Legal Aid
NEW SOUTH WALES

The advocates guide to arrests

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“Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police practice of arbitrary arrest is a hallmark of tyranny.”

Donaldson v Broomby (1982) 40 ALR 525 per Deane J

“The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded.”

DPP v Carr [2002] NSWSC 194 per Smart AJat [35]

Introduction

Being arrested is usually regarded as the immediate result of a person committing a crime. However, criminal lawyers know that sometimes an arrest can be the immediate *cause* of a person committing a crime. Likewise, an arrest is usually seen as the initiating step in a legal process that eventually leads to trial and (for the guilty) sentence and punishment. But criminal lawyers know that not all arrests are made for that reason. Furthermore, an arrest can also be seen a type of punishment in and of itself.

Australian courts have long recognised these things. As such, Parliament has placed limits onthe power of police officers to arrest people. For example, A police officer cannot arrest someone without a warrant unless they suspect on reasonable grounds that that person hascommitted an offence and they are satisfied that an arrest is reasonably necessary for at leastone of the nine reasons outlined in s 99 of LEPRA. Parliament has also provided alternatives to arrest that should be used in appropriate cases.

This paper aims to help defence advocates identify when an arrest is illegal or improper, and the consequences this may have on a case.

What is an arrest?

At common law, there are two elements to an arrest:

1. communication of intention to make an arrest, and
2. a sufficient act of arrest or submission

See *Alfio Licciardello v R* [2012] ACTCA 16

How are arrests made?

Police can make an arrest by words or actions or a combination of both. In either case, it is necessary that some physical restraint was placed on the person, or that they submitted to being arrested:.

For example:

1. Words – E.g. “You are under arrest”.

May be any form of words which in the circumstances bring it to the defendant’snotice that they are under arrest – *and they submit*.

2. Actions – E.g. restraining the person from moving anywhere beyond the arrester'scontrol.

A touch on the shoulder can be sufficient. Even this is not necessary if the arrested person submits: *Alderson v Booth* [1969] 2 QB 216 at 220.

Can be any conduct that makes clear that the suspect is no longer a free person. What must be done is what is reasonable in the circumstances*: Tims v John Lewis & Co Ltd* [1951] 2 KB 459 at 466.

Legislation

Power to arrest without warrant

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") outlinesa police officer's power to arrest a person without a warrant:

99 Power of Police Officers to Arrest Without Warrant

1. A police officer may, without a warrant, arrest a person if--

   (a) the police officer suspects on reasonable grounds that the person is committing or hascommitted an offence, and

   (b) the police officer is satisfied that the arrest is reasonably necessary for any one or moreof the following reasons--

      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.

2. A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

3. A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

Note: The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer--see section 105.

4. A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other

purpose authorised by that Part.

5. This section does not authorise a person to be arrested for an offence for which the person has already been tried.

6. For the purposes of this section, property is connected with an offence if it is connected withthe offence within the meaning of Part 5.

Note that first, subsection (1)(a) states there must be a 'reasonable suspicion' [see *Rondo* anddiscussion in *The Advocate's Guide to Stop and Search Cases* for more on this] and second: that reasonable suspicion must be linked to one of the nine reasons outlined in subsection (b)(i)-(x).

Safeguards to exercise of arrest power

There are also safeguards in LEPRA which apply to the exercise of police powers (includingthe power to arrest a person without a warrant):

Section 202 of LEPRA provides that a police officer must tell a person their name, place of duty and the reason for arresting them as soon as reasonably practicable:

202 Police Officers to Provide Information When Exercising Powers

1. A police officer who exercises a power to which this Part applies must provide the followingto the person subject to the exercise of the power—

   (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
   (b) the name of the police officer and his or her place of duty,
   (c) the reason for the exercise of the power.

2. A police officer must comply with this section--

   (a) as soon as it is reasonably practicable to do so, or
   (b) in the case of a direction, requirement or request to a single person--before giving ormaking the direction, requirement or request.

3. A direction, requirement or request to a group of persons is not required to be repeated to each person in the group.

4. If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

5. If a person subject to the exercise of a power to which this Part applies asks a police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

6. A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1)(a) and (b) only once on that occasion.

As a result of the number of cases that were successfully defended on this "technicality", Parliament passed s 204A of LEPRA which provides that the validity of the arrest will not be affected by the officer's failure to provide his or her name and place of duty.

204A Validity of Exercise of Powers

1. A failure by a police officer to comply with an obligation under this Part to provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity ofanything resulting from the exercise of that power.
2. Subsection (1) does not apply if the failure to comply occurs after the police officer was askedfor information as to the name of the police officer or his or her place of duty (as referred to in section 202(5)).
3. Subsection (1) does not apply to the exercise of a power that consists of a direction, requirement or request to a single person.

However, note that s 204A does not "save" the arrest if the officer fails to provide the reason for the arrest. In other words, if a police officer fails to tell the person the reason for the arrest as soon as reasonably practicable, that arrest will be invalid unlawful by operation of s 202(1)(c).

Note also, that if an officer does not comply with the other parts of s 202 of LEPRA, although the arrest is still valid, it is a matter that an advocate can raise in support of any application to exclude evidence under s 138 of the *Evidence Act* (EA).

If a police officer performs an arrest and does not comply with s 99 of LEPRA or the safeguard in s 202(1)(c) of LEPRA, then that arrest will be illegal.

Case law

In addition to the safeguards in LEPRA, there are also common law safeguards such as the principle of liberty that apply to the exercise of the arrests power.

The Supreme Court of NSW has held that using the power to arrest someone should be a last resort. If issuing a summons would have sufficed, then the arrest may be illegal or improper.

***DPP v Carr* [2002] NSWSC 194**

Facts

The respondent was approached by police in regard to a minor incident. The respondent, who was intoxicated, swore at police. The police arrested him and he then struggled. He was charged with resisting, assaulting and intimidating police. The magistrate held that the evidence relating to these charges was obtained in consequence of an improper act, namely, the arrest of the respondent for offensive language in circumstances where a summons was more appropriate as the offence was minor and there was no question as to the identity and usual place of residence of the respondent.

Held per Smart AJ at [35]:

> "This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and

thereis no reason to believe that a summons will not be effective.

Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

The Court of Appeal has upheld the application of fundamental common law principles to LEPRA and confirmed that arresting someone for the purpose of investigation or questioning is legal.

***Robinson v State of New South Wales* [2018] NSWCA 231**

Facts

The appellant attended a Sydney police station in response to attempts by police to contact him. Upon attendance he was immediately arrested, without warrant, for breach of an apprehended violence order. The appellant was offered, and accepted, the opportunity to participate in a record of interview. He was released without at theconclusion of the interview.

The appellant commenced proceedings against the State of New South Wales, claiming damages for wrongful arrest and false imprisonment. The arresting officer gave evidence that a decision about whether or not to charge the appellant depended on what he said in the interview and that, at the time of the arrest, he had not decided to charge him.

Issue

The key issue on appeal was whether the arrest of the appellant was lawful under s 99 of LEPRA in circumstances where there was no positive intent to lay charges at the time of arrest.

Held

Section 99 of LEPRA must be construed in its context, including general law principles concerning the scope and purpose of arrest: [34]-[35]; [132]. In the absence of explicit terminology, s 99 does not abrogate common law principles.

A reasonable suspicion must be accompanied by an intention to charge the person being arrested, but need not be accompanied by a clearly formulated charge, and maybe subject to contingencies (such as the expectation that others may charge the person). The power to arrest exists, and must be exercised, for the purpose of bringing the person arrested before a justice as soon as reasonably practicable: [46]; [95]; [136]; [154].

As no decision whether to charge the appellant had been made at the time of arrest, the arrest was not for the purpose of commencing the criminal process; accordingly, it was unlawful: [128]-[129]; [194].

Robinson is an important case for three reasons:

1. First, it is authority for the proposition that it is illegal to arrest someone without a warrant for the purpose of questioning or investigation. Therefore, if an officer arrests your client forthe purpose of conducting an ERISP, that is illegal and the evidence should be excluded.

See also: *Williams v The Queen* (1986) 161 CLR 278: If an arrested person is detained,not for the purpose of enabling him to be brought before a justice, but solely for the purpose of questioning him, the detention will be unlawful.

2. Second, *Robinson* was decided after new amendments to s 99 of LEPRA were passed which essentially made it easier for a police officer to justify their arrest of a person. However, the Court of Appeal affirmed that s 99 must be read in light of fundamental common law principles such as the principle of personal liberty (at [239]). The provisions of s 99 of LEPRA should be interpreted strictly:

Clear words are required in a statute before it will be construed as authorising the holding of an arrested person in custody for a purpose other than for giving effect to the common law purpose of arrest. It is of critical importance for the existence and protection under the law of personal liberty, that the circumstances in which a police officer may, without warrant, arrest or detain an individual be strictly confined, plainly stated and readily ascertainable. Arrest should be reserved for circumstances in which it is clearly necessary and where it is inappropriate to resort to the power of arrest when the issue and service of a summons would suffice adequately. *Robinson* at [223]

3. Third, and flowing from this, the common law principle that an arrest should be a measure oflast resort, discussed in *DPP v Carr* [2002] NSWSC 194 still applies:

It is of critical importance for the existence and protection under the law of personal liberty, that the circumstances in which a police officer may, without warrant, arrest or detain an individual be strictly confined, plainly stated and readily ascertainable. Arrest should be reserved for circumstances in which it is clearly necessary and where it is inappropriate to resort to the power of arrest when the issue and service of a summons would suffice adequately: *Robinson* at [233].

What are the consequences of an unlawful arrest?

If a police officer arrests your client and does not comply with the provisions of LEPRA, that arrest is unlawful. There are a number of consequences that flow from this.

The police officer ceases to be acting in the execution of his or her duty

In *Re K* (1993) 71 A Crim R 115, the Court said, in a joint judgment at 120:

> A police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer and continues to act in the execution of that duty as long as he is engaged in the task provided he does not do anything outside the ambit of his duty so as to cease to be acting therein.

That statement was approved by the High Court in *Coleman v Power* (2004) 220 CLR 1 at [117].

There are a number of offences that require, as an element of that offence, that the officer

was acting in the execution of his or her duty.

For example:

1. Assault, resist or obstruct officer **in the execution of his or her duty**: Section 58 CrimesAct 1900
2. Assault, throw missile at, stalk, harass or intimidate police officer **while in the execution of the officer's duty**: Section 60(1) Crimes Act 1900
3. Assault occasioning actual bodily harm on police officer **while in the execution of theofficer's duty**: Section 60(2) Crimes Act 1900
4. Resist, hinder or incite person to assault, resist, hinder police officer **in the executionof his or her duty**: Section 546C Crimes Act 1900

Also:

5. Escape **lawful custody** offences: Common Law

(For a person's custody to be *lawful*, the arrest has to have been lawfully made.)

Since it is an element of the offence, the onus is on the prosecution to prove that the officer was in the execution of his or her duty *beyond reasonable doubt*.

Therefore, if your client is charged with assaulting or resisting police and there is a reasonable doubt about the lawfulness of the arrest, then the offence is not made out.

Evidence obtained in consequence of the arrest is illegally or improperly obtained evidence

Section 138 of the *Evidence Act 1900* states:

138 Exclusion of improperly or illegally obtained advice

1. Evidence that was obtained--

   (a) improperly or in contravention of an Australian law, or

   (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Some examples of this type of evidence may include:

- Evidence that the defendant assaulted, resisted, obstructed or intimidated police at the time of, or after the arrest.
- Evidence of prohibited drugs, illegally obtained goods, or other offences found during a search of the person or their vehicle following the arrest.
- Evidence of admissions obtained as a consequence of the arrest.

Note that s 138 applies to evidence of any offence that was obtained in consequence of the illegal arrest. It is not restricted to offences where 'in the execution of duty' is an element.

However, in these cases, the onus is on the defendant to prove the illegality or impropriety on the balance of probabilities and persuade the judge or magistrate to exercise their discretion to exclude the evidence.

Causal connection

'In consequence of'

Section 138(1) EA requires that the evidence be obtained 'in consequence of' impropriety or illegality.

Whilst the 'obtaining' itself does not have to be illegal, there must be a causal connection between the arrest and the obtaining of the evidence: *Cornwell v The Queen* [2010] NSWCCA 59 at [178]-[180], [292].

The NSW Court of Criminal Appeal has accepted that it is appropriate the apply the "but for"test of causation: *R v Grech; R v Kadir* [2017] NSWCCA 288 at [119].

In some cases, this connection is relatively clear.

For example:

> *Police notice the accused riding her bicycle down the road without a helmet. They recognise her, having dealt with her on several previous occasions, and naturally decide to arrest her.*
>
> *Before putting the accused in the back of the caged vehicle they perform a personal search in case she is carrying any weapons or dangerous articles. During the search, police locate a clear resealable bag containing 0.1 grams of cannabis in her front rightpocket.*

Analysis:

> *In this case, the arrest is likely to have been illegal or improper as 'ride bicycle without a helmet' is a fine-only offence and none of the criteria in s 99(1) of LEPRA would haveapplied at the time of the arrest. The search may have complied with LEPRA, however,the evidence of the cannabis was still obtained in consequence of the arrest (i.e. would not have been obtained 'but for' the arrest) and therefore it would be illegally or improperly obtained evidence.*

In other cases, the chain of causation it is not so clear.

For example, continuing the previous example, suppose:

> *The accused is taken back to the police station and kept in a holding cell for two hours.She becomes angry, threatens to kill the police sergeant on duty and floods the toilet in her cell, causing damage to the floor of the police station and requiring it to be professionally cleaned.*

Analysis:

In this case, whilst the accused may not have done those things 'but for' the arrest, the chain of causation between the illegal arrest and the obtaining of the evidence (of the threat and property damage) is not as easily drawn.

Causation case law

The 'narrow' vs the 'less narrow' approach

In *Director of Public Prosecutions v Coe* [2003] NSWSC 363, Adams J adopted a narrow approach to causation, stating that:

> "It does not seem to me that the evidence will have be "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 (to a greater or lesser extent) achieve the commission of the offences."

However, in *Director of Public Prosecutions (NSW) v AM* [2006] NSWSC 348, Hall J disagreed with this approach, stating:

> [80] With the greatest respect to the view expressed by Adams, J. in *Coe* (supra) at [24], I am unable to agree with all that is therein stated. Before identifying the area of disagreement, I record the following propositions:-

(a) Where a law enforcement officer intentionally engages in purposive action designed or expected to procure or induce the commission of offences, then plainly evidence of those offences will have been *"obtained"* in relation to them.

(b) Where a person is subject to an ill-advised or unnecessary arrest but the suspected offender acts in a way which amounts to a disproportionate reaction, an issue may arise, as it did in *Coe*, as to whether that offence can, as a matter of causation, be said to be a consequence of the arrest.

(c) In other circumstances, however, offences that stem from an ill-advised and unnecessary arrest, may objectively be considered the anticipated or expected outcome and so *"obtained"* for the purposes of s.138. *Carr* is such a case.

In other words, in cases where there are further offences committed as a result of an illegal arrest, you should consider whether the offences are of a kind that one might "expect" would occur (Cf. *DPP v AM* at [82]). If the subsequent offence is disproportionate to the illegality of the arrest, then the evidence may not be obtained 'in consequence' of the impropriety and s 138 *EA* would not apply. Hall J's analysis was accepted by Bell J of the Victorian Supreme Courtin *Director of Public Prosecutions v Kama* (2014) 247 A Crim R 300 at [346].

Questions of causation can lead you down a philosophical rabbit hole but don't let that put you off

In *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, Lord Shaw said (at 369):

The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

Ultimately it is a question of fact and degree that turns on the evidence in each particular case. The more direct the chain of causation, the more likely the evidence will have been

obtained in consequence of the impropriety.

Excluding the evidence under s 138

The higher courts have reaffirmed the importance of fundamental common law principles of personal liberty and their application to the arrests power.

The statements in *Robinson*, for example at [233], about the 'critical importance for the existence and protection under the law of personal liberty' of construing strictly the arrests power are a clear example of this. This would assist in establishing illegality of impropriety.

An arrest is one of the most serious incursions into a person's liberty, given the ignominy andfear' that may result from one. These factors would weigh in favour of the exclusion of evidence under s 138.

For a more detailed discussion on s 138, see Isaac Morrison, 'Advocate's Guide to Stop and Search Cases: Part 2 – Excluding the Evidence.'

Conclusion

The arrests power should be interpreted strictly and in accordance with fundamental common law rights and freedoms. In every case involving an arrest and subsequence evidence of offending, defence advocates should analyse the circumstances of the arrest carefully and determine whether the arrest was unlawful – by breach of the legislation or common law, then whether the evidence of the offence was obtained in consequence of that arrest and finally, how that evidence can be excluded.