyer (s464C(1)). D must also be afforded reasonable facilities to do so under s464C(2)). Failing to inform D of this right or not allowing adequate time to do so, may render any subsequent confession/admission inadmissible in evidence, depending on the seriousness of the failure (Fox)

Recording of the confession/admission

- Here, D's confession or the substance of the admission must be recorded; otherwise, it may not be admissible (s464H). It's unclear whether the statement was recorded. If it was, it would likely be admissible; otherwise, it is unlikely to be admissible because P would probably not satisfy on the BOP for exceptional circumstances justifying its admission (s464H(2))
- Here, the recording facility was unavailable due to [running out of power]. Since the substance of the confession was not later confirmed by [D], and that confirmation was not recorded (s464H(1)(e)), the confession is inadmissible unless P can satisfy on BoP that exceptional circumstances justify its admission, which is unlikely in this case (s464H(2)).

Breach of Charter

S25 Charter has been breached because it is evident that PO assumed D was guilty, failing to uphold the principle of innocent until proven guilty (s25(1)).

Should D receive bail?

All sections mentioned are from the Bail Act.

[D] is entitled to bail unless the bail decision-maker (DM) is required to refuse bail (s4).

Sch 1 offence

Since [D] has been charged with [murder], a Schedule 1 offence, the following two tests must be considered:

Exceptional circumstances test (s4A)

The bail decision-maker (DM) must refuse bail unless satisfied that exceptional circumstances exist that justify the grant of bail (s4A(1A)). [D] bears the burden of satisfying the DM as to the existence of exceptional circumstances (s4A(2)).

In considering whether exceptional circumstances exist, the bail decision maker must take into account the surrounding circumstances' (s4A(3)), as listed in s3AAA. OTF

- [Offence] is [very/not] serious, as it [is/is not] considered a 'serious example of the offence. The nature of the offence is [heinous/not particularly depraved].]
- [D] has [no/a minimal/an extensive] criminal history
- P's case is strong because [reason]
- [Personal circumstances] the length of time [D] will spend in custody is [large/small]
- the likely sentence to be imposed would be [significant/minor], potentially around [time period]

On balance, the bail DM [would/would not] be satisfied that exceptional circumstances exist that justify the grant of bail. [Therefore/Assuming I am wrong] the bail DM must then move to unacceptable risk test' (s4A(4))

Unacceptable risk test (s4E)

The bail DM must refuse bail if satisfied that there is a risk that [D], if released, would act in a manner as prescribed under s4E(1)(a)(i)-(iv), and that this risk is unacceptable (s4E(1)(b)). P bears the burden of satisfying this (s4E(2)).

P may argue that there is a risk that [D], if released on bail, would

- endanger the safety or welfare of any person, as [evidence] (s4E(1)(a)(i)).
- commit an offence while on bail, as ____ [evidence – e.g., a family violence offence] (s4E(1)(a)(ii)).
- interfere with a witness or otherwise obstruct the course of justice in any manner, as [evidence] (s4E(1)(a)(iii)).
- fail to surrender into custody in accordance with the conditions of bail, as [evidence] (s4E(1)(a)(iv))

P would argue that the risk is unacceptable (s4E(1)(b)) because [reason]. In reaching a decision, the bail DM must consider the surrounding circumstances (s4E(3)(a)) - see above, and assess whether any conditions of bail may be imposed to mitigate the risk so that it does not constitute an unacceptable risk (s4E(3)(b)).

The Bail may consider imposing the conditions of: X

On balance, the bail decision maker [is/is not] likely to be satisfied that bail presents an unacceptable risk for reasons discussed above. Accordingly, bail [will not/will] be granted.

Sch 2 offence

Since [D] has been charged with [possession of DOD], a Schedule 2 offence, the following two tests must be considered:

Compelling reason test (s4C)

The bail DM must refuse bail unless satisfied that a compelling reason exists to justify the grant of bail (s4C(1A)). [D] bears the burden of satisfying the DM as to the existence of as to the existence of a compelling reason (s4C(2)).

In considering whether a compelling reason exists, the bail DM must take into account the surrounding circumstances (s4C(3)), as listed in s3AAA. OTF

- [Offence] is [very/not] serious, as it [is/is not] considered a 'serious example of the offence. The nature of the offence is [heinous/not particularly depraved].]
- [D] has [no/a minimal/an extensive] criminal history
- P's case is strong because [reason]
- [Personal circumstances] the length of time [D] will spend in custody is [large/small]
- the likely sentence to be imposed would be [significant/minor], potentially around [time period]