

CRIMINAL LAW SUMMARY



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TOPIC 1: PRE-TRIAL PROCEDURES

1.1 Discretion to arrest

Arrest involves depriving a person's liberty. It may be the physical seizure of the arrested person or advising the person the fact of arrest.¹ The police have the discretion to either arrest; proceed by way of a summons² or a Field Court Attendance Notice (FCAN)³. This power is derived from s 138 of the *Evidence Act 1995* (NSW). In addition, the discretion to arrest is also controlled through internal police guidelines. In *DPP v Carr*,⁴ the issue was whether the police had misused their discretion to arrest. It was held that whether a police had acted 'improperly' by arresting instead of issuing a summons was determined through factors such as police knowledge of Carr's address, and the fact that they arrested him because it was quicker than issuing a process later on.⁵

The Magistrate emphasised that in relation to less serious matters, arrest is a measure of last resort.⁶

1.1.1 Internal police guidelines

The NSW police have a code of practice called *CRIME*⁷, which is regulated by LEPR.⁸ Under these guidelines, before a police officer is to arrest someone, they are to consider various factors. These factors include:

- the seriousness of the offence;
- the need for medical examination, fingerprints, identification parades;
- the likelihood the offender would if not apprehended:
 - abscond;
 - offend again;
 - interfere with the evidence;

¹ Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2010) 47.

² This is prepared by the police to bring a person before the court.

³ This is a notice which the arrested person signs to acknowledge that he or she will attend court.

⁴ [2002] NSWSC 1994.

⁵ Kenneth Adams, 'Pushing the boundaries of Public Order Law: A Commentary on *DPP v Carr* [2002] NSWSC 194' (2003) *Criminal Law Journal* 277.

⁶ *DPP v Carr* [2002] NSWSC 194, [14].

⁷ NSW Police Service, *Code of Practice for CRIME (Custody, rights, investigation, management, and evidence)* (21 June 2011) NSW Police Force

http://www.police.nsw.gov.au/about_us/policies_and_procedures/legislation_list/code_of_practice_for_crime

⁸ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').

- intimidate witnesses;
- hinder the police investigation; and/or
- jeopardise the safety and protection of the victim.

1.1.2 Legality of arrest

In order for an arrest to be lawful, the police must inform the person of the grounds of arrest (subject to the exceptions below): *Adams v Kennedy*.⁹ This requirement to inform needs only that the grounds be stated in general terms, and no precise charge needs to be formulated at the time of the arrest.

The police also have to be mindful that arrest has to be executed with minimum force. They then need to be taken to the nearest police station. Only in exceptional circumstances can the police take them on a longer route. The police must endeavour to charge them under their real name.

The courts have held that there are **four situations** where the grounds for arrest **do not have to be communicated** to the suspect: *Christie v Leachinsky*¹⁰.

1. The police may arrest them for one felony (for example, murder), then later charge them with another (manslaughter).
2. The police do not need to communicate the grounds of arrest if the suspect has been caught red-handed.
3. The police do not need to communicate the grounds for arrest where it is important to secure a possibly violent criminal.
4. It is permitted to arrest the suspect for a charge (for example, reasonably suspected of murder), with the view to investigate a second charge.

◆◆◆◆

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⁹ (2000) 49 NSWLR 78.

¹⁰ [1947] AC 573.