

Facts of the case:

- ATO (in sworn affidavit) alleged H committed offences based on a tax fraud investigator saying that 'Hyder' (H) was 'Haider'.
- Police honestly believed H had committed offence under assumed identity.
- H arrested → charged → released on bail → charge withdrawn.
- H sued police, arguing they didn't have reasonable grounds for believing that H had committed an offence (i.e. Hyder was 'Haider').
- The court held that the police did have reasonable grounds, given that they relied on the information supplied by the ATO, albeit it was inadmissible.
- A reasonable person with the arresting officer's mind would have reasonable grounds.

Principles

- Evidence, even if it's inadmissible, can be used to form reasonable grounds, especially if it's from an authoritative source.
- Objective standard does not require court to look beyond what facts were in mind of arresting officer.

5. Arresting Without Warrant

5.1 Flow Chart

1. Was there consent to not go anywhere?

- Does the suspect agree to go with police/stay where they are? Even if they do:
- Look at *S and J*: Whether a reasonable person in the circumstances would believe there was no genuine choice.

2. If there is no consent, police may rely on **LEPRA s 99**. For an arrest to be lawful, police need to:

- s 99(1)(a): suspect on reasonable grounds that the person is committing or has committed an offence: **Hyder and Rondo**
- s 99(1)(b): be satisfied that the arrest is reasonably necessary:
 - (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.

3. Was the arrest therefore lawful?

- Consider *Williams v DPP* (note this is pre-2013, standards have dropped now).
- Excessive force as per s 231. However, note that the jury is undecided as to whether this renders the arrest unlawful.

4. Consequences of an unlawful arrest:

- Element of “acting in the course of their duty” missing:
 - *Crimes Act 1900* (NSW) s 546C: resisting arrest
 - *Crimes Act 1900* (NSW) s 60: assaulting police

- *Coleman v Power*: Failure by police to act lawfully means that they are failing to act in the “**execution of their duty**”. This provides a substantive defence to matters such as assault police, resist arrest, hinder police etc. as a key element of the offence or offences is not made out (i.e. “execution of duty”). **It also has the effect of establishing an illegality such as to enliven the consideration of the exercising of the discretion under Evidence Act s.138** to disallow evidence obtained in consequence of such unlawfulness. Remember that the defence bears the onus of establishing the unlawfulness on the voir dire, and must do so on the balance of probabilities (Evidence Act s.142).
 - In other words, two consequences: provides substantive defence to the additional charges and enlivens s 138 so as to not admit certain evidences.

5.2 Arrest as a Last Resort

<i>DPP v Carr</i> [2002] NSWSC 194.

Facts of the case:

- Case involved Const Robins who was patrolling in Wellington. Carr and a female companion were throwing rocks and hit the police vehicle.
- Robins got out of the vehicle and questioned the two asking who threw the rocks.
- An argument ensued between Robins and Carr. Carr proceeded to walk away while swearing. Robins cautioned Carr, but he continued.
- Robins proceeded to arrest Carr for offensive language → brief struggle → Carr managed to break free and run → Robins tackled Carr and Carr ripped the officer's shirt.
- Robins knew Carr's address and identity as he was a local resident. Aware that he could issue a CAN/summons.

Principles:

Arrest is inappropriate where:

- There is no reason to believe that a CAN would be ineffective.

Lecture V: Sentencing and Punishment

1. Sources of Law

1.1 Legislation

- Maximum sentence in e.g., Crimes Act
- Crimes (Sentencing Procedure) Act 1999 (legislation references are to this Act)

1.2 Common law

- Cases decided in the CCA and HCA: Veen (No. 2)
- Particularly, 'guideline judgments' – Part 3, Div 4

2. Justification for Punishment

Traditionally – 4 reasons for punishment:

- **Retribution** (The accused deserves some sort of punishment)
 - **Future? – Retribution costs**
 - To what extent will we continue to allow retribution to guide our sentencing punishments? Should we keep punishing for the sake of punishing?
 - You did a wrong, you were culpable and therefore you deserve to be punished.
- **Deterrence** (Deter potential offenders as well as the specific offender from offending again)
- **Rehabilitation** (Utilitarian movement during 1970s)
 - Borne out of a recognition that people are not born "criminals" rather it was a process that led them to criminalisation.
 - Critique: puts the onus on the state and society to bring the criminal back to socialisation
 - **Now – "just deserts", proportionality, culpability.**
 - Shifting onus back to the criminal because of the costs of the social systems of rehabilitation: what are you doing to save yourself.
- **Community Protection**

3. Purpose of Sentencing: CSPA s 3A

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately **punished** for the offence,
- (b) to prevent crime by **detering** the offender and other persons from committing similar offences,
- (c) to **protect the community** from the offender,
- (d) to promote the **rehabilitation** of the offender,
- (e) to make the offender **accountable** for his or her actions,
- (f) to **denounce** the conduct of the offender,
- (g) to **recognise** the harm done to the victim of the crime and the community.

3.1 Judicial Discretion

“The responsibility for determining an appropriate sentence rests squarely and solely on the sentencing judge.”

- (Brennan, former CJ of the HCA, 2006.)

‘The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner.’

- (Gleeson CJ, Wong (2001) 207 CLR 584)

3.2 Striking the Balance

<i>Veen (No2)</i> (1988) 164 CLR 465

Facts of the case:

- Veen was an aboriginal man convicted of manslaughter due to a diminished mind: defence of diminished responsibility.

- Trial judge handed down a severe sentence of life without parole. Justification was protection of the community as all evidence showed there was a considerable risk of reoffending.
- On appeal to the HCA: overturned the sentence and was reduced to 12 years. Court held that this was proportionate given his circumstances. When Veen got out he killed again with almost the same set of facts.
- Recommitted to life without parole.
- On appeal to the HCA: taking into consideration that he had a propensity to kill, the sentence was approved.

Principles of the case:

- The HCA did not believe they erred in the first decision: protection of the community is not the only factor that goes in to a sentence.
 - In addition, there was also no mental health facilities in prison and life without parole for the first case was not proportionate.
- Judges must 'strike a balance' between the varying purposes of sentencing.

"The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives, including deterrence, retribution and rehabilitation. These objectives do not always point in the same direction. The requirements of justice and the requirements of mercy are often in conflict, but we live in a society which values both justice and mercy."

- Spigelman CJ, Foreword to the Sentencing Bench Book, 2010

4. Confining Judicial Discretion

There is also an ongoing power struggle concerning judicial discretion in sentencing, between the judiciary and the legislature.

- In recent time, many statutes have been introduced by Parliament for the purposes of regulating and constraining this discretion, such as the Crimes (Sentencing Procedure) Act 1999.

Flow Chart of the Civil Procedure

Client

1. ADR: ***Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015***
r 7.2
2. Client sees lawyer (basic facts):
 - a. injuries (medicals)
 - b. circumstances: pleadings/particulars r 14.14 UCPR/15.1 UCPR
 - c. who is at fault (relationship, do they have the \$\$\$) (**Security for Costs?**
UCPR 42.21)
 - d. when (limitation period*): ***Limitation Act 1969***
 - e. costs agreement
3. Assess reasonable prospects of success: **Schedule 2.2(1): *Legal Profession Uniform Law Application Act 2014*** (NSW).
 - a. Sign a certificate cl 4 schedule 2,
 - b. If no prospects wasting courts time, litigant's time and money: has to certify on the statement of claim that there is a reasonable prospects of success
 - c. Preliminary discovery (part 21 UCPR)
 - d. Preservation Orders: search orders
 - i. UCPR pt 25.19: Anton Pillar Orders
 - ii. UCPR r 25.2(1)(c): Marev Injunction
 - iii. Notice of motion
4. Originating process UCPR part 6
 - a. Statement of claim (plaintiff, defendant) UCPR r 6.3
 - b. Summon (applicant, respondent) UCPR r 6.4
5. Service must be effected (UCPR part 10)
6. Defendant files a notice of appearance of defence UCPR r 6.9

Defendant

1. Get a lawyer
2. Statement of claims: ask questions (request for particulars)