Lance Carr for Kids

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presented by
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DPP v Carr – a brief overview

The decision of DPP v Carr (2002) 127 A Crim R 151 deals with arrest for minor matters and the impropriety of police using arrest otherwise than as a measure of last resort when a non-arrest alternative would suffice.

Briefly, the facts in DPP v Carr were that a police vehicle was struck by a rock which had been thrown by another towards Carr. The police vehicle stopped and the officer asked Carr to assist as to who threw the rock. Carr, believing he was a suspect, allegedly said the words "Fuck off. I didn't fucken do it. You can get fucked." Carr commenced to walk away from police. An arrest for offensive language was announced and Carr was taken by the arm. He allegedly pushed the officer and then ran away, was pursued for about 25 metres, then crash tackled to the ground. He was taken in custody to the local police station. As a result of alleged threats made from the charge dock, Carr was also charged with Intimidate Police.

When police engage in such an improper arrest, evidence obtained in consequence may be excluded in the exercise of the court's discretion pursuant to Evidence Act s.138. This may include evidence of further offences such as resist arrest, assault police, intimidate police etc. Such evidence was excluded in Carr, and upheld on appeal.

DPP v Carr in the Children's Court

In the Children's Court, the decision must be applied subject to specific children's legislation, with the result being that defence practitioners will adopt a different and specialised approach when dealing with such an issue. Had Lance Carr been a juvenile his arrest would not only have been improper *but also unlawful*. It is important therefore to be familiar with the issues as they pertain to juveniles.

Issue 1 – the Young Offenders Act

In the conduct of a voir dire the first issue to pursue would be the issue of any perceived police failure to adhere to the provisions of the Young Offenders Act 1997 (NSW).

Failure by police to consider the mandatory provisions of this Act 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).

Young Offenders Act s.7 requires police to use the least restrictive sanction having regard to matters required to be considered, and further requires that criminal proceedings are not to be instituted if there is an alternative and appropriate means of dealing with the matter, nor solely in order to provide assistance or services to advance the welfare of the child. S.14 creates a presumptive entitlement to be dealt with by warning subject to exceptions. S.15 entitles police to issue the warning at any place including the place where the child is found (including what would otherwise be the place of arrest). Note that the giving of a warning does not require the child to make any admissions.

Similarly with cautions, s.20 creates a presumptive entitlement to be dealt with by way of caution, subject to exceptions. One notable exception is that the child admits the offence. Have police considered this option?

Further, matters may be dealt with by way of youth justice conferencing. Part 5 of the Act deals with this issue. Again there is a presumptive entitlement for a child to be dealt with in this manner subject to exceptions. Again an admission is required.

Have police considered all appropriate options under the Young Offenders Act in the circumstances prior to deciding to arrest? If not, they are not acting in the execution of their duty and any arrest is unlawful.

A useful discussion of the above matters can be found in Police v Nye [2003] NSWLC 9, which can be found on the Lawlink website (www.lawlink.nsw.gov.au) and clicking on the "Caselaw NSW" link followed by the "Local Court NSW 2002-2003" link. This was a matter in which Craig Smith, barrister (who was junior counsel in DPP v Carr) appeared before Heilpern LCM at Bateman's Bay Local Court. It represents an analysis of the above issues with considerable clarity.

Issue 2- Children (Criminal Proceedings) Act s.8

In the same voir dire is to examine the issue of compliance with Children's (Criminal Proceedings) Act s.8. This issue pre-supposes that a decision to deal with the child under the Young Offenders Act rather than effecting an arrest is inappropriate in the circumstances.

Section 8 creates a statutory presumption (subject to exceptions) against the arrest of juveniles and the instituting of criminal proceedings by a non-arrest means. Consequential amendments to the section have deleted reference to the presumption of proceeding by way of "summons or court attendance notice" (meaning without the imposition of bail or the need for arrest) and substituted "court attendance notice" with its new meaning, however the legislative intent remains clear, particularly in ss.8(2)(b) and (c) which deal with exceptions including the question of whether the child should be "allowed to remain at liberty". There is a need for a more considered amendment to the section such that clear Parliamentary intent is expressed in equally clear language.

A failure by police to consider the clear intent of the section means that they are not acting in the execution of their duty. Any such failure would make arrest unlawful, and evidence obtained in consequence of it lawfully obtained for the purposes of Evidence Act s.138.

A useful analysis of this issue can be found in the judgment of Schurr CCM in Police v Gilmour (13 December 2002, Cobham Children's Court, unrep). This matter involved police arresting a young person (rather than issuing a summons) in the grounds of Cobham Children's Court in the presence of his solicitor and mother, and AFTER the young person had just appeared on another matter!!

In terms of decisions of the superior courts, there is precious little guidance to be found in the decided cases. Notwithstanding that the legislation has been in place for many years, there is no decided case (to this author's knowledge) which goes directly to the principle outlined in the section. The section was the subject of an obiter remark in DPP v CAD [2003] NSWSC 196 in the single judgment of Barr J at [8]. After having referred to the usual common law authorities to the effect that arrest is a measure of last resort, His Honour went on to say:

> *"These principles apply all the more when any person suspected of committing an offence is a child. Although it makes no reference to arrest and does not purport to limit the powers of arrest in a proper case, s.8 Children (Criminal Proceeding) Act provides that a criminal prosecution should not be commenced against a child other than by summons or attendance notice."*

Not only are the above remarks obiter, they are also, with respect, inaccurate in that they fail to note the statutory exceptions contained within s.8. Perhaps defence practitioners can draw some strength from the first of these two sentences

Issue 3 – DPP v Carr

This issue involves the pursuit of the improper arrest issue in the same fashion as one would if representing an adult offender.

Common law duty to enquire as to name??

This issue was raised in both oral argument and written submissions in the matter of DPP v CAD [2003] NSWSC 196. Regrettably, the issue formed no part of the ratio decidendi of the judgment. The issue remains outstanding and represents an opportunity to expand the common law in a manner favourable to the defence.

Arguments in favour of such a proposition include the following:

(i) that it is implicit in the Parliamentary intention behind Children (Criminal Proceedings) Act s.8 that for the section to be given its proper effect, such an obligation is to be implied. Regrettably the Second Reading Speech offers no assistance in this regard, and case law is silent on the issue.

(ii) the decision of Lake v Dobson (1980) 5 Petty Sessions Review 2221. This case involved the arrest of nude sunbathers for the legislative equivalent of what is now known as "Offensive Manner". Smart J condemned the use of the power of arrest and made the following (obiter) remarks at 2223:

> *"I appreciate that this type of offence is capable of constituting, as it were, a continuing offence, and that it may involve questions of identification. However, since it can scarcely be regarded as ranking high in the criminal calendar, it is to be hoped that police will employ a summons in these cases wherever possible."*

It is arguable that the common law presumption against arrest for minor matters implies an obligation on police to make reasonable enquiries as to the identity of the offender in the circumstances.

(iii) Brown v GJ Coles & Co Ltd (1985) ALR 455 involved a shoplifting matter. An arrest was made by a store detective. The alleged shoplifter refused to provide his name to the store detective and was detained until the arrival of police. Sheppard J (at 490) made the following obiter remarks:

> *"I should mention in passing, however, that there was some discussion during the argument as to whether the appellant should not have been proceeded against by summons. Senior counsel for the respondents said that there was no warrant for this course of action because of the appellant's stubbornness and stupidity in refusing to identify himself either to Mrs Eales or Constable Blacka, at least before he was taken into custody by Constable Blacka. I think it an important consideration was that the appellant was never told that if he gave his name and address and provided adequate evidence to establish what he said was the truth, he may well have given his name and address and brought his detention to an end even before Constable Blacka arrived. But none of those considerations affects directly the question of whether the detention of the appellant after Constable Blacka had arrived was unlawful."*

(iv) The decisions of Fleet v District Court [1999] NSWCA 363 and authorities cited therein, Daemar v Corporate Affairs Commission NSWCA 4/9/90 unrep (BC9002053) and DPP v Carr (2002) 127 A Crim R 151 all deal with the

preference of summons over arrest for minor matters. It should be noted however, that in each of these cases the arresting officers were already aware of the identity of the alleged offender PRIOR to the arrest.

Arguments against such a proposition:

In DPP v CAD [2003] NSWSC 196 this issue was raised and Barr J made the following obiter remarks at [24] and [26]:

> *"[24] It was submitted on behalf of the defendants that it was irrelevant that the unidentified person continued to walk away when called upon to stop because the complainant had made up his mind by the time he got out of the car to make the arrest….so there was nothing stopping the complainant from asking him to supply his name and address…..*
> *[26] The…submission seems to me to almost counsel perfection and to ignore the nature of the events facing the complainant. Perhaps he could have walked after the unidentified person and asked him his name and particulars, but his actions have to be judged according to the way things must have appeared to him at the time. In view of the response he did get from the unidentified person it seems unlikely that such a request would have produced any co-operative reply."*

Doubtless, police prosecutors will seek to make much of the above. Two points should be kept in mind – firstly; the remarks are clearly obiter. Secondly, they relate to the *specific facts* in DPP v CAD and are therefore distinguishable.

Does DPP v Carr apply to every set of facts?

Practitioners should note that police have been highly selective in which matters they have taken on appeal subsequent to DPP v Carr.

It is respectfully suggested that the facts in DPP v Wilson [2002] NSWSC 935 and DPP v Coe [2003] NSWSC 363 never lent themselves to a proper application of the decision in DPP v Carr. Police have subsequently sought to make the most of the old adage –"bad facts make bad law."

Practitioners should be aware of this potential difficulty, and exercise judgment accordingly. It fairness, it is acknowledged that clients do not always accept even the most sound legal advice, even that provided by the most capable and/or experienced practitioners.

Impropriety – what does it mean, and when does it exist?

Evidence Act s.138 (1)(a) deals with the exclusion of evidence obtained "improperly or in contravention of an Australian law, or (b) in consequence of an impropriety or a contravention of an Australian law."

So what does "improperly" or "impropriety" mean in a legal sense?

The modern origins of the concept of "improperly obtained" evidence can in one sense be traced back to the High Court in Bunning v Cross (1978) 141 CLR 54. It was at that point that the superior courts commenced to use the word of "improper" to refer to what until that time had been referred to in the common law as "the fairness discretion". This concept, in turn, has its modern Australian origins in the High Court decision of The King v Lee (1950) 82 CLR 133.

The issue of impropriety (in common law) was also visited in the High Court decision of Ridgeway v R (1995) 78 A Crim R 307. The High Court did not define what the word "improper" meant, noting (at 319) that "It is neither practical nor desirable to seek to define with precision the borderline between what is acceptable and what is improper…" .

In DPP v Carr, Smart AJ noted that the High Court did not define "improper" for the purposes of the common law and went on to state at [27]:

> *"Mr Carr submitted that there is no need to define improper, as what is improper will vary from case to case and will be determined by reference to the relevant facts and circumstances of each case. That submission is correct."*

Smart AJ applied a "but for" test in dealing with the issue of whether the evidence was "obtained in consequence of" the impropriety but confined its application to the facts of that case (see para [70]).

Notwithstanding the above, it seems that the decisions subsequent to DPP v Carr have in a sense become the accidental battleground for the meaning of Evidence Act s.138 and in particular the concepts of "impropriety" and "obtained in consequence of" as used in the section.

The subsequent single Judge decisions conflict.

In R v Cornwell [2003] NSWSC 97, a single Judge decision, Howie J held at [20]:

> *"…the court should determine whether the section is engaged having regard to the particular facts and circumstances before it but with due regard to the seriousness of a finding that evidence was obtained improperly or as a consequence of an impropriety and the outcome of such a finding."*

The remarks of Howie J are ambiguous in terms of the section being "engaged". Does this mean the finding of an impropriety, or the exercising of the discretion after having found the impropriety? Howie J at least appears to be saying that the appropriate course is to first look at the "seriousness" of making an adverse finding, then secondly the impact upon the Crown case in determining whether the section is "engaged".

I suggest that the section is "engaged" or comes for consideration whenever there is an impropriety to illegality raised. The discretion must be exercised one way or another. The fact that evidence might be allowed does not mean

that the section has not been "engaged". The traditional Bunning v Cross approaches involves two steps in the application of the section; firstly the finding of the impropriety or illegality, and secondly the exercising of the discretion (or declining to exercise the discretion) to allow the evidence (note that under the Evidence Act is a discretion to allow evidence, whereas the common law is a discretion to exclude).

In DPP v CAD [2003] NSWSC 196 the s.138 issue is not taken very far one way or the other as the magistrate at first instance admitted the evidence of the alleged impropriety, however did not receive any evidence of what transpired "in consequence" of the impropriety. The prosecutor simply did not lead this evidence on the voir dire; and the magistrate proceeded to rule in its absence. Thus error was found. This case offers little in resolving the s.138 conundrum.

In DPP v Coe [2003] NSWSC 363 Adams J took an extremely narrow view with respect to s.138. He distinguished Smart AJ in Carr, notwithstanding that Smart AJ specifically limited Carr to its facts on the s.138 issue. At [24], Adams J also took issue with the obiter remarks of Spigelman CJ in Haddad & Treglia (2000) A Crim R 312 at [73] and stated as follows:

> "Where, however, the evidence in question is that of offences which have been caused by the impugned conduct, it does not seem to me that the evidence will have been "obtained" unless something more is shown than the mere causal link: the circumstances must be such as to fit fairly within the meaning of "obtained", almost invariably because the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of the offences. In some cases, of which Robinett and Carr may be examples, there could be such an expectation that the offences will result from the impugned conduct that it will be reasonable to say, as an objective matter, that they were 'obtained' by that conduct but these situations will be rare."

The above interpretation seems to ascribe a form of "mens rea" to police. This seems to fly in the face of s.138(3)(e) which makes it clear that the court is to consider whether the impugned conduct was deliberate or reckless.

Discretionary Exclusion – Resolving the Dilemma – "Rondo rules"

It is suggested that the dilemma is resolved by reference to the NSWCCA decision of R v Rondo (2001) 126 A Crim R 562 and in particular the judgment of Spigelman CJ at [5] wherein the Chief Justice refers to "a clear chain of causation" as satisfying the "in consequence of" requirement in s.138. The judgment is broadly reflective of the traditional Bunning v Cross approach. This is a three judge appellate bench; and to the extent that the aforementioned single judge judgments conflict with Rondo they are wrongly decided. It is further suggested that "a clear chain of causation" is reflective of a civil law "but for" test.

If confronted by an excitable police prosecutor on this issue just remember – "Rondo rules".

I am happy to answer any questions. Don't hesitate to contact me on **0408 277 374** (Please try to avoid ringing between 9.30am -10.00am on a court day – I have a case and a client to worry about too!!). I am also happy to respond to any question sent by email. My email address is **dark.menace@forbeschambers.com.au**. I will get back to you ASAP.

I have endeavoured to state the law as at 6 November 2003.

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