Lance Carr for Kids

Mark Dennis
Forbes Chambers

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.

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 in the conduct of a voir dire would be to pursue 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.

Issue 2 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.

Issue 3 involves the pursuit of the improper arrest issue in the same fashion as one would if representing an adult offender.

A brief word about discretionary exclusion

There have been a number cases that have considered DPP v Carr; specifically R v Cornwell [2003] NSWSC 97, DPP v CAD [2003] NSWSC 196, and DPP v Coe [2003] NSWSC 363. Some of these cases take a radically different approach to the interpretation and application of Evidence Act s.138 and the means by which a court determines "impropriety" and whether evidence is "obtained.... in consequence of..." an illegality or impropriety. Suffice to say that the decisions conflict with each other.

All the aforementioned decisions are single judge decisions of the NSW Supreme Court.

The dilemma is easily 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 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".

Best of luck.