Defending the right to personal liberty: A Practical Guide to Unlawful Arrests

Isaac Morrison

Solicitor Advocate, Legal Aid NSW

September 2024

Table of Contents

"Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable. Where the Parliament has legislated so as to define those circumstances, neither legal principle nor considerations of public interest commend or support a search among the shadows of earlier subordinate legislation for the means of evading the constraints upon the interference with the liberty of the subject which the Parliament has imposed."

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

Introduction

This paper is for criminal defence lawyers. It aims to help you identify what an unlawful arrest is, and how this can best be used to protect and advance your client's rights and interests in criminal proceedings.

An arrest is usually seen as the first step in a legal process that leads to charge, trial, sentence and punishment. But we know that not every arrest is made for this reason. Sometimes an arrest is actually the *cause* of alleged offending. And in many cases an arrest is punishment in and of itself.

Lawmakers have long recognised these issues. In New South Wales, the provision that give police the power to make arrests also limit the use of that power. Police generally cannot arrest a person without a warrant unless that person is reasonably suspected of an offence, and the arrest is for one of the reasons set out in the legislation. Parliament has also provided safeguards and alternatives to be followed by police in exercising this power.

Where police do not comply with the limits and safeguards placed upon their power, the consequence will be that the arrest is unlawful. The customary companions of an unlawful arrest should be the exclusion of evidence and the refusal to regard that officer as being in the execution of his or her duty.

It is the duty of criminal defence lawyers to identify that an arrest is unlawful and challenge the admission of evidence obtained as a result. This is an essential aspect of our criminal justice system. It is an important means by which the rights of all citizens are protected from abuses of authoritarian power. Often, defending this right to personal liberty involves opposing a 'search among the shadows' for reasons said to justify an unlawful arrest and avoid the lawful constraints on police powers. This paper is designed to assist with that task by making the relevant principles clear and ascertainable.

Just as a practice of arbitrary arrest is a hallmark of tyranny, a practice of carefully and critically examining of the use of police powers is a hallmark of a free and just society.

Part 1. What is an arrest?

A. Elements of an arrest

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

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

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

B. How to make an arrest

Police can make an arrest by words or actions, or a combination of both. In order to validly make an arrest (i.e. sufficient act of arrest or submission) it is necessary that *either:*

a. some physical restraint is placed on the person; or
b. he or she submits to being arrested.

Arrest by action and restraint

An example of arrest by action and restrain would be: *Police restrain the person from moving anywhere beyond the arrester's control by surrounding them or holding onto them.*

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

Arrest by words and submission

An example of arrest by words and submission would be: *Police say, "You are under arrest" and the person being arrested submits to that arrest by going with police.*

- It may be any form of words which in the circumstances bring it to the defendant's notice that they are under arrest – *and they submit*.

Part 2. When is an arrest unlawful?

Arrest without a warrant

There are two key sections of legislation which give police power to arrest a person without a warrant.

1. Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA")
2. Section 77 of the *Bail Act 2013* ("Bail Act")

Both sections also place limits on the use of that power.

Section 99 LEPRA

Section 99 of LEPRA states:

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 has committed an offence, and
  (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of 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 with the offence within the meaning of Part 5.

In other words, a police officer may lawfully arrest a person without a warrant if:

1. the police officer has a 'reasonable suspicion' that the person is committing or has committed an offence; ***and***
2. the arrest is 'reasonably necessary' for one of the nine reasons outlined in s 99 (1)(b)(i)-(ix).

Section 77 Bail Act

Section 77 of the Bail Act states:

> **77 Police officers may take actions to enforce bail requirements**
>
> (1) Unless section 77A applies [i.e. where a court has issued a warrant] a police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may--
>
> (a) decide to take no action in respect of the failure or threatened failure, or
>
> (b) issue a warning to the person, or
>
> (c) issue a notice to the person (an "application notice") that requires the person to appear before a court or authorised justice, or
>
> (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
>
> (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
>
> (f) apply to an authorised justice for a warrant to arrest the person.
>
> (2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).
>
> (3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered)--
>
> (a) the relative seriousness or triviality of the failure or threatened failure,
>
> (b) whether the person has a reasonable excuse for the failure or threatened failure,
>
> (c) the personal attributes and circumstances of the person, to the extent known to the police officer,
>
> (d) whether an alternative course of action to arrest is appropriate in the circumstances.
>
> (4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.
>
> (5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.
>
> (6) The regulations may make further provision for application notices.

In other words, a police officer may lawfully arrest a person without a warrant if:

1. the officer believes on reasonable grounds that a person has failed to comply, or is about to fail to comply, with their bail conditions; ***and***
2. the officer has considered the matters outlined in s 77(3)(b).

A. No reasonable suspicion

LEPRA s 99

If a police officer arrests someone they do not suspect on reasonable rounds is committing or has committed an offence, the arrest is unlawful: s 99(1)(a) LEPRA.

In *Hyder,* McColl JA considered the caselaw on reasonable suspicion and belief as it applies to the power of police to arrest a person.

Hyder v Commonwealth of Australia [2012] NSWCA 336

Facts: Nazmul Hyder was arrested by Federal Police on suspicion of tax fraud as part of an investigation codenamed "Operation Starfish" conducted by the Australian Taxation Office. It turned out, however, to be a case of mistaken identity. Hyder then tried to sue the police for false imprisonment.

Held: Per McColl JA (with whom Hoeben JA agreed) at [15] (citations omitted):

> [15] The following propositions, adapted by reference to s 3W [of the *Crimes Act 1914 (Cth)*], can be extracted from decisions considering how a person required to have reasonable grounds either to suspect or believe certain matters for the purposes of issuing a search warrant or arresting a person might properly form that state of mind:
>
> (1) When a statute prescribes that there must be "reasonable grounds" for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: *George v Rockett* (at 112);
>
> (2) The state of mind that the reasonable grounds for the relevant suspicion and belief exist must be formed by the person identified: *George v Rockett* (at 112);
>
> (3) The proposition that it must be the arresting officer who has reasonable grounds to suspect (or believe) the alleged suspect to be guilty of an arrestable offence is intended to ensure that "[t]he arresting officer is held accountable ... [and] is the compromise between the values of individual liberty and public order": *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 291);
>
> (4) There must be some factual basis for either the suspicion or the belief: *George v Rockett* (at 112); the state of mind may be based on hearsay material or materials which may be inadmissible in evidence; the materials must have some probative value: *R v Rondo* [2001] NSWCCA 540;
>
> (5) "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof" *George v Rockett* (at 116);
>
> (6) "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture": *George v Rockett* (at 116);
>
> (7) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against "what was known or reasonably capable of being known at the relevant time" *Ruddock v Taylor* (at 40); whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the

subjective beliefs of the police at the time but according to an objective criterion": *Anderson v Judges of the District Court of New South Wales* (at 714);

(8) The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it; *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 298, 301, 303)

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist." *New South Wales Crime Commission v Vu* (at [46])

(10) In *Holgate-Mohammed v Duke* (at 443), Lord Diplock held that the words "may arrest without warrant" conferred on a public official "an executive discretion" whether or not to arrest and that the lawfulness of the way in which the discretion was exercised in a particular case could not be questioned in any court of law except upon the principles Lord Greene MR enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*…

Courts will consider the state mind of the police officer at the time of the arrest and not with benefit of hindsight. Therefore, a police officer may validly arrest someone even if it later turns out that for example, there was no case against them.

> [43] It is important in this, as in other fields of legal discourse, to be careful not to judge the "reasonable grounds" issue with the benefit of hindsight. As I have earlier explained (see [15](8)), a reasonable belief may be based on information which turns out to be wrong.

In *New South Wales v Robinson* [2019] HCA 46 (discussed further below) the High Court held:

> [115] Reasonable suspicion requires an arresting constable to have reasonable grounds for suspicion of guilt. This is less than reasonable and probable cause for prosecution. The former is the necessary intention at the time of arrest. The latter is the necessary intention when making a decision to prefer a charge and then preferring it. Contrary to the submissions of the State of New South Wales, the requirement of an intention to charge at the time of arrest does not import, *to the time of arrest*, a requirement to have the mental state required at the time of charging. All that it means is that there is an intention to meet the requirements for charging *at the time of charging*, which is to take place as soon as is practicable after the arrest, unless it emerges after the arrest that there is not sufficient basis to bring a charge. And in that circumstance, the arrest should be discontinued pursuant to s 105.

Ultimately, Mr Hyder's case was dismissed as the majority found that he police officer held a reasonable suspicion based in the information he had at the time.

***R v Rondo* [2001] NSWCCA 540**

Facts: In *Rondo* the appellant was driving a sports car when police drew up alongside him and asked him whether it was his car. He said it was not, and the police required him to stop. It was alleged that as an officer approached the vehicle, he saw the appellant reach across and appear to place something in the glovebox. The vehicle was then searched and $860 in cash was found in the centre console and some cannabis was found in the glovebox.

Police suspected the cannabis came from his home and applied for, and were granted a search warrant which they executed and found more cannabis, leading to a cultivation charge. The trial judge exercised his discretion to admit evidence of the search.

Held: Per Smart AJ at [53]: These propositions emerge:

(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one or more of the states of affairs covered by s 357E [the precursor to s 36 of LEPRA]. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole surrounding circumstances.

The requirement for 'some factual basis' and references to the source and content of the information giving rise to the suspicion mean that defence practitioners will be well within their rights to seek access to these materials before, or during, trial or hearing.

Bail Act s 77

It is not a requirement for police who arrest someone under s 77 Bail Act to suspect that person has committed a crime, however, there is corresponding requirement that the officer 'believes, on reasonable grounds' that the person 'has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition.'

A reasonable belief is actually a *higher* state of subjective apprehension than a reasonable suspicion (cf. *Rondo* at [53](a)). Therefore, similar principles would apply. Whilst it is still about what is operating in the police officer's mind, the information supporting this 'belief' would logically have to be higher than that which might support a 'suspicion.'

B. Not reasonably necessary

It is a precondition to the power to arrest a person without a warrant that the police officer is satisfied that the arrest is reasonably necessary for one of the purposes outlined in s 99(1)(b)(i)-(ix) of LEPRA.

There is some important history to this. The predecessor to s 99(1)(b) stated:

> A police officer must not arrest a person … unless the police officer *suspects on reasonable grounds that it is necessary* to arrest the person to achieve one or more of the following purposes…

Amendments passed in 2013 changed the wording to remove the requirement that the officer "suspects on reasonable grounds" so current provision now states:

> A police officer may, without a warrant, arrest a person if … the police officer *is satisfied that the arrest is reasonably necessary* for any one or more of the following reasons…

As Basten J stated in *NSW v Randall* [2017] NSWCA 88 at [13] the precondition now "depends, not upon objectively verifiable circumstances, but on the state of satisfaction of the officer." Therefore:

> [A] challenge to the existence of a suspicion or state of satisfaction will only be available where it can be shown that the suspicion or state of satisfaction was manifestly unreasonable, or 'arbitrary, capricious, irrational, or not bona fide', as explained by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*."

In other words, any challenge to an arrest on the basis that it was not reasonably necessary now revolves around an inquiry into the officer's state of mind, or 'satisfaction'.

This means the defence will need to prove, on the balance of the probabilities, that either:

1. The police officer was actually not satisfied that the arrest was reasonably necessary for one of the nine reasons outlined in LEPRA s 99(1)(b)(i)-(ix); or
2. The police offer's state of satisfaction was manifestly unreasonable, or 'arbitrary, capricious, irrational, or not bona fide' (also known as *Wednesbury* unreasonableness).

As Gummow J explained in *Minister for Immigration and Multicultural Affairs v Ehetsu* at [133] (quoting Latham CJ in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*):

> [This] does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

Whilst this may sound like a high bar, it is an unfortunate reality that police often do misconstrue the terms of the relevant legislation, take into account irrelevant considerations and act in arbitrary, capricious or irrational ways when exercising their power of arrest.

There are a couple of areas in particular where challenges to arrests have been successfully made under this ground:

Arrest as first response, not last resort

The following two cases were decided before the 2013 amendments to LEPRA. However, it is the author's view that if they were decided today, they would likely be decided the same way.

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 there is 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."

Where an officer has used their power of arrest capriciously, or as a first response without really considering whether it is necessary (such as where the person has committed a minor offence, police know who they are, there is no risk of them failing to attend court and issuing a summons would have sufficed) then the arrest will be unreasonable and therefore illegal.

Director of Public Prosecutions (NSW) v Mathews-Hunter [2014] NSWSC 843

Facts: The respondent, an 18 year old, was arrested by a transit officer after being seen drawing on an internal window of a train with a "Stealth Ink" marker. The officers physically restrained him, first on the train and then at Woy Woy train station until police arrived. A large group of young people were yelling at the officers to let him go. The transit officer who performed the arrest did not ask the respondent for identification as he considered it unsafe to do so in the

circumstances. The respondent asked to be let go and then attempted to headbutt the transit officer twice, the second time occasioning actual bodily harm. Police arrived a short time later. The magistrate excluded the evidence of the assaults.

Issue: The key issue on appeal was whether the arrest was improper or in contravention of Australian law pursuant to s 138(1) of the Evidence Act. Another issue was whether the arrest, which was made under s 100 of LEPRA (power of persons other than a police officer to arrest without a warrant) was subject to the same qualifications as the power of police to arrest without a warrant under s 99.

Held: [50] Although Smart AJ was dealing with arrest powers under s 352 of the *Crimes Act* (since repealed), I note that the second reading speech to the Bill introducing LEPRA in 2002 makes it clear that the legislature intended that both s 99 and 100 would be subject to the restrictions on the exercise of the power to arrest, including that an arrest should be exercised only when necessary and only as a last resort. In any event, s 352 did not displace the common law with regards to limitations on the power to arrest; neither did the enactment of ss 99 and 100 of LEPRA which replaced that provision (see *Zaravinos v State of NSW* [2004] NSWCA 320; 62 NSWLR 58 per Bryson JA at [23]). In *Zaravinos*, at [23], Bryson JA observed that because of the high value the law places on personal liberty, "a statute which authorises the detention of a person must be strictly construed".

[52] … Far from the power to arrest being executed as the last resort as is required at law, it was the transit officer's first response. There is no evidence to suggest that obtaining the defendant's details and passing them on to the police would not have been an effective way of dealing with the graffiti offences. In my view, in all the circumstances, the evidence supports his Honour's finding that the arrest was unlawful and improper.

Arrest for the purpose of investigation

The High Court has made it clear at the time of making an arrest, the police officer must have formed the intention to charge the arrested person. Therefore, an arrest for the purpose of asking questions or making further investigations into whether they should charge the person is illegal.

New South Wales v Robinson [2019] HCA 46

Facts: The respondent attended a Sydney police station in response to attempts by police to contact him. Upon attending the police station 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 charge at the conclusion of the interview.

The respondent commenced civil 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 respondent was lawful under s 99 of LEPRA in circumstances where there was no positive intent to lay charges at the time of arrest.

Held: [109] Section 99(1) stipulates conditions for arrest without a warrant, namely that "the police officer suspects on reasonable grounds that the person is committing or has committed an offence" and that "the police officer is satisfied that the arrest is reasonably necessary for any one or more" of specified reasons. And a police officer who arrests a person under s 99 must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law. That is a requirement that takes effect immediately upon arrest. To comply with the requirement in s 99(3) immediately upon arrest, a police officer must at the time of arrest have an intention to take the person, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person.

[110] Thus, an arrest under s 99 can only be for the purpose, as soon as is reasonably practicable, of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with the crime is an arrest for an improper purpose and is unlawful.

The preceding case of *Robinson v State of New South Wales* [2018] NSWCA 231 made it clear that the provisions of s 99 of LEPRA should be interpreted strictly and LEPRA is to be read in light of fundamental common law principles such as the principle of personal liberty:

> 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: at [233].

Similarly to an arrest for the purpose of investigation, it is 'manifestly unreasonable' to arrest a person for the purpose of establishing his or her identity in circumstances were there is no positive intent to lay charges.

JH v R [2019] NSWSC 192

Facts: Police approached JH, a young person, on Manly Corso because they believed he might be in breach of his bail conditions, however they weren't sure if it was him or his brother. As they approached, he lit up a cigarette (which was prohibited in that area under counsel laws). Police requested JH's identity and he initially refused, then gave then a fake ID. He was placed under arrest for smoking on the Corso and violently resisted police.

Issue: The issue on appeal was whether the arrest of the respondent was lawful under s 99 of LEPRA.

Held: Police did not have reasonable grounds to believe that he was in breach of his bail, so they did not have the power to arrest him under s 77 of the *Bail Act*.

Although police told JH he was being arrested for smoking on the Corso, the weight of the evidence was that he was arrested so that police could ascertain his identity in order to see if he was in breach of bail. Therefore there was no positive intent to lay charges at the time of his arrest.

The power to arrest under s 99 of *LEPRA* exists for the purpose of bringing the arrested person before a justice as soon as reasonably practicable: at [58] citing *Robinson*. Therefore, an arrest can only be 'reasonably necessary' to enable inquiries to be made to establish the person's identity (cf. s 99(1)(b)(iii)) if it is proposed that the person be charged. In this case, there was no positive intent to lay charges at the time of the arrest and therefore the officer's state of satisfaction was manifestly unreasonable.

Exceeding maximum investigation period

An arrest will be unlawful where police exceed either (a) what is reasonable in the circumstances or (b) the maximum investigation period.

Section 115 of LEPRA states:

> (1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.
>
> (2) The maximum investigation period is 6 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

Section 116 sets out relevant considerations including the person's age, physical and mental condition and the number, seriousness and complexity of the offences under investigation. Subs (3) states that the burden is on the prosecution to prove on the balance of probabilities that the period of time was reasonable.

Section 117 outlines time periods that are not to be taken into account, including time taken to: transport the person, communicate with a legal practitioner, receive medical treatment, participate in an identification parade, recover from intoxication, and carry out forensic procedures.

Whether an investigation period is reasonable depends on the facts of the case. As the minority in *Robinson* stated at [53]: "In some cases, possibly many – for example, cases of relatively minor offences where the facts are clear – it might not be reasonable to detain the person for any significant period of time at all."

The existence of the 6 hour investigation period cannot be taken into account by a police officer at the time of arrest in forming a reasonable suspicion. Otherwise this would lower the threshold for making an arrest and dilute its purpose: *Robinson* at [113]-[114].

C. Lack of compliance with legislative safeguards

There are safeguards in LEPRA and the Bail Act which apply to the exercise of police powers (including the power to arrest a person without a warrant). Failure to comply with these safeguards will result in an arrest being unlawful.

LEPRA s 202

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 following to 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 or making 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 of anything resulting from the exercise of that power.

(2) Subsection (1) does not apply if the failure to comply occurs after the police officer was asked for 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.

Note that s 204A does not "save" the arrest if the officer fails to provide the reason for the arrest. 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). See also: *Michaels v The Queen (1995)* 184 CLR 117 at 119-120.

Also, 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 1995*.

Bail Act s 77(3)

If a police officer believes someone is in breach of their bail conditions, they must consider the matters outlined in s 77(3) of the *Bail Act* before arresting them. Failure to do this will render the arrest unlawful.

Section 77(3) states:

(3) The following matters **are to be considered** by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered)--

(a) the relative seriousness or triviality of the failure or threatened failure,

(b) whether the person has a reasonable excuse for the failure or threatened failure,

(c) the personal attributes and circumstances of the person, to the extent known to the police officer,

(d) whether an alternative course of action to arrest is appropriate in the circumstances.

Bugmy v Director of Public Prosecutions (NSW) [2024] NSWCA 70

Facts Ms Bugmy was charged with an offence of 'use carriage service to menace/harass/offend' contrary to s 474.17(1) of the *Criminal Code Act 1995* (Cth). She was granted bail. One of her bail conditions was that she was not to contact Broken Hill Police Station unless it was an emergency. While she was on bail subject to this condition, Ms Bugmy called Broken Hill Police Station and asked for police to attend her home in the next 15-20 minutes. When the officer told her he needed to know the reason first Ms Bugmy yelled at him and called him names.

Constable McCrindell was advised of the breach and attended Ms Bugymy's home with four other officers. He immediately informed her that she was under arrest. Ms Bugmy resisted and was charged with 'resist officer in execution of duty' contrary to s 58 of the *Crimes Act.*

Issue The issue in the case was whether Constable McCrindell was acting in the execution of his duty when he arrested Ms Bugmy.

Significantly, Constable McCridell admitted in cross-examination that when he exercised his power under s 77(1) of the *Bail Act 2013* to arrest Ms Bugmy for breaching her bail he did not consider the matters outlined in s 77(3) of the Act.

Held The court held that a failure to comply with s 77(3) does render an arrest for breach of bail invalid.

Per Leeming JA: [45] The starting point is that the statute empowers an officer to infringe a person's liberty but at the same time requires that officer to consider certain matters. Prima facie, a lawful exercise of power is an exercise of power in which the police officer complies with the requirements imposed by statute. It is improbable, especially when a statute confers a power of arrest, that an exercise of the power will be lawful even if the constraints upon it have been breached. That reflects settled principles of construction. In *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 at [222] Nettle and Gordon JJ said:

> As Wilson and Dawson JJ said in *Williams v The Queen*, questions of statutory construction regarding the powers of police to keep a person in custody:
>
> > "must necessarily be considered against the background of the common law which provides in this instance the spirit if not the letter of the law. The presumption which requires clear words to override fundamental common law principles has an obvious application in a matter as basic as the liberty of the person".

[46] One aspect of construing such legislation strictly is that obligations imposed upon the arresting officer are to be complied with if the exercise of the power is to be lawful.

D. Excessive use of force

Section 231 of LEPRA limits the amount of force that a police officer may use in making an arrest:

> **231 Use of Force in Making an Arrest**
>
> A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

Section 230 of LEPRA covers the use of force by police officers generally:

> **230 Use of Force Generally by Police Officers**
>
> It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

Both sections explicitly authorise only such force as is reasonably necessary for a specific purpose (to make an arrest, prevent an escape or exercise another function under LEPRA).

If the use of force is excessive or is not directed towards a lawful purpose, the arrest will be unlawful.

Objective or subjective test or both?

Director of Public Prosecutions (NSW) v Greenhalgh [2022] NSWSC 980

Facts The complainant, a 16 year old, was observed to be state of distress and acting bizarrely in a lane in Byron Bay. The defendant (a police officer) and three other police officers attended the location, capsicum sprayed him fired least two bursts from a Taser into his body and struck him 18 times with a police baton before handcuffing him and placing him in a police van. The complainant was conveyed to Byron Bay Police Station where and then taken by ambulance to Tweed Heads Hospital for examination. He was subsequently released from hospital into his mother's care. A nearby resident captured part of the incident on a smartphone.

Issue The issue in the appeal was whether the force used by the defendant, in particular the last six blows by the baton, was "reasonably necessary" in the terms of s 230 of LEPRA. In dismissing the charge in the Local Court, the Magistrate interpreted "reasonably necessary" to be a subjective test.

Held His Honour Justice Ierace found that s 230 did not displace the common law test articulated in *R v Turner* [1962] VR 30 at 36:

> What is reasonable depends upon two factors. [The police officer] is entitled to use such a degree of force, as in the circumstances [perceived] by him, [and] are such as a reasonable man placed as he was placed, would not consider to be disproportionate to the evil to be prevented.

Therefore, s 230 has an objective element. The correct test is, "whether a reasonable person in the position of the police officer would not consider the use of force by the police officer to be disproportionate to the risk or danger sought to be prevented "at [186].

The order dismissing the charges was set aside and the matter remitted to the Local Court to be dealt with according to law.

Often these cases will turn on their facts. However, advocates should keep in mind that judges and magistrates are often reluctant to criticise the actions of police made 'in the heat of the moment' from the relative calm of the courtroom with the benefit of hindsight. As such, advocates should be prepared to answer remarks drawn from cases such as *Woodley v Boyd* [2001] NSWCA 35 at [37]:

> …[I]n evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight. In *McIntosh v Webster* (1980) 43 FLR 112 at 123, Connor J said:
>
> > '[Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.'"

When does the arrest finish?

It is important to keep in mind, especially for use of force cases, that an arrest is a 'continuing act'.

In *Holgate-Mohammed v Duke* [1984] AC 437 at 441, Diplock LJ said:

> The word "arrest"... is a term of art. First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody, (sc. by action or words restraining him from moving anywhere beyond the arrester's control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate's judicial act.

Therefore, an arrest that starts off being lawful can become unlawful if excessive force is used.

(However, be aware also that an arrest that starts off unlawful can, in some circumstances, become lawful. See, for example *Michaels v The Queen* (1995) 184 CLR 117).

E. Arrest no longer necessary

If an arrest no longer becomes necessary, police officers are empowered (and in fact, required) to discontinue the arrest: see LEPRA; s 105, *Bail Act* s 77(2).

Williams v R [1986] HCA 88: "The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."

Arrest with a warrant

Section 101 of LEPRA states:

> **101 Power to arrest with warrant**
>
> (1) A police officer acting in accordance with a warrant issued under any Act or law may arrest or deal with the person named in the warrant in accordance with the warrant.
>
> (2) The police officer may take action whether or not the warrant is in his or her possession.

S 101 confers the power to arrest a person ***in accordance with a warrant***. Therefore, if the warrant is invalid or expired, or the arrest is not made in line with the terms of the warrant, the arrest may be unlawful.

Whilst a police officer who arrests someone pursuant to a warrant does not have to comply with s 99 of LEPRA, the safeguards in ss 202 and 231 of LEPRA still apply. However, the requirement to inform the person of the reason for their arrest is satisfied simply by informing the person that there is a warrant for their arrest: *Wang v New South Wales* [2019] NSWCA 263 at [79].

Where an arrest is made pursuant to an expired or invalid warrant, the arrest will not be made lawful even if police would had grounds to arrest the person without a warrant, such as under s 99 of LEPRA. What matters is the power the police officer was purportedly exercising at the time of the arrest.

Part 3. What are the consequences of an unlawful arrest?

If a police officer arrests your client and does not comply with the legislation and the applicable common law safeguards, that arrest is unlawful. There are a number of consequences that flow from this.

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

If a police officer arrests someone unlawfully, the immediate consequence of this is that they are not acting in the execution of their 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.

This 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. Any of the offences under s 60 of the *Crimes Act 1900* such hindering, resisting and assaulting a police officer which contain as a necessary of the element of the offence that it was done *in the execution of the officer's duty.*
2. The common law offence of escape lawful custody. (For a person to be convicted of escape from lawful custody, it must be established as a necessary element of the offence that the arrest from which the person escaped was lawful: see for example *Alfio Licciardello v The Queen* [2012] ACTCA 16 at [19]; *Michaels v The Queen* (1995) 184 CLR 117 at 124.

Onus of proof is on the prosecution to prove the arrest was not unlawful

Since it is an element of these offences, that the officer was in the execution of his or her duty, the onus is on the prosecution to prove this *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, or the magistrate cannot decide, then the offence is not made out.

B. Evidence illegally or improperly obtained evidence

In other types of cases, if a police officer arrests someone unlawfully, the court has a discretion to exclude the evidence obtained in connection with the arrest.

Section 138 of the *Evidence Act 1900* states:

> **138 Exclusion of improperly or illegally obtained evidence**
>
> (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: see *Evidence Act 1995* ss 142, 138.

The meaning of 'in consequence of'

Section 138(1) of the *Evidence Act* 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.

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 right pocket.*

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 have applied 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.

Example: [Continuing from the previous example] 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.

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.

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 Court in *Director of Public Prosecutions v Kama* (2014) 247 A Crim R 300 at [346].

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.

In other words, questions of causation can lead you down a philosophical rabbit hole but don't let that put you off. 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.

C. Excluding 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.

Likewise, the comments of McColl JA in *Hyder* at [15] suggest that it is an important function of the law to keep police officers accountable as a way of upholding the value of individual liberty and striking a compromise between individual liberty and public order.

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

Conclusion

The arrests power should be interpreted strictly and in accordance with fundamental common law rights and freedoms. In every arrest case, defence advocates should analyse the circumstances carefully and critically to determine whether the arrest was unlawful, then whether the evidence of the offence was obtained in consequence of that arrest and finally, how that evidence can be excluded.

Further reading

For further reading on reasonable suspicion and excluding evidence under s 138, see "Antithetical to any free society': A Practical Guide to Unlawful Stop and Search Cases", Isaac Morrison (March 2021) available on criminal CPD: https://criminalcpd.net.au/police-powers/

Isaac Morrison

Solicitor Advocate

Legal Aid NSW