

# (1) Criminal Procedure

## Arrest

### Arrest with warrant

- **Introduction:** (B) argues their arrest with a warrant unlawful. There is no common law power of arrest & arrest generally requires a warrant unless statute provides otherwise (*s457 CA*). Issue is if valid warrant + lawfully executed
- **Issuing warrant:** On the filing of a charge-sheet (*s6 CPA*), an application may be made to registrar of Magistrates Court (MC) for either a summons (B answer charge) **OR** warrant to arrest (compels B's attendance), unless notice to appear been served on (B) (*s 12(1) CPA*). A warrant should not issue in the first instance unless the registrar is satisfied by sworn or affirmed evidence, whether oral or by affidavit, that one of the grounds *s 12(5)) CPA* exists. Here, most likely requirement that is satisfied is (...) – warrant satisfied
  - **Not answer a summons:** (B) is highly unlikely to answer a summons as (...) (*s 12(5)(a)*)
  - **Absconded:** (B) absconded/ likely to abscond/avoiding service of summons that's been issued as (...) (*s 12(5)(b)*)
  - **Other good cause:** warrant is required or authorised by any other Act or for **other good cause** as (B has committed a serious offence of murder, warrant is required for community safety) (*s 12(5)(c)*)
- **Contents of warrant:** The warrant issued under *s12 CPA* must be properly accompanied on service or execution by: (a) a copy of charge-sheet; (b) a notice in prescribed form containing: (i) a summary of preliminary brief or hand-up brief; (ii) advice that (B) should seek legal advice; (iii) advice that (B) may have right to legal aid if eligible; and (iv) details for contacting Victoria Legal Aid (*s 13 CPA*). Here (B) (did/not) receive copy of charge-sheet, required notice, legal advice info, legal aid info and/or VLA contact details. Thus, warrant (was/not) compliant w/*s13 CPA*
  - **Bail endorsement:** warrant may be endorsed w/ direction (B) be released on bail on arrest as specified in endorsement (*s 62(1) MCA*). Endorsement must fix amount in which principal & any sureties are to be bound & amount of any money or value of any security to be deposited. Here, warrant (was/not) endorsed for bail as(...)
- **Execution of warrant:** A warrant may be directed to particular police officer, all police officers, or anyone authorised to arrest (*s 63(1) MCA*). Even if directed to specific officer, other police & PSOs may execute it (*s 63(2)*). Arresting officer must have warrant & show it to (B), though execution still possible even if not in possession (*s 65(1)*). Here...
- **Execution of arrest:** The arrest must be lawfully executed. Presumption of innocence be maintained (*s25 VCHRR*)
  - **Search/seize:** A warrant authorises **police officer to break, enter & search any** place where (B) suspected to be & to arrest (B) (*s 64(1)(a) MCA*). (A) must bring (B) before bail justice or Court within reasonable time of being arrested to be dealt w/ according to law, or release (B) in accordance w/ endorsement on warrant (*s64(2)*). **OTF**
  - **Information:** (A) must use words or conduct to convey to (B) they under arrest & no longer at liberty & (B) must understand this (*s21(1) Charter*). (B) should know of suspicion of what crime they are being arrested for (*s21(4) Charter; s 464A(2)(i) CA*), though no technical lang. Here, (A) (said ykwim, gave info, no) – **sufficient/insufficient**
  - **Force:** (A) may use force if believe, on **reasonable grounds** was necessary either to prevent commission, continuation or completion of indictable offence **OR** to effect or assist in effecting lawful arrest of person (suspected of) committing offence (*s 462A CA*). Here (A) used (spray, pushed) – **reasonable/unreasonable**
- **Conclusion:** On balance, if court finds arrest was unlawful, then (B) may take civil action against (A) for wrongful imprisonment or assault (excessive forc). Subsequently obtained evidence may be excluded at trial, although court has discretion on whether this will happen (*s 464J CA*). (B's) unlawful arrest also acts as defence to (B's) charge of (escaping from legal custody/resisting arrest/assaulting, hindering or obstructing police in execution of their duty)

## Arrest without warrant

- **Introduction:** (B) argues arrest w/o warrant unlawful. There is no common law power of arrest & arrest generally requires a warrant unless statute provides otherwise (**s457 CA**). Issue is if valid warrant + lawfully executed
- **Citizen arrest (summ + indict):** Any person lawfully arrest (B) w/o warrant if 1 of grounds in **s458 CA** satisfied. Here..
  - **Commit offence & necessity:** (A – citizen/police/PSO) argues (B) was ‘**found committing**’ an offence (**whether summary or indictable**) as (B do act in presence of arrestor, arrestor perceives behaviour) specifically (**holding boxcutter**) in a manner that gave (A) reasonable grounds to believe (B) guilty of offence (**s462 CA**). Further (A) had **reasonable grounds** to believe **apprehension necessary** to (**ensure B’s attendance at court (s458(1)(a)(i)), preserve public order (s458(1)(a)(ii)), prevent further offending (s458(1)(a)(iii)), protect safety or welfare of public or of (B) (s458(1)(a)(iv))**) as (X pregnant). Thus (B’s) arrest lawful (**ss 458(1)(a) CA**) **\*POLICE TOO**
    - **Not found committing:** (B) counters NOT ‘found committing’ offence by arresting person **at time** – STRICT
    - **Later found not commit:** (B) counters later found did NOT commit offence so illegal arrest **BUT** (A) counters arrest made on reasonable grounds (...) even if later found not commit so fine (**s461(1) CA**)
    - **No necessity:** (B) counters apprehension not necessary as (**minor conduct, no ongoing risk, public safe**)
  - **Instructed by police officer:** (A) argues (**police officer**) (has power to apprehend (B) under the **CA**) instructed (A) to (“**arrest him**”, “**seize him**”) & which (A) did. Thus (B’s) arrest w/o warrant was lawful (**s458(1)(b)**).
  - **Escaping legal custody:** (A) argues they believed, on reasonable grounds (B) (**escape from legal custody/aiding or abetting 2<sup>nd</sup> offender to escape from legal custody, avoiding apprehension by some person having authority to apprehend that person in circs of case**) as (...). Thus (B’s) arrest w/o warrant lawful (**s458(1)(c)**)
- **Police arrest (indict):** Police officer or protective services officer (PSO) arrest (B) w/o warrant if **reasonably** believe (B) committed **indictable offence** in Vic OR **elsewhere**, which would be indictable offence in Vic (**s 459(1) CA**). Here..
  - **Reasonable grounds:** (A – police officer/ PSO) argues believed (B) committed indictable offence in (Vic/elsewhere) as (**tip off, prior prop offences, ran, victim account, description**) & that belief was on reasonable grounds as (**facts showing more than mere suspicion**). Thus (B’s) arrest w/o warrant lawful (**s 459(1)(a)**)
    - **PSO:** only exercise this power if on duty & (B) is at, or in the vicinity of, a designated place (**s 459(2A)**). If PSO arrests (B), the PSO must hand (B) into the custody of a police officer ASAP (**s459(2), s65(1A) MCA**)
  - **Unreasonable grounds:** (B) counters (**mere suspicion, no direct evidence**) – unreasonable – arrest unlawful
    - **Later found not commit:** (B) counters later found out (B) did NOT commit offence (...) so illegal arrest **BUT** (A) counters arrest still be lawful is made on reasonable grounds (RG) (and here it is) (**s 461(1)**)
    - **Summons:** not take in custody if proceedings reasonably brought by summons/ notice to appear (**s461(2)**)
- **Execution of arrest:** The arrest must be lawfully executed
  - **Search/seize:** (A - **police**) enter & search any premises where believe on RG (A) is when arresting under **ss458/9** if believe RG (B) committed serious IO in Vic/elsewhere where be offence in Vic/escape legal custody/ commit serious IO (**s459A(1)**). Reasonable force enter place (**s459A(2)**) & implied license where public access. **OTF..**
  - **Information:** (A) must use words or conduct to convey to (B) they under arrest & no longer at liberty & (B) must understand this (**s21(4) Charter**). (B) should know of suspicion of what crime they are being arrested for (**s 464A(2)(i) CA**), though no technical lang required (**s25(2)(a) Charter**). (B) should know of right to silence (**s 464A(3) CA**) & if charge sheet is filed, (B) entitled to copy. Here, (A) (**said ykwim, gave info, no info..**)- suff/insuff
    - **Presumed:** (A) argues (B) could presume crime from surrounding circs as (B) arrested when (**rob**) **\*asked qs**
    - **Practically impossible:** (A) argues (B) (**ran, resist**)-forfeited right to be informed **\*other officers, after arrest**
  - **Force:** (A) may use force if believe, on **reasonable grounds** it was necessary either to prevent commission, continuation or completion of indictable offence **OR** to effect or assist in effecting lawful arrest of a person (suspected of) committing **any** offence (**s462A CA**). Force must be **proportionate** to the situation. Here (...).
    - **Reasonable:** (A) argues force was proportionate to objective sought as (**B was resisting, B was violent**) – RP find greater force be used to (**prevent commission, continuation or completion of indictable offence**)
    - **Unreasonable:** (B) counters disproportionate force used to achieve (B’s) arrest as (**B compliant, no threat**)
- **Conclusion:** On balance, if court finds arrest was unlawful, then (B) may take civil action against (**police**) for wrongful imprisonment or assault (excessive forc). Subsequently obtained evidence may be excluded at trial, although court has discretion on whether this will happen (**s 464J(c) CA**). (B’s) unlawful arrest also acts as defence to (B’s) charge of (**escaping from legal custody/resisting arrest/assaulting, hindering or obstructing police in execution of their duty**)

## Search & seizure

- **Searching private premises:**
  - **With warrant:** (police) have warrant for (B's) arrest so have authority to break, enter & search any place where (B) is suspected to be (s64(1)(a) MCA), arrest (B) (as person named or described in warrant) (s64(1)(b) MCA) & use reasonable force to enter premises to execute arrest warrant for indictable offence (s459A(2) CA). Here...
  - **Without warrant:** (police) have no general power to enter or search private premises to implement a warrantless arrest. However, in executing an arrest under s458/s459, (police) has the power to enter and search (place) without a warrant to find and arrest a person who, on reasonable grounds, is believed to be there and to have (committed a serious indictable offence punishable with imprisonment for five years or more: /escaped legal custody) (s459A(1) CA). In order to enter the premises, the police officer can use reasonable force if it is necessary to do so (s459A(2) CA). The implied licence which members of the public have to walk on a path or on a driveway is also available to police. Here...
    - **Less serious offences:** a warrant is generally required to search residential premises.
- **Seizing property:** (police) cannot seize goods without search warrant just to preserve as evidence in an anticipated case. However, as arrest of (B) was (presumably) for an indictable offence (with or without arrest warrant), the police have common law power to search (person/premises) & seize all documents & articles under person's control that are **reasonably believed** to be material evidence to prove the commission of that crime (s 459A CA). Here...
  - **Relates to crime:** (police) argues reasonably believed (articles) related to (crime) as (...)
    - **Return of property:** any seized items must be taken to a Magistrate who decides what to do with them (s465). Per s465(1B), (prop) may be detained until it is no longer required for evidentiary purposes. Can't hold property longer than required for trial or appeal, can't seize goods just to preserve as evidence in anticipated case, may need to return it within a time limit if no charge-sheet is filed (e.g. 3 months), may be ordered to return property prior to trial, if it's in the interests of justice & if unlawful won't get it back (e.g. drugs). Anything seized under a search order may be returned to its owner under Court direction, if it can be returned consistently with the interests of justice (s 78(6) MCA)
  - **Not relate to crime:** (B) counters (police) just taking something out of pure interest & it was not associated with the commission of an indictable crime as (...) so not have power to seize property that is not reasonably believed to be material evidence to prove the commission of a crime
- **Search & seizure warrants:** (police) may seek search (and seizure) warrant. The warrant may be directed to a named police officer, all police officers, or any other person authorised by law to execute a search warrant (s76(1) MCA). A search warrant directed to a named police officer may be executed by any police officer (s 76(2) MCA)
  - **Grounds:** search & seizure warrant issued by Magistrate if satisfied **reasonable grounds for suspecting smth relevant to offence that has been (or about to be) committed on prop** (s465(1) CA/ s75(1) MCA). Application for search warrant be supported by evidence on oath or by affirmation or by affidavit (s 75(2) MCA). Here..
  - **Authority:** warrant confers different powers based on searching for person/prop.
    - **Person:** authorises (police) to break, enter & search any place (B) suspected to be & arrest (s78(1)(a) MCA)
    - **Property:** authorises (police) to break, enter and search any place or vehicle described in the warrant for any article, thing, or material of any kind described in the warrant (s 78(1)(b)(i) MCA). Police may then bring that article, thing or material before the Court (s 78(1)(b)(ii) MCA), where a magistrate will determine what to do with it (s465 CA). Police may also arrest any person apparently having possession, custody or control of the article, thing or material (s 78(1)(b)(iii) MCA).
  - **Execution:** search warrant must disclose suspected offence, define premises to be searched, delimit things to be searched for & seized. Here, warrant said (search only) & (A) (stayed within limits/went beyond limits)
- **Searching the person:** There is also a common law power to search a person who has been arrested. Police cannot do full body searches or 'strip' searches, only 'pat down' searches. Excessively invasive, publicly degrading or unnecessarily humiliating search may render it unlawful. Person must be released within reasonable period of time.

## Questioning & Investigation

### Custody/Detention

- **Introduction:** (PO) not have a general power to interrogate suspects/witnesses against will, nor to detain persons not under arrest (s464I). (B) argues not afforded appropriate legal protections by police whilst in custody/before qs
- **Name and address:** (Police officer/PSO) can request (B's) name & address if they believe on reasonable grounds that (B) has either committed or is about to commit an offence (whether indictable or summary) OR (b) may be able to assist in the investigation of an indictable offence (s456AA(1)). (Police officer/ PSO) must also inform (B) of grounds for their belief in sufficient detail to allow (B) to understand nature of offence/suspected offence (s 456AA(2)) Here..
  - **PSO:** PSO can only exercise this power if (B) is at, or in the vicinity of, a designated place (s 456AA(6))
  - **Failure to comply:** Here, in response to request made by (police/PSO), (B) has (refused or failed to comply with the request - s456AA(3)(a), stated a name that is false in a material particular - s456AA(3)(b), stated address other than the full and correct address of their ordinary residence or business - s456AA(3)(c)) as (...) – so guilty of summary offence punishable on conviction by a level 11 fine (5 penalty units max.) (s456AA(3))
  - **Request info from police:** (B) can request (police/PSO) to state, orally or in writing, their name, rank & place of duty (s 456AA(4)). If (police officer/PSO) refuses, fails to comply, or states false information, they will be guilty of a summary offence punishable on conviction by a level 11 fine (5 penalty units max.) (s 456AA(5) CA) Here...
- **Custody:** Here, (B) in custody as (lawful arrest by warrant- s464(1)(a)), lawful arrest w/o warrant via ss458/459, or provision of another Act-s464(1)(b)), in co of investigating official & being questioned/to be questioned/otherwise investigated to determine involvement in commission of offence & sufficient info to justify arrest- s464(1)(c)
- **Duration:** Within reasonable time of being taken into custody, (B) must be released unconditionally, released on bail or brought before a bail justice or MC (s464A(1)). Investigating official may inform (B) of circumstances of the offence (s464A(2)(a) & question/carry investigations to determine involvement in offence (s464A(2)(b)). (B) argues held in custody for unreasonable time as in custody (24 hrs). Court sees factors in s464A(4) to see unreasonable time
  - **Delay:** (B) argues police not act prompt to release, grant bail or bring (B) before bail justice/MC (s464A(1), (4)(a))
    - **Needed time:** (A) counters some time was reasonably required to do so
  - **Few/simple offences:** (B) argues (1/few) simple offences of (...) investigated - unreasonable (s464A(4)(b))
    - **More offences:** (A) counters offences were (multiple, serious, complex), so more time was justified
  - **Little prep:** (B) argues not need much time to read, collate or prepare material for questioning (s464A(4)(c))
    - **More prep:** (A) counters significant preparation required as (high volume of material, statements, CCTV)
  - **No transport issue:** (B) argues (already, near station) so transport caused little/no justified delay (s464A(4)(d))
    - **Transport delays:** (A) counters transport to a proper interview facility was necessary.
  - **Few people to question:** (B) argues (no, few ppl) needing interview during period (s 464A(4)(e)) – unreasonable
    - **More witnesses/suspects:** (A) argues several (witnesses, co-accused) had to be spoken to first
  - **No need visit crime scene:** (B) argues police not need to attend scene or another place before qs (s 464A(4)(f))
    - **Need time to visit scene:** (A) argues a scene visit was reasonably necessary for the investigation.
  - **Need little communication time:** (B) argues only small amount of time used for communication with (lawyer, friend, relative, guardian) OR denied access to lawyer - NOT justify lengthy detention (s464A(4)(g))
    - **More time:** (A) argues meaningful opportunity to communicate had to be given and this took time
  - **No wait for support/lawyer:** (B) argues no reason to delay waiting for (support, lawyer) to arrive (s 464A(4)(h))
    - **Had to wait:** (A) argues waiting for (support/lawyer) to come required to protect (B's) rights & fairness
  - **No medical issue:** (B) argues there was no real need to suspend questioning for medical attention (s 464A(4)(i))
    - **Intoxicated/illness:** (A) counters delay was necessary because (injury, intoxication, illness, assessment)
  - **No genuine need for rest:** (B) argues fit to be interviewed, so delay for rest excessive/unnecessary (s464A(4)(j))
    - **Need rest:** (A) counters (B) needed to (sober up, sleep, recover) so questioning would be fair – delay ok
  - **Long police time:** (B) spent long period in company of investigating officials before & after custody (s464A(4)(k))
    - **Time connected to investigation:** (A) counters that time was all reasonably connected to the investigation.
  - **Delay not for investigation:** (B) argues delay (admin) & not reas connected to investigation as (....) (s464A(4)(l))
    - **Delay connected:** (A) counters delay connected to (interpreter, document review, safety, logistics)
      - ✚ On BoP, (B) held in custody for unreasonable time & should've been released, given bail or taken before magistrate. No enforceability attached to provision, so (B) has no protections against this duration

- **Rights:** (B) argues (police) NOT comply w/ (B's) legal rights under *CA* & *Charter* during questioning **\*TELL BEFORE QS**
  - **Circumstances of offence:** police must inform (B) of circs of offence before questioning (*s464A(2)(a) CA*) & in detail in regards of the nature & reason of charge in a language they can speak or understand (*s25(2)(a) VCHRR*)
    - **Breach:** (B) argues was (not told about why being arrested/only told 'you're in big trouble') - breach
    - **Counter:** (A) argues (B) knew offence from surrounding circs as (own confession). **BUT** must still disclose
  - **Right to silence:** police must inform (B) that they do not have to say or do anything, but anything they say or do may be given in evidence before questioning (*s464A(3), s464J, s25(2)(k) VCHRR*). Also (B) **must record** (by audio or audio-visual recording), if practicable, the giving of the information to (B) of this right (*s464G(1)*).
    - **Breach:** (B) argues (no caution given, given late, said "you know drill") + this info was not recorded
    - **Counter:** (A) counters the caution was clearly given before questioning began
  - **Right to adequate time & facilities to prepare defence:** police must give (B) adequate time & facilities to prepare defence (*s25(2)(b) VCHRR*). Here, (A) not given adequate time & facilities to prepare defence as (...)
  - **Right not to be compelled to testify against themselves or to confess guilt:** police must ensure (B) has the right not to be compelled to testify against themselves or to confess guilt (*s25(2)(k)*)
    - **Breach:** (B) argues (police) was (aggressively pushing B to admit what done "just tell truth") – breach
    - **Counter:** (A) counters DID NOT compel to testify against self as (...).
  - **Right to communicate:** police must inform (B) they may communicate with w/ friend or relative to inform them of whereabouts & lawyer before questioning (*s464C(1), s25(e)-(f) VCHRR*). Questioning & investigation must be deferred for reasonable time to allow that comm (*s464C(1)*) + reasonable facilities given as soon as practicable to communicate w/friend & communication with lawyer not be overheard so far as practicable (*s 464C(2)*). Also (B) **must record** (by audio or audio-visual recording), if practicable, giving of info to (B) of this right (*s464G(1)*)
    - **Breach:** (B) argues police not tell about right BEFORE investigation + (police said 'just tell the truth', denied right, discouraged it, rushed it, failed to provide privacy) + right not deferred + did NOT provide reasonable facilities to communicate to (friend/relative/lawyer) + not record this info being given
    - **Counter:** (A) counters (B) informed of right & had reasonable chance to call, even if unsuccessful attempt (*s464C(1)*). (A) **also** argues right to comm limited & no deferral needed as (A) reasonably believed communication result in (escape of an accomplice/fabrication of evidence/destruction of evidence - *s464C(1)(c)* OR questioning or investigation is so urgent, considering safety of other people, that should not be delayed - *s464C(1)(d)*) as (lied...). Thus (PO) must NOT defer questioning & investigation for a time that is reasonable in circs to enable (B) to make/attempt make communication (*s464C*)
  - **Right to interpreter:** As (B) **does not have sufficient English** to understand questioning, police must arrange for competent interpreter & defer questioning until interpreter is present (*s464D(1) CA, s25(2)(i) VCHRR*)
    - **Breach:** (B) argues (did not get interpreter, wait for interpreter to come in questioning)- questioning unfair
    - **Counter:** (A) counters (B) understood English sufficiently, so no interpreter was required.
  - **Right to child protection:** As (B) **is under 18**, a parent or guardian must be present during questioning (*s464E(1)(a)*). If a parent or guardian is not available, an independent person must be present (*s464E(2)(a)*). (B) should be able to communicate with parent or guardian (or independent person) before commencement of questioning or investigation in a manner that would not be overheard, as far as practicable (*s464E(2)(b)*)
    - **Breach:** (B) argues their parent/guardian not present during questioning neither independent person
    - **Counter:** (A) argues parent/guardian person present. (A) also argues right to comm limited & no deferral needed as (A) reasonably believed communication result in (escape of accomplice/fabrication of evidence/destruction of evidence - *s464E(2)(a)* OR questioning or investigation is so urgent, considering safety of other people, that should not be delayed - *s464E(2)(b)*) as (lied...). Thus (PO) NOT defer questioning & investigation for time that is reasonable in circs to enable (B) have right to child protection
  - **Right to consular communication:** As (B) **not Australian citizen or permanent resident**, police must inform (B) they may communicate with or attempt to communicate with their consular office & must defer questioning for a reasonable time & provide reasonable facilities unless statutory exception applies (*s 464F*). Also (B) **must record** (by audio or audio-visual recording), if practicable, the giving of the info to (B) of this right (*s464G(1)*)
    - **Breach:** (B) argues police (not informed of this right, failed to allow comm) + giving info not recorded
    - **Counter:** (A) argues right to comm limited & no deferral needed as (A) reasonably believed communication result in (escape of accomplice/fabrication of evidence/destruction of evidence) OR questioning or investigation is so urgent, considering safety of other people, that should not be delayed) as (lied...). Thus (PO) NOT defer questioning & investigation for time that is reasonable in circs to enable (B) have right this
  - **Right to VLS:** As (B) **is Aboriginal person**, Victorian Aboriginal Legal Service should be notified when (B) is taken into custody (*s 464FA CA*). Here, VLS (notified/NOT notified)