Criminal Procedure: The Trial Process

Week One: Introduction: Overview of the CJS

Readings

*Kenny 1:10-1:17*
- The whole of the statutory criminal law passed by the WA parliament isn’t contained in the Criminal Code. Many statutes have been enacted which create further criminal offences or otherwise relate to the criminal law and which haven’t been incorporated in the Criminal Code (such as Police Act, Road Traffic Act, Weapons Act, Misuse of Drugs Act, Litter Act, Firearms Act, Explosive & Dangerous Goods Act).

*McSherry: “Structuring Criminal Law” 49-58*
- Overwhelming majority of offences are processed in Magistrates courts
- Defence counsel has the discretion as to which offences, if any, will be raised at trial. Self defence and provocation most common.
- Criminal defences traditionally used to deny that the act was wrong (justification) or deny responsibility (excuse).
- General rule that the accused has an evidential burden in relation to defences. It’s for the judge to decide whether the defence has the support of enough evidence to enable it to be considered by the jury. If so, judge directs it as the elements of the defence & what needs to be proved/disproved. Standard unclear.
- Standard of proof in relation to legal burden is BRD.

*McSherry: Subjective vs Objective Fault*
- Courts generally have shown a preference for subjective fault elements in relation to serious crime. Although this is much harder to prove.
- In a criminal trial, the prosecution must prove BRD that the accused’s conduct was voluntary (although hard to define)
- Difference btw act & omissions, may be liable for some omissions (eg care of child)
- Fault elements: Generally three meanings of intention (a) intention to perform the conduct / basic intention (b) purpose plus foresight / specific intention (c) intention, foresight & probable consequence / oblique intention.
- Negligence: is objective so doesn’t sit well with concept of the fault element of a crime as referring to a guilty mind.
- In order for an accused to be convicted of an offence, it must be proved that the fault element coincided with, or existed at the same time as, the physical element. But courts r prepared take a broad time-frame approach to occurrence.
- Must also prove causation. No meaning but ‘common sense’ should be applied. Accused conduct must be a substantial cause.

*McSherry: “Aims of Criminal Law: Differing Perspectives” 17-24*
- (a) Punishment: Retribution/ Principle of proportionality/ Rehabilitation
- (b) Protection of individuals from harm: As a last resort. Although no meaning of ‘harm.’ Concept of harm is morally loaded.
- (c) Preservation of morality: Not as relevant as before (eg homosexuality used to be a crime) but still relevant.
- (d) Promotion of social welfare:
- It is very hard to measure crime. Difficult to get a truly representative sample. Much crime is not reported –“dark figure of crime.”

*Colvin 1.10-2.0*
Basic Principles in the Criminal Justice System

Issue 1: Privacy Vs the Public Interest

- Privacy v Public Interest: Matt Birney Article (drink driving incident which was incorrect)
  - Look at motivation behind- eg was it mere political smearing?
  - His private life might affect his public
  - Many people ignorant of the law so may be only way public finds out what goes on. But is it the right information? Needs to be objective & balanced.
  - Role Models
  - Police Investigation procedures often shrouded in secrecy

Issue 2: Safety of the Individual/possessions Vs Safety from harassment from authorities

- Criminal law & procedure is very important to safeguard (esp in relation to confessions)
- Not giving evidence at trial can also be a safeguard
- Tapping of phones

Issue 3: Equality before the Law

- Tribal Punishment a big issue
- Infanticide is a female only defence (reduces wilful murder to manslaughter)
- Children treated separately.
- Think about indigenous def, women, ESL & children

See handout on Tribal punishments

Issue 4: Victims & Defendants rights

- You can never compensation for a life
- Will there ever be satisfaction between the two?
- Does the community have the wrong expectations of the justice system?
- Do our procedural rules attempt to rectify the apparent differences?

See handout on driver who accidentally ran down boy

Readings

ALRC “Seen and Heard: Priority for Children in the Legal Process”
- Criminal responsibility for kids is 10
- Old common law principle presumes that a child aged under 14 does not know that his or her criminal conduct was wrong unless the contrary is proved. That is, it is a rebuttable presumption
- The principle of doli incapax has been controversial in recent years both in Australia and the United Kingdom

Readings.

McSherry: Feminist & Critical Race Theories
- Basically just says be aware of social contexts.

Refer to press clipping “shock on beaches at Stirling’s new Laws”
IS it the best way to get to the truth?
- In a criminal trial there is a dispute between the state & the individual that needs to be resolved. The best we can do is arrange a criminal dispute resolution procedure that is at least fair to both state & indv. The
**Function of the Trial & Some Aspects Affecting the Search for the Truth**

The Function of the trial in WA is to
- To seek the truth
- To ensure that a person is judged fairly & according to the law

This means that “the central thesis of the administration of justice is the entitlement of an accused person to a fair trial according to the law.” (per Mason, Deane, Gaudron & McHugh in *McKinney*)

A fair trial essentially relates to the accused

What are some of the law/processes designed to ensure this?
- We do have some basic recognition of fairness eg the right to remain silent, accused right to give & call evidence on his own behalf.
- Rules about disclosure of information
- Rules in relation to media prejudice, effect of lengthy trials.

Some aspects affecting the search for the truth / fair trial:

1. **Do we have a right to a speedy trial?**

   The longer you leave a trial the bigger the problems to the trial process (mishandling of evidence, is evidence still fresh, memory of witnesses etc)

   Is the right to a fair trial prejudiced by the undue delay? If your trial is going to be prejudiced then this would amount to an abuse of process. Court has right to stay proceedings if there has been an abuse of process.

   The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system ((1) Jago v. District Court per Mason C.J. at p 29; Deane J. at p 56; Toohey J. at p 72; Gaudron)

   But As Deane J correctly pointed out in Jago the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial

   *Jago* (1989) CLR (authority that court has inherent or implied jur to stay a crim proceeding where the proceedings are an abuse of process by reason of the fact that the trial would be unfair)


   Two questions are raised by those facts. The first question is whether the common law of Australia recognizes a right to a speedy trial separate from and additional to the right to a fair trial. The second is whether in this case the appellant's right to a fair trial has been prejudiced by virtue of undue delay amounting to an abuse of process. The appellant urges an affirmative answer to each question and accordingly seeks a permanent stay of the charges against him.

   **Mason CJ:** It is clear that Australian courts possess inherent jurisdiction to stay proceedings which are an abuse of process. At least in cases of undue delay, the courts possess power to stay criminal proceedings in order to prevent "injustice" to the accused

   In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried
without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed.

"The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.

(note: stay isn’t only remedy; court may order that a trial be expedited where it sees the delay as warranting such action but not as being of such a kind as to justify staying the proceedings- a court will inevitably give consideration to a range of matters, apart from the mere existence of delay, including whether the conduct of the accused has contributed to the delay, whether the accused has pressed for expedition in a manner consistent with the anxiety and concern he is said to be suffering, whether court resources are available for an expedited trial and whether the displacement of other trials is warranted.)

In the context of undue delay, the interests of the accused in obtaining fairness are similar to, if not the same as, those which the right to a speedy trial contained in the United States Constitution is designed to protect. Those interests were identified by McHugh JA in Aboud v Attorney-General (NSW) (1987) 10 NSWLR 671, at 692, as the following:

(i) the prevention of oppressive pre-trial incarceration;
(ii) the minimization of the anxiety and concern of the accused;
(iii) the limiting of prejudice to the presentation of the accused's defence; and
(iv) the protection of the reputation and social and economic interests of the accused from the damage which flows from a pending charge.

Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.

- The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial.

The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused. In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare.

To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences": Barton, at 111, per Wilson J. Where delay is the sole ground of complaint, an accused seeking a permanent stay must be "able to show that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute": I agree with Toohey J that no such case has been made out in the present appeal. For that reason, and because there is no right to a speedy trial or trial within a reasonable time independent of the right to be protected from unfairness resulting from undue delay, I would dismiss the appeal.

Lect: There is a right to a fair trial, but no separate right to speedy trial, separate representation etc (they just go towards whether trial was fair). If you have something (like delay, excessive
publicity etc) then have to see if fairness will be prejudiced by these factors. If so, there is an
abuse of processes so court must stay proceedings (until factors fixed or may be stayed forever).
No separate right because there would be different opinions on eg what is a speedy trial. So
don’t look at what is the cause but look at the effect i.e. have they been prejudiced.
Brennan J: In the present case there is no suggestion of bad faith, though the lengthy delay found
by Judge Thorley was reprehensibly inefficient. The proceedings which the prosecution finally
got to trial were, so far as appears, intended simply to administer the criminal law. There was no
abuse of process. It remains for the prosecution to consider whether, in all the circumstances, the
trial should proceed, but the appeal must be dismissed.
Deane J: The power of a court to stay proceedings in a case of unreasonable delay is not confined
to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair
one. Circumstances can arise in which such delay produces a situation in which any continuation
of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would
constitute an abuse of the court's process. Multiple prosecutions arising out of the one set of
events but separated by many years or a renewed charge brought years after the dismissal of
earlier proceedings for want of prosecution could, in a case where the relevant material had been
available to the prosecution from the outset and depending on the particular facts, provide
examples. Where such circumstances exist, the power of a court to prevent abuse of its process
extends to the making of an order that proceedings be permanently stayed.
It is not practicable to seek to precisely identify in advance the various factors which may be
relevant in determining whether, in the circumstances of a particular case, unreasonable delay has
produced the extreme situation in which any further proceedings should be permanently stayed.
The starting point will be consideration of the question whether the delay is so prolonged that it is
unreasonable in the context of the particular case. An affirmative answer to that question will, at
least where the accused does not share responsibility for the delay, prima facie indicate that the
accused is entitled to some relief (e.g. an order fixing a date for trial). It will not, however, of
itself and viewed in isolation, suffice to found an order that the proceedings be stayed. In that
regard, it is relevant to note that, in the context of an accused being entitled to the benefit of any
reasonable doubt, the vagueness and uncertainty of memory and evidence which is likely to result
from delay is more likely to be damaging to the prosecution than to the defence case. An order
that proceedings be permanently stayed will only be justified in the exceptional cases which I
have indicated, namely, where it appears that the effect of the unreasonable delay is, in all the
circumstances, that any subsequent trial will necessarily be an unfair one or that the continuation
of the proceedings would be so unfairly oppressive that it would constitute an abuse of process.
Relevant circumstances and considerations to which a court should advert in deciding whether
proceedings should be stayed on the ground that the effect of delay on the part of the prosecution
is that any trial will necessarily be an unfair one in all the circumstances.
(i) the length of the delay;
(ii) reasons given by the prosecution to explain or justify the delay;
(iii) the accused's responsibility for and past attitude to the delay; and,
(iv) proven or likely prejudice to the accused
(v) public interest in the disposition of charges of serious offences and in the conviction of
those guilty of crime

Parties not only include the accused, but the victim and the community it serves; see if those
parties should be subjected to some unfairness. Sometimes community may say victim has to
endure some unfairness to ensure accused accorded a fair trial.

Lawyers now talk about ‘an injustice’ to the accused. But court prefers to use prejudice of a fair
trial which leads to an abuse of process: stick to these terms. If rules that are legislatively enshrined
are breached then automatically is an abuse of process.
If not, then look to see if it prejudices your trial which may be an abuse of process.

McKinney (1991) CLR
Facts: Charges arising out of the breaking and entering. 3 ppl charged, each the applicants signed a record of interview in which he stated that he, and he alone, had entered the premises at Dharruk and accidentally discharged the gun. The case against the accused was based substantially on signed police records of interview. Apart from their signatures, there was no independent evidence corroborating the making of those records or confirming their contents. The defence of each accused was conducted on the basis that his record of interview had been fabricated by the police and that he had signed the fabricated document only because his will was overborne. The accused applied for special leave to appeal to the High Court on the ground that a warning should have been given as to the danger of convicting on the basis of the records of interview.

Lect: The notion of what people think is fair could and should change with time; the social conditions upon which we live in.

Held: Whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone. The basis of the rule lies in the special position of vulnerability of an accused to fabrication when involuntarily held in police custody in that the detention will have deprived the accused of the possibility of the corroboration of a denial of the making of all or part of an alleged confessional statement.

Set aside the decision and orders of the Court of Criminal Appeal of NSW, or that the convictions be set aside and a new trial held.

Mason, Deane, Gaudron and McHugh J: “The basis lies, as we have explained, in the special position of vulnerability of an accused to fabrication when he is involuntarily so held, in that his detention will have deprived him of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement. That basis is obviously a fortiori in a case such as the present where it is common ground that the involuntary detention of the applicants in police custody was unlawful. The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary with changed social conditions, including developments in technology and increased access to means of mechanical corroboration. In these circumstances what has been said by the Court in the past even in the recent past cannot conclusively determine the content of that requirement. Where a majority of the Court is firmly persuaded that the absence of a particular warning or direction in defined circumstances will prima facie indicate that the requirement of fairness is unsatisfied and will give rise to the detriments of the miscarriage of justice and a need of a second trial, it is incumbent upon the Court, in the proper discharge of its judicial responsibilities, to enunciate a prima facie rule of practice that such a warning or direction should be given in those circumstances.”

Refer to article p.3: Re Kison & others charged over Metro Incident. One of them kept in custody for a long time awaiting trial. Could apply for bail or stay of proceedings. If you speed one trial up it may affect the fairness of another. But in determining if there is a speedy trial to be decided on case by case basis. So when it’s all balanced up it’s a question of where would the prejudice lie.

Also refer to press clippings

Mallard [2005] HCA
“Of particular concern are the items in which evidentiary material, consistent with innocence and presenting difficulties for the prosecutor’s hypothesis of guilt, were actually suppressed or removed from material supplied to the defence. The important issue of legal principle in this appeal is whether such non-disclosures & suppression deprived the appellant of a fair trial.”
- Shows that essential question is whether you have a fair trial.
2. The Right to Counsel

*Dietrich* (1992) CLR

**Facts:** Charged with importing heroin. D applied to Legal Aid, given a grant for a plea of guilty only. Legal Aid said they don’t have the funds for such a lengthy trial. D made application H/C saying is a complicated case which he wasn’t capable of representing himself. Court looked at whether there is a separate right to representation.

The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed.

**Held:** Court said sep rep is good for the community (cause someone who knows what’s going on is doing it, will be quicker) is in the interests of the accused, saves judges time (although some articles say this is just lawyers justifying their own existence). Nevertheless, held **that there is no separate right to representation.**

**Gaudron J:** “It’s fundamental to our system of criminal justice that a person shouldn’t be convicted of an offence save after a fair trial according to the law. The expression ‘fair trial according to the law’ is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal process were perfect that would be so in every case. But the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with the law. Thus the overriding qualification & universal criterion of fairness!

**Mason & McHugh JJ:** In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.

**Dietrich** established the following propositions:

1. Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense.
2. However, under Australian law, an accused has the right to a fair trial or, perhaps more accurately, a right not to be tried unfairly.
3. The courts have an inherent jurisdiction which extends to a power to stay proceedings in order to prevent the prosecution of a criminal proceeding which will result in a trial which is unfair.
4. Each case needs to be examined in the light of its own particular circumstances. However, ordinarily, where an indigent person has been charged with a serious criminal offence, if, by reason of lack of means and the unavailability of other assistance, that person is denied legal representation, the trial will be unfair.
5. Accordingly, where an indigent person has been charged with a serious criminal offence, and he or she is denied legal representation by reason of lack of means, and the unavailability of other assistance, the court has jurisdiction to stay the proceedings until he or she is provided with legal representation necessary for a fair trial, or with the resources necessary for such representation.

As a result, AG fund set up for Legal Aid where if they didn’t have $ to fund trials it goes to AG where he can choose to pay for some trial.

**S172 Criminal Procedure Act**

Basically says you can be represented by yourself, another person (but can’t be paid) or a lawyer. Only a police officer can represent the DPP.
Milat (1995) NSW

**Facts:** Claimed he had a right to competent Counsel. He had obtained grant of Legal Aid, they referred on but he wasn’t happy who he referred onto. The Legal Aid Commission had made various offers of legal representation to an accused in respect of his forthcoming Supreme Court criminal trial which included seven counts of murder. However, the lawyers whom he wishes to represent him at his trial have informed the Legal Aid Commission that they are unwilling to act for the fees offered to them by the Commission. The respondent did not seek to make a case based on proof of unsuccessful attempts to retain other lawyers, and inability to find suitable representation.

**Held:** The accused had failed to show that he was unable to obtain proper legal representation and that his trial would therefore be unfair: the principles in *Dietrich* do not require or authorise the setting of a reasonable rate of remuneration for the accused's legal representation by the judiciary. There is nothing in Dietrich to suggest that an indigent accused can frustrate attempts to bring the accused to trial simply by rejecting offers of legal aid or other assistance. Mason CJ and McHugh J (at 311) emphasised that the circumstances of each case need to be considered, and Deane J (at 337) related the principle in question to denial of legal representation by reason of an accused's lack of means and the unavailability of other assistance.

But the principle in Dietrich turns upon whether legal representation is unavailable to an indigent accused. It would be a serious criticism of a qualified lawyer, regularly practising in the criminal area, to say that representation by such a person was the equivalent of being relevantly unrepresented.

**Lect:** Community & state have an interest in seeing people are properly represented. But also said court isn’t the judge of that, they won’t say who is a good lawyer or not. Isn’t appropriate for court to assess competency.

3. The Effects of pre-trial publicity

*Narkle:* refer to press clippings.

*Long* (2003) QCA 77

**Facts:** L charged & convicted of backpacker fire in NT. A lot of windows had bars on them, exits blocked with boxes etc. B4 he was charged had his face & details splashed Aust wide media. Eg 285 media reports given to court (and they were only samples). In particular, was a photo of him b4 his arrest saying “Aust most wanted.” Also rumours going around which was completely disproved at trial. Media stopped after his arrest but began again at trial, He appealed against extensive publicity b4 trial which meant there was no way he was going to get a fair trial.

**Senior counsel for the appellant** referred the court to the decisions of the High Court in *Murphy v R*, Glennon v R, Gilbert v R, R v Lewis, Chambers and Davidson. Those decisions establish that considerations which are relevant on an application for a stay based on pre trial publicity include:

1. The extent and nature of the publicity, when it occurred, and the nature of the offence charged:
2. The legitimate public interest, and legitimate private interest(s) of a person charged with a crime, the witnesses, the victim of the alleged crime and their relatives, in the ordinary and expeditious process of prosecution to verdict of those charges:
3. That in this era of intense commercial publication of information about immediately current events, and easy electronic access to that, there can be no guarantee an individual juror may not have been influenced by pre trial publicity:
4. That recognition of that possibility requires judges to do what can be done to protect the integrity of the criminal process, including but not limited to punishment for contempt, adjourning a trial until the influence of prejudicial publicity subsides, ordering a change of venue for the hearing of the trial, ordering separate trials for different accused persons, and giving express directions to jurors that their verdict must be based on the evidence given before them on the trial and that in reaching that verdict they must disregard knowledge otherwise acquired:
5. That of necessity the law places much reliance on the integrity and sense of duty of jurors to comply with such directions and give a verdict based on the evidence led. Accordingly, it is necessary to show more than the possibility that a juror or jurors would have gained knowledge of prior convictions to support the argument that it was likely those jurors would or did ignore or disobey directions given.

6. That the necessary assumption that jurors understand and follow directions given by trial judges can give way to recognition that jurors’ decision making is affected by matters of possible prejudice, where more is shown than the mere possibility a juror would have gained knowledge of inadmissible and prejudicial matters. It is in these cases that the discretionary exercise of the powers of the trial judge is critical, including the power of adjournment for a lengthy period:

7. That a permanent stay will be ordered only in an extreme case where there has been adverse pre trial publicity of such a nature that nothing a trial judge can do in the conduct of the trial could relieve against its unfair consequences. The need to maintain public confidence in the administration of justice, and the public interest in ensuring that the judicial processes are not abused and that trials are fair to the people charged, means that a permanent stay should be ordered when it is impossible to ensure that a fair trial could take place.

8. That the fact that adverse publicity is deliberately generated by those for whom the Crown should properly be held responsible may have the result that justice requires a permanent stay be granted.

**Held:** There was very substantial public interest, locally, nationally and internationally, in the arson of the Palace Backpacker's Hostel at Childers which caused the death of 15 residents, many of whom were healthy young people on working holidays. Understandably, there was also considerable public interest in the apprehension of the person who may be responsible for such a tragedy. The media accommodated that interest at times in a way which put at risk the system of the administration of criminal justice, a fundamental bulwark of our democratic society. The most objectionable and damaging pre-trial publicity is contained in articles in The Courier-Mail & Today Tonight. This publicity was grossly inflammatory and contained some wrong information about the appellant, Long, then an undetained suspect, or, as the investigating police euphemistically stated, a person of interest. It strongly suggested Long's guilt and depicted him as a morally bad person who had lit fires in the past, placed lives at risk and had at least been charged with trying to strangle his partner's six year old daughter. It set out other information, some of which was wrong, linking Long with the fire and it defamed him in a general way. Fair-minded people surveying that material at the time might well question whether Long, if located and charged, could, because of such publicity, exercise his constitutional right to a fair trial by jury and obtain a verdict based only on admissible evidence.

Although the inflammatory media reports did not continue after Long was charged on 28 June 2000, the appellant emphasises that access could be obtained to them through the internet. There is nothing to suggest his Honour's clear and careful directions were not followed by the jury despite the inflammatory, unreliable and prejudicial early pre-trial publicity. The trial was heard, 20 months after the tragedy and early publicity, in Brisbane, a place removed from those most immediately affected by it. The evidence does not suggest that the police officer who deliberately released damaging and inadmissible information to a journalist was acting with the knowledge or acquiescence of his superiors so as to infect the fairness of the criminal justice system and the trial and verdicts. In these circumstances, I am satisfied that this was not within that rare category of extreme cases requiring a permanent stay of the indictment. The passage of time between the publicity and trial, the changed venue and the careful judicial directions ensured a fair trial. In the end, the appellant has not demonstrated that because of the pre-trial publicity the jurors were not true to their oaths, conscientiously following his Honour's directions and returning a true verdict on the evidence alone. The appellant has not demonstrated a miscarriage of justice through this ground of appeal.

**Lect:** Court admitted it was difficult to get publicity more prejudicial, but then talked about what can they do about it. Didn’t want to acquit cause meant could never try him again (not just in community interest but also for him cause might want his name cleared). Have to look at extent & nature of publicity, when it occurred and the nature of the offence charged. Also have to look at legitimate pubic interest & legitimate private interest of the person being charged. Also have to recognise that now we can get hold of info vey
Lecture 3: Essential Acts

The Bail Act 1982
- When someone has committed a criminal offence, if it’s a minor offence, police can issue a summons requiring them to come to court.
- Police can decide on the spot to give you bail (police bail). IF no assurity is required then its called bail with a personal undertaking (with or without amount). If you don’t turn up warrant issued for your arrest, and if personal assurity $ then that is forfeited.
- Whole purpose of bail is that there is an extra incentive for person to turn up at court
- There is a presumption in favour of bail. Unless subject to Sch.
- If mag refuses bail you can appeal to a single judge of the mag court.
- Home detention also available (like house arrest)
- When ask for bail need a residential address.
- If there is a risk to the community or evidence of prosecution is very strong than will be refused bail
- Whole purpose of bail act is to ensure people will get to court

Misuse of Drugs Act 1981
- Lists all the drugs & which courts deal with what.
- In 2000 assets confiscation legislation introduced. Declared drug trafficker can have all their assets confiscated by the state
- s 23 of MDA allows the police unlimited scope to search where there is a suspicion that drugs are present.

The Police Act 1892
- The Act deals with the appointment, duties, discipline and dismissal of police officers and also with police powers (such as arrest, entry, search and seizure) and summary offences.
- Though it has often been amended, the drafting style of the Act remains old-fashioned and unchanged. Many of the offences contained within the Act are either out of date or duplicated in other legislation.
- Police have power to demand name & address: Failure to do so results in $300 or 6months imprisonment: s50 Police Act
- Move on powers: s54A
- Also stipulates police have to identify themselves
Police investigations- search, seizure and identification

Sequence of Events
1. Police investigations- search, seizure and identification
2. Commencing a prosecution
3. Drafting a Prosecution Notice/Summons/Warrant

The Course of the Process through the court.
Where does it all start- Police Investigations: Search, seizure & identification.

- The exercise of general liberties by the police is subject to the liberties of the person under investigation
- If police obtain consent for their actions then there is no need to rely on special powers (although consent is different from compliance)
- If an investigative procedure is unlawful, there is no duty to cooperate or to submit to it.

A. POLICE INVESTIGATION

1. Issues in Police Investigation

The continuation of the concept of fairness

Although the concept of ‘fairness’ is often extolled in terms of trials, the law recognises that that concept must not have boundaries and covers the whole of the criminal process, especially in relation to personal liberty.

What are some of the ways in which police investigation can impose on our personal freedom?
How do we justify this?

Remember the articles on Matt Birney? (when he ‘almost’ committed an offence).
• Do we have a right to personal sanctuary in our own homes – should we be safe from police and public intrusion there?
• Should we have to give our names to police or other authorities?
• Should we have to give authorities our property or ‘samples’ in order that they can investigate crimes? (can be quite intrusive)
• Should we have to incriminate ourselves? (lots of law about confessions)
• Where does the public interest lie in all of this? (needs to be weighed up)

Concept of fairness should start at the investigation stage. We expect sanctuary in our own homes, although it is quite rare that police come into your homes without permission.

How does the law balance an individual’s rights with the expectations of the community that offenders will be caught and punished?
Does the ‘public’ always see the balance between the two?

The Power to Investigate: Warrant and warrantless powers

a. Where do investigative powers come from?

Large body of legislation covers. Mainly Misuse of Drugs Act, Police Act & Criminal Code. Misuse of Drugs Act have to prove intent (where otherwise don’t) because is intent to possession.

b. The Power to investigate: warrant and warrantless powers of the police:

In WA, police still exercise CL power to act without warrant in taking possession of articles which are believed to provide evidence of the commission of offences. Also, specific powers to act without a warrant a proscribed under a number of statutes.

For example, under s16 of the Criminal Investigation (Identifying People) Act 2002, police may demand personal details from a person reasonably suspected of involvement in an offence or of being able to assist in the investigation of an offence or suspected offence.

Also, ‘reason to suspect,’ is the standard adopted under s49 of the Police Act 1892 for the power to stop & search people or vehicles for stolen property.

Under Misuse of Drugs Act 1981, in relation to drugs the standard which is generally applicable is reasonable suspicion that drugs, evidence of drugs or instruments used in drug offences are present. Under s23 there are warrantless powers to detain and search persons & vehicles, s25 to require certain info to be provided. A suspect may be taken into the police station for the purpose of conducting a search if its not practicable to carry out the search at the place the person was detained; s23(3)

Arrest with a Warrant
Prior auth for police to arrest person, more safeguards. If warrant is invalid, warrant still lawful, so long as person arresting acted in good faith and did not know it was invalid
Ss225-232 Crim Code
Ss58-59 JA

225. Execution of process
It is lawful for a person who is charged by law with the duty of executing the lawful process of a court, and who is required to arrest or detain another person under such process, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the terms of the process.

226. Execution of warrants
227. Erroneous sentence or process or warrant
228. Sentence or process or warrant without jurisdiction
A person who executes or assists in executing any sentence, process, or warrant which purports to be passed or issued by a court, justice, or other person, and who would be justified, under the provisions of the 4 last preceding sections, in executing the same if it had been passed or issued by a court, justice, or person having authority to pass or issue it, is not criminally responsible for any act done in such execution, notwithstanding that the court, justice, or person had no authority to pass the sentence or issue the process or warrant, if in such execution he acted in good faith and in the belief that the sentence, process, or warrant was that of a court, justice, or other person having such authority.

229. Arrest of wrong person
230. Irregular process or warrant
231. Force used in executing process or in arrest
226. Execution of warrants
232. Duty of persons arresting

Arrest without a warrant (Ss564-569)

s564(4)- police officer may arrest wout warrant even when an offence has not been committed but police have reas gds for suspecting that arrestable offence has been committed.

Criminal Code (WA)
564. Arrest without warrant generally
(1) In this section “arrestable offence” means an offence punishable with imprisonment, with or without any other punishment.
(2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.
(3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.
(4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.
(5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.
(6) Where any person is called upon by a person whom he believes, on reasonable grounds, to be a police officer to assist in effecting the arrest under this section of a third person, it is lawful for the first person to assist the second person in effecting the arrest unless the first person knows —

(a) that the third person has not committed an arrestable offence; or
(b) that there are no reasonable grounds for suspecting that the third person has committed an arrestable offence.

Ss43-50 Police Act

43. Police may arrest suspects without warrant
(1) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night may apprehend any person whom he shall have just cause to suspect of having committed or being about to commit any offence.
(2) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he shall have just cause to suspect of having committed an offence in any place other than the State which, if committed in the State, would be an indictable offence (including an indictable offence that may be dealt with summarily) and shall detain any person so apprehended in custody, until he can be dealt with according to law, and the apprehension of a person pursuant to this subsection shall not be taken to be unlawful only by reason that it subsequently appears or is found that the person apprehended did not commit the offence alleged.

George v Rockett
Suspicion= more than a mere idle wondering, must be positive feeling of actual apprehension or mistrust.
45. Police may arrest without warrant a person for whom a warrant is believed to exist or who is believed to have committed an indictable offence Any officer or constable of the Police Force may, without a warrant, take into custody any person whom he may have reasonable and probable cause for believing or suspecting to be a person for whose apprehension a warrant shall have been issued and any person who shall be charged by any other person with having committed, or whom he shall have reasonable and probable cause for believing has committed any indictable offence in any case when by reason of the recent commission of the offence a warrant could not have been obtained for the arrest of the offender. And any warrant of arrest under this or any other Act may be executed by any police officer or constable on any day.

49. Police and property owners may apprehend offenders; police may search vehicles and people for stolen property

Any person found committing any offence punishable in a summary manner may be taken into custody without a warrant by any officer or constable of the Police Force, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every police officer or constable may also stop, search, and detain any cart, carriage, or vehicle, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property or liquor shall be offered to be sold, pawned, or delivered (if he shall have reasonable cause to suspect that any offence has been committed with respect to such property or liquor, or that the same, or any part thereof, has been stolen, or otherwise unlawfully obtained, or is intended to be used for an unlawful purpose), may apprehend and detain the person offering any such property or liquor as aforesaid, and as soon as may be deliver him into the custody of a constable, together with such property or liquor, to be dealt with according to law; and every person taken into custody without warrant for any offence against the provisions of this Act, or for any offence punishable in a summary manner, shall be detained in custody until he can be dealt with according to law.

Misuse of Drugs Act 1981

Part V - Location, seizure, detention and disposal of things used in commission of offences

23. Powers of police officers when things suspected of being used in commission of offences

(1) Subject to this section, if there are reasonable grounds to suspect that any thing whatsoever (a) with respect to which an offence has been, or is suspected to have been, or may be committed; (b) which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or (c) which may provide evidence in respect of an offence, is in the possession of a person, a police officer may, using such force as is reasonably necessary and with such assistance as he considers necessary, stop and detain the person and search him together with any baggage, package, vehicle or other thing of any kind whatsoever found in his possession, and for that purpose may stop and detain any vehicle.

(2) A person shall not be searched under subsection (1) except by (a) a person of the same sex as the firstmentioned person; or (b) a medical practitioner.

(3) A police officer who wishes to search a person under subsection (1) may, if it is not then and there practicable to comply with subsection (2) in relation to the person (a) detain the person until; or (b) detain the person and convey him to a place where, it is practicable for subsection (2) to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.

24. Granting of search warrants in connection with prevention or detection of offences
(1) A justice of the peace who is satisfied by information on oath that there are reasonable grounds to suspect that any thing referred to in section 23(1)(a), (b) or (c) may be in or on any vehicle, or in or on any premises or other place, may grant to a police officer a search warrant authorising a police officer at any time or times within 30 days from the date of that search warrant to enter any vehicle, or any premises or other place, named in that search warrant and, subject to this section, to search that vehicle or those premises or that other place and any person and any baggage, package or other thing of any kind whatsoever found therein or thereon, using such force as is reasonably necessary and with such assistance as the police officer considers necessary.

(2) A person shall not be searched under a search warrant except by ¾
(a) a person of the same sex as the firstmentioned person; or
(b) a medical practitioner.

(3) A police officer who wishes to search a person under a search warrant may, if it is not then and there practicable to comply with subsection (2) in relation to the person ¾
(a) detain the person until; or
(b) detain the person and convey him to a place where, it is practicable for that subsection to be complied with in relation to the person.

(4) A person shall not be detained, or detained and conveyed, under subsection (3) for longer than is reasonably necessary under the circumstances for the purpose of complying with subsection (2) in relation to the person.

25. Powers ancillary to power of search
(1) A police officer or approved person exercising the powers conferred by section 22 or 23 or by a search warrant may for the purposes of this Part ¾
(a) seize and detain, or make extracts from or copies of, books, papers and documents found during the course of that exercise;
(b) require a person to give, or cause to be given, to the police officer or approved person such information as it is in the power of the person to give or cause to be given, as the case requires.

(2) Subject to subsection (3), a person who ¾
(a) without reasonable excuse, does not comply with a requirement made to him under subsection (1); or
(b) in purporting to comply with a requirement made to him under subsection (1), gives or causes to be given to the police officer or approved person concerned information that to his knowledge is false or misleading in a material particular, commits a simple offence.

(3) Notwithstanding anything in subsection (2), a person shall not refuse or fail to comply with a requirement made to him under subsection (1) by reason only that compliance with that requirement would tend to incriminate him or render him liable to any penalty, but the information given or caused to be given by him in compliance with that requirement is not admissible in evidence in any proceedings against him for an offence other than a simple offence under subsection (2)(b).

Also see MDA (below)
Gives extensive powers of search if there is reas suspicion an offence has been committed. No req of prior arrest.

3. The power to take identifying particulars

Can a police officer really ask for my name and address even though I have not done anything wrong?
Yes

What is the trifecta?: Failure to give name & address, disorderly conduct and assaulting a police officer.
Note: You are legally entitled to ask why, and you are entitled to know a police officers name & rank.
S16 Criminal Investigation (Identifying People Act) 2002

16. Officer may ask for name, address, etc. (see handouts, below, for more info on this section)

(1) In this section

personal details, in relation to a person, means

(a) the person's full name;
(b) the person's date of birth;
(c) the address of where the person is living;
(d) the address of where the person usually lives.

(2) If an officer reasonably suspects that a person whose personal details are unknown to the officer

(a) has committed or is committing or is about to commit an offence; or
(b) may be able to assist in the investigation of an offence or a suspected offence,
the officer may request the person to give the officer any or all of the person's personal details.

(3) If an officer reasonably suspects that a personal detail given by a person in response to a request is false, the officer may request the person to produce evidence of the correctness of the detail.

(4) A person to whom a request is made under subsection (2) or (3) may request the officer making the request to identify himself or herself.

(5) An officer who is requested by a person to identify himself or herself must do so.

(6) A person who, without reasonable excuse, does not comply with a request made under subsection (2) or (3) commits an offence.
Penalty: Imprisonment for 12 months.

(7) For the purposes of subsection (6), the fact that an officer did not comply with subsection (5) as soon as practicable is a reasonable excuse.

(8) A person who, in response to a request made under subsection (2), gives any false personal details commits an offence.
Penalty: Imprisonment for 12 months.

(9) A person who, in response to a request made under subsection (3), produces any false evidence commits an offence.
Penalty: Imprisonment for 12 months.

S236 Criminal Code (WA) - DNA

236. Accused person in custody, examination of, samples from

When a person is in lawful custody upon a charge of committing any offence, it is lawful for a police officer to search his person, and to take from him anything found upon his person, and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner, acting at the request of a police officer, and for any person acting in good faith in aid of, and under the direction of, the medical practitioner, to make such an examination of the person of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that a sample of any matter on the person’s body will afford evidence as to the commission of the offence, it is lawful for —

(a) a legally qualified medical practitioner; or
(b) a nurse as defined in the Nurses Act 1992,
acting at the request of a police officer, and for any person acting in good faith in aid of, and under the direction of, the person acting at the request of the police officer, to take the sample from the person so in custody and to use such force as is reasonably necessary for that purpose.

Where —
(a) a person is found not guilty of an offence in respect of which a sample has been taken under this section; and
(b) the person requests that the sample and any genetic information arising from the taking of the sample be destroyed, the sample and any genetic information arising from the taking of the sample is to be destroyed in his presence after the time for an appeal from the finding has expired or an appeal from the finding has been resolved in his favour.
This section does not authorise the taking of an identifying particular (within the meaning of section 34 of the Criminal Investigation (Identifying People) Act 2002) and does not apply to such an identifying particular taken under that Act.

S50 Police Act
50. Police may order suspects and others to move on
(1) A police officer may order a person who is in a public place, or in a vehicle, vessel or aircraft used for public transport, to leave it, or a part of it specified by the officer, if the officer reasonably suspects that the person
   (a) is doing an act
       (i) that involves the use of violence against a person;
       (ii) that will cause a person to use violence against another person; or
       (iii) that will cause a person to fear violence will be used by a person against another person;
   (b) is just about to do an act that is likely to
       (i) involve the use of violence against a person;
       (ii) cause a person to use violence against another person; or
       (iii) cause a person to fear violence will be used by a person against another person;
   (c) is committing any other breach of the peace;
   (d) is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person;
   (e) intends to commit an offence: or
   (f) has just committed or is committing an offence.
(2) A police officer giving an order under subsection (1) may in addition do either or both of the following
   (a) order the person to go beyond a reasonable distance from a place, or the part of a place, set by the officer;
   (b) order the person to obey the order or orders for a period set by the officer; but the period must not be longer than 24 hours.
(3) For the purpose of giving an order under this section to a person whose personal details (as defined in section 16 of the Criminal Investigation (Identifying People) Act 2002) are unknown to the officer, a police officer may request the person to give the officer any or all of the person's personal details.
(4) If a request is made under subsection (3), section 16 of the Criminal Investigation (Identifying People) Act 2002 applies to and in relation to the request in the same way as it applies to a request made under subsection (2) of that section.
(5) Any order given under this section to a person must
   (a) be in writing in a form approved by the Commissioner of Police; and
   (b) be served on the person by giving it to the person in person or, if the person refuses to accept it, by leaving it near the person and orally drawing his or her attention to it.
(6) A person who, without reasonable excuse, does not comply with an order given by a police officer under this section commits an offence. Penalty: imprisonment for 12 months and a fine of $12 000.
(7) This section does not prevent a police officer charging a person with an offence without having exercised a power in this section.

50AA. Police may take identifying particulars from people in custody

(1) Where any person is in lawful custody for any offence punishable on indictment or summary conviction, other than an offence that is a serious offence within the meaning of the Criminal Investigation (Identifying People) Act 2002, any officer or constable of the Police Force may take or cause to be taken all such particulars as he may think necessary or desirable for the
identification of that person, including his photograph, measurements, fingerprints, and palmprints.

(2) Where the photographs, fingerprints, palmprints or other identification particulars of a person are taken under subsection (1) and that person is found not to be guilty of any offence arising out of the circumstances leading to the taking of those particulars, the original negatives and all other copies available of the photograph, fingerprints, palmprints and other particulars taken shall, if so requested by that person, be destroyed in his presence but not until the time for an appeal from the finding has expired or an appeal from the finding has been resolved in favour of the accused person.

5. **Search Warrants**

The warrant itself is an authorisation to exercise the power. The traditional model is for warrant to be issued by Justice of the Peace, now usually a magistrate, following a complaint which establishes the justification for the warrant to be issued.

Search warrants are judicial or quasi-judicial authorisations to look for and take possessions of things in ways which would otherwise be unlawful. They are ordinarily very specific in describing the person who can conduct the search, the place(s) to be searched and the items for which the search is to be made. Its not an entitlement to conduct a wider “fishing expedition.”

Although search warrant doesn’t extend to seizing docs which are subject to legal professional privilege. Where evidence is obtained by means of an invalid warrant or in breach of the terms of a valid warrant, it’s potentially liable to be excluded on the ground that its admission would be contrary to public policy. A civil action for trespass can also be brought.

The requirements of a valid search warrant?

*George v Rocket*
- Complaint on oath
- In writing (desirable)
- In person (desirable)
- Complaint must state gds and relevant suspicion of belief
- Justice must be satisfied that gds are present
- Warrant must be consistent w complaint

**If other evidence is found:**
Nevertheless, if additional evidence of an offence is discovered in the course of executing a search warrant, that evidence can also be seized

**The grounds on which a search warrant will be granted:** – See S711CC
The role of the person issuing the warrant is to make an independent assessment of whether the statutory grounds for the search are present. The key standard which justifies issuing a warrant is reasonable suspicion.
Must make application for warrant (usually by police officer) then warrant needs to be issued (usually by justice). The application must be on oath. The application must state the grounds on which the warrant is sought & the stated grounds must justify the relevant suspicion, Justice can ask questions. Warrant must be consistent with the application.

711. Search warrant
If it appears to a justice, on an application supported by evidence on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place—

(a) Anything with respect to which any offence has been or is suspected, on reasonable grounds, to have been committed; or
(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or (c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence; he may issue his warrant directing a police officer or police officers named therein, or all police officers, to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.

Any such warrant is to be executed by day, unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.

Where it appears on the application that an offence involving the safety of an aircraft has been, is being or may be committed on board or in relation to the aircraft, the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched.

A female person shall not be searched under the authority of a warrant issued under this section, except by a female person.

George v Rocket: Suspicion is more than a mere “idle wondering”, it is a positive feeling of actual apprehension or mistrust. Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition. A form of objective standard.

George v Rockett (1990) 170 CLR 104

Facts: The warrant authorized Rockett to enter upon the premises of Q.D. George, Hillhouse & Co., solicitors, and to seize certain documents. The warrant was executed against Quentin Douglas George, and the documents were seized and delivered to the magistrate. George obtained an order to review under s. 209 of the Justices Act 1886-1989 (Q.) calling upon Rockett and the magistrate to show cause why the warrant should not be reviewed. The order to review was returned before the Full Court which ordered that it be discharged. George appealed to the High Court

Held: Search warrant thus authorises an invasion of premises without the consent of persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. In prescribing conditions governing the issue of search warrants, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law. In enacting s679, the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property.

It is the duty of a justice before issuing ... a warrant, to satisfy himself that there are grounds for suspecting and grounds for believing the respective matters mentioned in s711 of the Criminal Code and that those grounds are reasonable."When the justice is so satisfied and a warrant is issued, the warrant should express the justice's satisfaction that there are reasonable grounds for the suspicion and belief.

Halliday [1984] 155 CLR 1

Facts: Police officer pursuing a disqualified driver entered the open driveway of premises in which he had taken refuge and arrested him while he was standing in the driveway. The officer did not seek the permission of the owner of the premises before entering and making the arrest.

Held, by Gibbs C.J., Mason, Wilson and Deane JJ., Brennan J. *2 dissenting, that the officer had an implied licence from the owner of the premises to be on the driveway, and accordingly the arrest was lawful.

If the path or driveway leading to the entrance of a suburban dwelling-house is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors