

TOPIC 2 CRIMINAL PROCEDURE

ARRESTING PEOPLE

There is no common law power to arrest and generally no person shall be arrested without a warrant (s 457 CA).

ARREST WITH A WARRANT

[Type] Per s 12 CPA, a court via an application may issue a warrant to arrest (or a summons). For a warrant it must contain a copy of the charge-sheet, summary of the charges, advice for legal advice and legal aid and the relevant contacts for these (s 13 CPA). A warrant to arrest may be issued at any time before the matter is listed for court (s 61 MCA), and the application requires supported evidence on oath, affirmation or affidavit (s 61(2) MCA).

The warrant may direct that the accused be released on certain bail conditions (s 62 MCA).

[Type] A warrant to arrest must only be issued to arrest if it is probable that the accused will not answer a summons (s 12(5) CPA), or:

- 12(5)(a) CPA it is probable that the accused will not answer a summons; or
- 12(5)(b) CPA the accused has absconded, it likely to abscond or is avoiding service of a summons that has been issued; or
- 12(5)(c) CPA a warrant is required or authorised by any other Act or for other good cause
- Or a warrant to arrest, if the accused fails to appear when required (s 80-81 MCA)

TO WHOM THE WARRANT IS DIRECTED

[Type] A warrant to arrest may be directed to a named policer officer, generally all PO's or anyone authorised to arrest (s 63(1) MCA). However, it may be executed by any PO (s 63(2) MCA).

PSO's? A warrant to arrest directed to a named PO or to all PO's may be executed by any PSO (s 63(2) MCA) and the PSO must hand the person into custody of a PO as soon as practicable after the person is arrested (s63(3) MCA).

EXECUTING A WARRANT

[Type] An arrest warrant allows the arresting officer to break, enter and search any place where the person named or described in the warrant is suspected, and to arrest the person (s 64(1) MCA). It also allows the arresting officer to bring the person before a bail justice or the court, within a reasonable time of being arrested to be dealt with or to be released on bail (s 64(2) MCA).

*In determining what constitutes a reasonable time, the matters specified in s 464A(4) of the CA may be considered.

Not in possession of the warrant? A police officer or a PSO on duty at a designated place has authority to arrest a person named in a warrant even if the warrant is not in their physical possession at the time (s 65(1) MCA).

ARREST WITHOUT A WARRANT

[Type] Per s 457 of the *Crimes Act 1958 (Vic)*, this provision ensures that a person is only arrested without a warrant where a power is expressly conferred by statute.

CITIZENS ARREST

[Type] Any person may arrest without a warrant if:

(a) they find or believe the person is committing a summary or indictable offence and believe on reasonable grounds that the apprehension of the person is necessary (s 458(1)(a) CA), for one of the following reasons (one must be present):

- (i) To ensure his or her attendance at court;
- (ii) To preserve public order;
- (iii) To prevent further offending; or
- (iv) For the safety or welfare of members of the public or of the offender

(b) they are instructed to do so by any police officer (s 458(1)(b) CA). (may be directed or instructed by police to arrest someone, say for example, if they need help).

(c) they believe on reasonable grounds (objectively) that it is necessary to do so in order to stop a person escaping from legal custody or lawful apprehension (s 458(1)(c) CA). (e.g. someone who is running from police and are wanted).

*PSO's who do not have other powers under the legislation, largely rely on s 458 to make their arrests.

[Type] Finds Committing: when a person is found doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence (s 462 CA). (immediate response or quite closely after, something that finds 3 days later will not satisfy this threshold).

POLICE ARREST

[Type] A police officer or a PSO on duty at a designated place, may at any time without a warrant apprehend any person they believe on reasonable grounds (objective standard) has committed an indictable offence in Victoria (including if the indictable offence may be heard and determined summarily); or they believe on reasonable grounds has committed an offence elsewhere, which would be an indictable offence in Victoria (s 459 CA).

*if it is conducted by a PSO, the person must be given to a police officer ASAP (s 459(2) CA).

A police officer is not bound to take a person found committing an offence into custody, if he or she believes on reasonable grounds that proceedings can effectively be brought by summons or notice to appear (s 461 CA).

EXECUTING AN ARREST

[Type] There is no fixed formula of actual arrest but words or conduct must convey to the accused that they are no longer at liberty to leave and the accused must understand this. The accused is entitled to know the reason for the apprehension (what crime he/she is being arrested for per s464A(2)(i) CA), and what the charge is, and they cannot complain of not being supplied with the requisite information if they make it difficult to convey (e.g. running away).

USE OF FORCE

[Type] Any person arresting may use force if they believe, on reasonable grounds, that it is necessary (s 462A CA) to prevent the commission, continuation or completion of an indictable offence, or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

[Type] However, the use of force must not be disproportionate to the objective sought.

UNLAWFUL ARREST

[Type] OTF there is no reasonable grounds for the arrest and therefore it is unlawful (s 461 CA). Thus, the accused may take civil action against the police for wrongful imprisonment. Subsequently obtained evidence may be excluded, although the court has discretion on whether this will happen (s 464J CA).

Continued in notes

TOPIC 3 CRIMINAL RESPONSIBILITY

MENTAL IMPAIRMENT DEFENCES

[Type] A person is only criminally responsible for an act if it was both voluntary and intentional. It follows that if the person is suffering from a sufficiently severe mental impairment, he or she will not be criminally responsible. (Waller and Williams, [2.39]).

FITNESS TO STAND TRIAL (OWN ISSUE AND CONSIDERATION TO START WITH THIS FIRST)

[Type] ____ cannot be tried unless they are fit as it is unfair to convict someone who is unable to understand and participate in courtroom proceedings (*Eastman v The Queen*). A person is presumed to be fit to stand trial per s 7(1) CMIA.

[Type] The question of a person's fitness to stand trial is a question of fact and to be determined on the balance of probabilities by a jury (s 7(3) CMIA). The party raising a person's fitness to stand trial is the one who bears the onus of rebutting the presumption of fitness (s 7(4) CMIA).

*this is at the TIME of trial, different to mental impairment which is at the time of offence

Investigating 'unfitness'

[Type] When a real and substantial question is raised concerning an accused's fitness to stand trial (s 9(1) CMIA), an investigation must be held to determine whether they are unfit (s 8 CMIA). The court can make orders (s 10 CMIA), such as hearing results of examinations and other evidence (s 11(1)(b) CMIA).

A specially convened jury determines the issue (s 11(6) CMIA).

Timing

[Type] Relates to the accused's condition at the time of trial, but the question may be raised at any time (s 9 CMIA). This differs to mental impairment which focuses on the time of the offence.

The Test

[Type] The accused should be suffering, or will suffer during the trial, from at least one of the listed incapacities in s 6(1) CMIA.

- (a). Unable to understand the nature of the charge;
- (b). Unable to enter a plea and unable to exercise the right to challenge jurors or the jury pool;
- (c). Unable to understand the nature of the trial namely as an inquiry into whether the accused committed the offence;
- (d). Unable to follow the course of the trial;
- (e). Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- (f). Unable to instruct counsel/legal practitioners

[Type] As the accused currently suffers from at least one of the listed incapacities, or will at some time during the trial, and that incapacity is caused by the accused's impaired or disordered mental processes, it will be made out OTF.

Consequences

[Type] If found fit, the trial must be commenced or resumed

[Type] If found unfit by the jury, the judge must determine whether it is likely that they will become fit to stand trial within 12 months (s 12).

- If it is likely they will recover, the judge must adjourn the matter
- If it is not likely, a special hearing must be held to determine whether they committed the offence charged (s 12(5) CMIA, 15 CMIA).

Continued in notes

TOPIC 4 ATTEMPTS

[Type] A person who attempts to commit an indictable offence, is guilty of the indictable offence of attempting to commit that offence per s 321M CA. The common law attempt has been abolished (s 321S CA).

***Structure:** Have to make out an attempt for EACH individual charge OTF

PHYSICAL ELEMENT

[Type] P must show acts that are not merely preparatory to the commission of the offence and must show acts that are immediately and not remotely connected with the commission of the offence (s 321N(1) CA).

***an action that goes beyond mere preparation**

COMMON LAW TESTS

Although there is no longer a definitive test in Victoria, the common law tests can still provide a useful guide for how a jury may determine whether ____ 's conduct has moved beyond mere preparation.

The 'Last Act' Test

[Type] Per this test, D performed all of the acts that they needed to do in order to complete the offence (*Eagleton*). There is no other thing needed to do before commission, or meeting of desired ends (*Robinson; Eagleton*).

There are two differing analyses of this test, however this test is often criticised in the Australian Jurisdiction.

R v Eagleton: It was held that his conduct was sufficiently proximate so as to constitute an attempt (selling underweighed bread) because there was no other act on the part of the accused that was required to complete the offence. That is, **he had done all that he could do to commit the offence** and was therefore guilty of an attempt.

R v Robinson: The accused's conviction for attempting to obtain money by false pretences (fake robbery he has set up) was quashed by the English Court of Appeal on the basis that **his acts were too remote in that he had not taken the last step of communicating with the insurers** and making a false claim.

*One side may argue Eagleton whilst the other may argue Robinson.

R v Eagleton (1855) 169 ER 826

- Eagleton supplied underweight loaves but his fraud was discovered before any payment was made, although his account had already been credited
- He was charged with attempting to obtain money by false pretences
- They jury found that Eagleton intended to represent that the loaves were of full weight
- The case was reserved on the question whether, in law, Eagleton's activity constituted an attempt
- **"....no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt"**

R v Robinson [1915] 2 KB 342

- A jeweller, D insured his stock against theft and burglary
- He then concealed some jewellery in the shop, tied himself up and called for help
- When police arrived, he told them he had been knocked down and there had been \$1500 worth of stock in the safe, which was found open and empty
- The police later found the jewellery hidden in the shop and D confessed he had intended to get money from his insurers
- D was convicted of attempting to obtain money by false pretences but his conviction was quashed by the COA
- Lord Reading CJ stated the Eagleton proposition and then said that here D's acts were only remotely but not immediately connected with the offence of obtaining by false pretences
- There was no communication of D's claim and the story supporting it to his insurers

Held

- He could not be convicted of an attempt to obtain money from the insurers by false pretences where there was no evidence of the false pretence having been made to the person intended to be defrauded or to his representative
- Last act of filing claim to insurer was not completed and following Eagleton, there was no proximity

The Substantial Step Test

HD point: As the last act test has been criticised it could be argued OTF instead that the substantial progress test will suffice. It could have been arguable that the case of *Robinson* could have had a different outcome if the substantial progress test was applied.

[Type] D's act went a substantial distance towards attainment of their goal and there are quite extreme and detailed steps taken (*Stonehouse*). This involves looking at a series of acts.

Stonehouse: Not only did Stonehouse's faking of his death go a substantial distance towards the attainment of the complete offence, it was also the final act that HE could perform.

*Is something a substantial progress along the way?

DPP v Stonehouse [1978] AC 55

Facts

- The accused was a prominent British politician and was in serious financial difficulties and decided to fake his own death to start a new life afresh in Australia under a new identity
- In order to provide for his wife, who was not aware of his plan, he first insured his life with various companies in England namely his wife as beneficiary
- He faked drowning in Florida however 5 weeks after the incident, he was discovered living in Australia under a false identity
- He was extradited to England for many offences including attempting to obtain property by deception
- In this case there was no evidence of any act done by the appellant in the nature of a false pretense which ever reached the minds of the underwriters – judge stating the court was wrong in R v Robinson
- He argued that because he did not file the insurance policy (his wife did), this meant he did not complete the last act

Held:

- The faking of his death was the final act that he could perform and went a substantial distance towards the attainment of his goal

Voluntary Desistance

Insofar that the acts of the accused are sufficiently proximate to constitute an attempt, the fact that someone desisted will not provide a defence to the charge (**R v Page**).

R v Page [1933] VLR 351

- Accused induced another, Partridge to join him in a shopbreaking enterprise
- Accused kept watch whilst Partridge mounted a wall, having reached a position where he could open a window, he put the lever under the window-ledge for the purpose of prising it open, but before any force, he decided he would not 'continue on with the job'
- He dropped the lever to the ground and himself descended, and was arrested
- Issue: whether the act done by Partridge amounted to an overt sufficient to constitute an attempt to break into the shop in question

Held

- The attempt in this case was, the fact that the confederate of the accused desisted of his own volition affords no answer to the charge

FAULT ELEMENT

[Type] ____ must further intend that the offence, be committed (**s 321N(2) CA**). This is a subjective intention to commit this principal indictable offence and not some other one. Per **R v Mohan**, 'intent' in the context of attempts means a decision to bring about a consequence.

Considerations:

- Was it planned?
- Was it executed?
- Was it premeditated (calculated, thought of in advance rather than occurring impulsively or under emotion)

Intention has been held to be distinguished from a motive in the sense of an emotion leading to action. It is a, 'decision to bring about a certain consequence' (*R v Mohan*). Recklessness and negligence are irrelevant (*Mohan*).

[Type] Must have intended or believed that any fact or circumstance that is an element of the offence will exist at the time the offence is expected to take place (*s 321N(2)(b)*). Must show knowing facts that will result in the crime being committed, not merely potentially knowing facts which would make some actions a crime (*Neal v The Queen*).

Continued in notes

TOPIC 7 DRUG OFFENCES

USE OF A DRUG OF DEPENDENCE

[Type] A person who uses or attempts to use a drug of dependence without being authorised to, is guilty of an offence (*s 75 DPCSA*).

Where the offence was committed OBP in relation to cannabis or tetrahydrocannabinol, a penalty of not more than 5 units applies (*s 75(a)*) and in any other case, a penalty of not more than 30 penalty units or level 8 imprisonment (1 year maximum) (*s 75(b)*).

ELEMENTS

- Elements
 1. The substance in question was a drug of dependence; and
 2. D used, or attempted to use, that substance.
- Mental state
 1. No explicit mental state listed
 2. I haven't found any case law addressing this specific provision
 3. Apply general principles concerning strict liability

A DRUG OF DEPENDENCE

[Type] The first element requires the prosecution to prove that the substance in question was a 'drug of dependence' (DOD). Any drug listed in *Parts 1 and 3* of *Schedule 11* to the Act, whether mixed with another substance. An exception to this is the plants specified in *Part 2* of *Schedule 11*.

[Type] Per *s 4* of the *Drugs Act*, it applies to: natural drugs or synthetic, fresh or dried parts, and the salts, analogues, derivatives and isomers of that drug of the drug. Unusable portions of a drug (such as the stems, roots and stalks of the cannabis plant) are still considered, so long as they fit within the definition specified in *s 4 DPCSA* (*Coviello*). The whole of the plant will be considered as the drug (*Coviello*).

There must be a visible amount of DOD, not requiring science to identify (*Williams; Booking v Roberts*). Analogous to *Booking v Roberts*, it was determined that any amount is sufficient even 20 micrograms worth.

USE

ACTUAL USE

[Type] The second element P must prove is that D 'used' that DOD. Use in relation to a DOD means to smoke (s 70(a)), inhale the fumes caused by heating or burning a DOD (s 70(b)), or introducing a DOD into the body of a person (s 70(c)).

*the provision is generally wide enough to cover any method in which it enters a person's system

Where someone injects another person: P must prove that D administered or attempted to administer, that substance to another, in which case they will be liable to 30 penalty units or imprisonment for 1 year (s 74).

ATTEMPTED USE

[Type] Per s 75 DA, it makes it an offence to use or 'attempt to use' a drug of dependence. Attempt involves making an effort to achieve or complete. A person charged with attempted use will be subject to the same penalties as a person charged with use of a DOD. A person can also be charged with attempted use under s 321M of the Crimes Act 1958 and will be subject to the lesser penalties set out in s 321P.

AUTHORISED / LICENSED USE EXCEPTION s 104 DA

D will not be guilty if they use a drug with authorisation or license under the Drugs Act or its regulations (such as pharmaceutical prescriptions) or under the Access to Medicinal Cannabis Act 2016 or its regulations (s 75 DA). It is therefore for D to prove, on the balance of probabilities that he/she was appropriately authorised or licensed, rather than for the prosecution to disprove this beyond reasonable doubt.

INTENTION

[Type] D must have intended to use a DOD, although not necessarily the particular drug in question. While the provision does not explicitly state any mental state, the presumption of mens rea is applied (He Kaw Teh).

*it is unlikely that parliament wanted to punish people who unintentionally used drugs and other drug offences have been interpreted to require D to have intended to possess or traffick

DEFENCES

Other previous defences learnt such as duress, sudden or extraordinary emergency etc may apply.

POSSESSION OF A DRUG OF DEPENDENCE

[Type] A person who attempts to have in their possession a drug of dependence is guilty of an indictable offence (s 73(1) DPCSA). For a small quantity of cannabis or THC the maximum penalty is 5 penalty units. For other drugs, the maximum penalty is 400 penalty units or level 6 imprisonment (5 years maximum) s 73(c).

ELEMENTS

External Elements

- Drug of dependence
- The meaning of possession
 - Physical Custody/Control

Fault Element

- Intention to possess [Common law]
- Knowledge [Deemed possession]

DRUG OF DEPENDENCE

Same as above ^^

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There must be a visible amount of DOD, not requiring science to identify (**Williams; Bocking v Roberts**). Analogous to **Bocking v Roberts**, it was determined that any amount is sufficient even 20 micrograms worth.

POSSESSION

[Type] Any substance shall be deemed to be in the possession of a person if it is upon any land or premises occupied by them or is used, enjoyed or controlled by them in any place whatsoever, unless the person satisfies the court to the contrary **s 5 CA**. This definition is not exhaustive so the common law definition of 'possession' also continues to apply.

[Type] The prosecution can prove possession by either, **(1)** relying on the common law definition of possession, or **(2)** by relying on the deeming provision in **s 5** and proving that, the DOD was on land or premises occupied by D, or D used, enjoyed or controlled the DOD.

COMMON LAW

At common law, the definition of 'possession' contains two elements:

1. D must have exercised custody or control over the DOD to the exclusion of others (the conduct element);
and
2. D must have intended to possess the DOD (the mental element)

EXTERNAL ELEMENT: PHYSICAL CUSTODY/CONTROL

In order to demonstrate possession, D must at the time have complete present personal control **to the exclusion of others (Moors v Burke)**. It is not necessary for it to be literally in their hands, but sufficient if it is in their physical control/physically with them (**R v Maio**). Even a short amount of time of exclusive control is sufficient per **R v Boyce**.

Analogous to **R v Boyce**, the accused was convicted of selling hemp found in his luggage in the airport. Although the accused did not have physical control for long, this still was sufficient to constitute physical custody.

Analogous to **Bocking v Roberts**, it was determined that any amount is sufficient even 20 micrograms worth.

Rebuttal: D could argue that they were not in physical possession as analogous to the case of *R v Buck*, the heroin was in the body of another, which is not belonging to D or 'under their control'. D can further 'satisfy the court to the contrary' as it is only on balance of probabilities (*Momcilovic*).

Analogous to *R v Van Swol*, the defendant may argue that as they did not know of the existence of the drug, even though it is in their physical control, they cannot be deemed to have the requisite fault element and therefore may be acquitted. In that case even though the drugs were placed in the common area of the accused and housemate, the housemate did not know of the existence of the drugs.

Continued in notes