

# CRIMINAL PROCEDURE NOTES

## LAWS5003 Semester One, 2017

★ Journal Articles

● Case Readings

### CRIMINAL PROCEDURE

#### Topic One - Introduction to Criminal Procedure

Page 1

Principles underlying criminal justice

Fair Trial – What constitutes a fair trial in the criminal context?

Brown: The Criminal Process and Competing Versions of What the Law “Is”

Pre-Trial Process

Procedural v Substantial

Page 2

Discretionary Decisions: Under the powers of arrest

Brown: The Criminal Process - Introduction

The process of punishment

Page 3

3.1.4: The (in)visibility of pre-trial processes

3.1.5: Technocratic Justice: the drive for efficiency

★Tom Tyler: Why People Obey the Law: Procedural justice, legitimacy and compliance (2006).

Page 4

★David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001): Ch. 5

Page 5

High crime rates as a normal social fact

Page 6

The myth of the sovereign state and its monopoly of crime control

Adaptive Responses

Defining Deviance Down: (pg. 10)

Page 7

Relocating and redefining responsibilities (pg. 12 - 13)

Non-adaptive responses: Denial and Acting out (pg. 15- 16)

Page 8

#### STAGES OF CRIMINAL JUSTICE

Page 9

Jurisdictions of courts in NSW

How do I determine where an offence will be heard?

Page 10

Elective or ‘hybrid’ offences

Two tiers of justice

Page 11

**Readings: Stages of Criminal Justice**

★Pat Carlen, Magistrates Justice Examines the structures of court rooms as “ritualistic spaces” **Page 13**

A right to silence **Page 14**

The expansion of summary jurisdiction

## **Topic Two - Police Powers and Discretion** **Page 15**

Discretion and the ‘construction of the suspect population’

Sources of police power include:

Consent as a source of police power

Regulation of the power to question

Specific provisions of LEPRA **Page 16**

Case study: Requesting ID

Case study: Arrest without a warrant

How is an arrest affected? **Page 17**

Safeguards: Part 15, ss201-203, 204A LEPRA

What are the potential consequences of unlawful arrest?

After arrest **Page 18**

★Interrogation, the right to silence, and the introduction of the ERISP

Search powers and reasonable suspicion **Page 19**

### ● **R v Rondo (2001) 126 A Crim R 562**

*Stop and search. Reasonable suspicion = less than a reasonable belief but more than a possibility.*

Consider: Gareth Griffith, Police Powers in NSW

Possible consequences of improperly or illegally obtained evidence

Power of entry in domestic violence situations **Page 20**

### **Readings: Police powers and discretion**

“In cruder days” ... a dose of “low-level terror?”

PP McGuinness, “The Price of Liberalism”, Sydney Morning Herald, 8/3/1995

The Extent of Discretion

An Illustration of Discretion: Constructing the suspect population **Page 21**

★M McConville et al, The case for Prosecution (1991)

An Illustration of Discretion: Police Move-on Powers

NSW Ombudsman, Policing Public Safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 **Page 22**

Regulating Discretion: Police and the Young Offenders Act 1997 **Page 22**

★Janet Chan, Jenny Barga, Garth Luke and Garner Clancey, "Regulating Police Discretion: An assessment of the impact of the NSW YOA 1997" (2004)

An Illustration of Discretion: Summons or Arrest? **Page 23**

Neither Arrest Nor Summons: Assisting Police with their inquiries – "voluntary" attendance and the realm of "consent"

●**S and J (1983) 32 SASR 174 at 185**

*The choice whether to comply/give consent must be a genuine choice. Even though police stated they were not under arrest at the time, they did not say he was free to go at any time*

The non-justiciability of Selective Law Enforcement **Page 24**

●**Wright v McQualter (1970) 17 FLR 305 at 318**

*Courts are reluctant to consider issues of selective enforcement relating to police discretion.*

Powers of arrest (LEPRA Part 8)

Purpose of arrest **Page 25**

●**R v Dungay [2001] NSWCCA 443**

*An arrest under s99 LEPRA must be for the purpose of taking proceedings in relation to the offence, and not for some extraneous purpose*

●**Zaravinos v State of New South Wales [2004] NSWCA 320**

*There were reasonable grounds to suspect that the plaintiff had committed an offence. However, the arrest was held to be unlawful because it was done for an extraneous purpose.*

Arrest as a last resort: common law pre-LEPRA

Arrest as a last resort: LEPRA s.99(3)

Case law on arrest powers under LEPRA s.99 **Page 26**

●**Williams v DPP [2011] NSWSC 1085**

*An arrest must comply with LEPRA s.99(3) to be lawful. This can impact the conviction of offences relating to the arrest (i.e. resist police).*

Other factors that may make an arrest unlawful

Discontinuing arrest and use of alternatives

Citizen's arrest **Page 27**

Resolving Disputes without Litigation

On the Spot Justice: Infringement Notices, Fines and "Simulated Governance"

★Pat O'Malley, "Fines, Risks and Damages: Money Sanctions and Justice in Control Societies" [2009] **Page 28**

★Pat O'Malley, "Simulated Justice: Risk, Money and Telemetric Policing" [2010] **Page 29**

Majority Verdicts

Page 29

●**Cheatle (1993)**

*Requirement of unanimity is an essential feature of the trial by jury guaranteed by s 80 of the Jury Act.*

●**Brownlee (2001)**

*HC held that two provisions of Jury Act allowing for reduction in no. of jurors from 12 to 10 in course of trial (s 22) and allowing for jury to separate at end of the day (rather than be sequestered, s 54) were both consistent with s 80*

●**Williams v Florida (1970) US**

*The essential feature of jury lies in the interposition btw the accused and his accuser of the common sense judgment of a group of laymen, and in community participation and shared responsibility that results from a groups determination of guilt or innocence*

The expansion of summary jurisdiction

Page 30

Restorative Justice

12.2.6 RISE (Reintegrative Shaming Experiments)

Page 31

★ John Braithwaite – Crime, shame and reintegration (1989)

Page 31

Domestic Violence – AVO's

Legislative Changes around AVOs

Page 32

Current Law

Grounds on which ADVO may be made - s16 of Crimes (Domestic and Personal Violence) Act 2007

Page 33

Issue Related to Policing Domestic Violence

Youth Justice Conferencing

Sentencing of Juveniles

Page 35

Circle sentencing

★ E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia" May 2004

Page 36

The extent and culture of police verbal

Page 37

Report of a Commission of Inquiry pursuant to Orders in Council (Fitzgerald Report) (1989) 206-7

A right to silence?

Detention for questioning?

Page 38

●**Clarke v Bailey (1933) 33 SR (NSW) 303**

*A constable arresting a person under powers given to him by statute must take him without delay and by the most direct route before a justice, unless the circumstances reasonably justify a departure from these requirements.*

Crimes (Investigation of Commonwealth Offences) Amendment Act 1991.

Law Enforcement (Powers and Responsibilities) Act 2002 **Page 38**

★David Dixon, "A window into the interviewing process"? The audio-visual recording of police interviews with suspects in New South Wales, Australia" (2006) **Page 39**

★M McConville et al, The Case For the Prosecution, (1991) at 65-67, 69-71, 78-79 Creating facts through interrogation **Page 40**

Conditions of reform

Reasonable suspicion **Page 41**

Searches by consent

●**DPP v Leonard (2001) 53 NSWLR 227**

*A person may validly consent to a search even if not aware of the right to refuse, although it was held that such lack of awareness may be relevant to the issue of consent in some cases.*

Types of personal search (LEPRA Part 4 Div 4)

**Topic Three – Bail and Appeals** **Page 43**

Legal doctrines being challenged by bail

Consequences of bail conditions

Trajectory of Bail Laws in NSW

★The Process is the Punishment – Malcolm Feeley **Page 44**

Questions **Page 45**

BASICS: What is bail?

PURPOSE: What are the competing considerations that bail legislation attempts to balance?

Procedure

Power to refuse to hear bail application: **Page 46**

★Hogg: Increasing remand rates, punishment, the presumption of innocence and likelihood of Conviction

Conflating bail and sentence: the rise of diversionary options

★Freiberg, N Morgan - Between bail and sentence: the conflation of dispositional options **Page 47**

●**Abdulrahman v R [2015] NSWCCA 238** **Page 48**

*Bail: Unacceptable risk; Strength of Crown case; Balance of seriousness of offending and community protection against personal matters affecting the applicant; Unacceptable risk found, bail application refused*

How should the bail authority make a bail decision? **Page 49**

Rules of evidence for bail proceedings

s21 Right to release for certain offences **Page 49**

What kind of bail conditions can be imposed? **Page 50**

When is it appropriate to impose bail conditions?

What happens if a person doesn't comply with bail conditions?

Proposed Changes to the Bail Act 2013

**How to make or oppose a bail application** **Page 51**

Does the "show cause" requirement apply? **Page 52**

Judicial guidance of 'show cause' requirements **Page 54**

**●LIST OF KEY CASES FROM LEGAL AID WEBSITE RELATING TO SHOW CAUSE AND UNACCEPTABLE RISK** **Page 55**

Appeals **Page 62**

Criminal appeals process in NSW – Local Court

Criminal appeals process from District and Supreme Court NSW **Page 63**

Review of the system of criminal appeals in New South Wales in 2014 by the New South Wales Law Reform Commission **Page 63**

What a good criminal appeal system should look like

Appeals: Local to District **Page 64**

Appeals: Local to Supreme

Appeals: District/Supreme to CCA **Page 65**

Appeals to HC **Page 66**

What happens if an appeal is successful?

NSW law reform: double jeopardy

Appeals Cases **Page 67**

**●R v Carroll (2002) 213 CLR 635**

*A new trial for perjury after new evidence was found in a murder case to indicate the accused had lied under oath, was actually a breach of the principle of double jeopardy, and an abuse of process*

**●Weiss v The Queen (2005) 224 CLR 300**

*It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of an offence on which the jury returned its verdict guilty*

**●Baiada Poultry v The Queen [2012] HCA 14** **Page 68**

*The fundamental duty of the appellate court under the criminal appeal statute is to decide the appeal. Here the question is whether there had been a miscarriage of justice in relation to procedure, not relating to the jury's verdict. It was not open to the Court of Appeal to decide whether or not the right verdict had been reached, it was whether the trial judge had improperly directed the jury.*

● **Mraz v The Queen (1955) 93 CLR 493**

Page 68

*Proviso to S6(1) of the Criminal Appeal Act does not mean that a convicted person on appeal must show that he ought not to have been convicted of anything.* Note: Proviso set out in s 6(1) of the Criminal Appeal Act 1912 (NSW) that the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred

**Readings: Appeals**

Page 69

The structure of the Criminal Courts System

Magistrates and Local Courts

Supreme and District Courts

The Appellate Jurisdiction of the Higher Courts

Appeal from Local Court to the District Court

Page 70

Appeal from Local Court to Supreme Court

Appeal from the District or Supreme Court to the Court of Criminal Appeal

Determination of Appeals

Page 71

★ "Conviction and Sentence Appeal in NSW CCA 1996-2002" P Poletti and L Barnes

Appeals to the High Court

Page 72

● **Veen (1979) 23 ALR 281**

*Very rare to allow appeals against sentence. This is because such appeals seldom involve a point of law of general application. The HCA is not experienced at administering criminal sentences*

**Topic Four – Pre-Trial Process, The Decision to Prosecute and Mandatory Defence Disclosure**

Page 73

1. Discretion in the prosecutorial function

2. The role of the prosecutor

Police Prosecutions

Page 74

● **Woods v R [2012]**

*Breaches of prosecutor's duties*

3. The decision to prosecute?

Page 75

Reasons for Decisions: DPP Guideline 12

Case study: The Chaser – Decision not to prosecute

Page 76

Election for offence to be dealt with on indictment (DPP Guideline 8)

Outcomes of pre-trial investigation

Page 77

4. Charge negotiation and the production of guilty pleas

Charge/plea negotiation: risks and safeguards Page 77

5. Pre-trial disclosure requirements – prosecution and defence Page 78

Defence disclosure

Legislative obligations on parties to disclose information prior to trial

**Readings: Pre-Trial Process and Prosecutions**

Discretion in the Criteria for Prosecution Page 79

The Adversarial System and the (In)Visibility of the Pre-Trial Process

Police Control over Pre-Trial Process

★R Hogg, “Identifying and Reforming the Problems of the Justice System”

Independent Police Prosecutors? Page 80

Duties of the Prosecutor

Disclosure

NSWLRC survey of prosecutors in 1987

**(Disclosure, miscarriage of justice cases)** Page 81

●**Lawless**

*On HCA appeal majority held that suppressed items did not constitute ‘fresh evidence’ and reaffirmed that NO rule of law requires a P to disclose material favourable to the D.*

●**Re Van Beelen (1974)**

*Failure to call any one of the witnesses in question cannot constitute a ground for (calling into question) the conviction’*

●**Apostilides (1984)**

*Failure to call known witnesses thus forcing defence to call them: decision not to call witness only a ground for setting aside conviction if, when viewed against conduct of trial as whole, it is seen to give rise to a miscarriage of justice.*

●**Jamiesen (1992) CCA NSW**

*Held that in all the circumstances and having regard to the purpose for which Wells was to be called to witness box, there was no obligation of Crown to inform counsel for A that an indemnity had been granted to a witness whom the D intended to call*

**Page 82**

●**Anderson (1991) 53 A Crim R 421**

*A procedural miscarriage of justice will be found where the Crown attempts to persuade the jury towards inferences that cannot be substantiated by evidence.*

The Centrality of the Guilty Plea and Plea Bargaining

★K Mack and S Roach Anleu, “Balancing Principle and Pragmatism: Guilty Pleas” (1954) 4 Journal of Judicial Administration 232

**Page 83**

★S Roach Anleu and K Mack, “Intersections Between In-Court Procedures and the Production of Guilty Pleas” (2009) 42 ANZ J of Criminal 1

Magistrates and the Production of Guilty Pleas

Charge Bargaining Page 84

DPP Prosecution Guidelines

Benefits and Criticisms of Plea Bargaining

**●Brown (1989) NSW CCA**

*A trial judge has the power to stay criminal proceedings in the ground that they constitute an "abuse of process". However, the DPP prosecutor does have a very wide discretion. An abuse of process has a very narrow meaning, because the DPP have a lot of consideration to take into account and the court should not intervene*

**Page 85**

**●Gas; SJK [2004] HCA**

*Court does not necessarily have to adhere to plea agreements.*

3.5.7 "Clearing the books": taking outstanding charges into account Page 86

Spigelman CJ – gives two rationales for taking outstanding charges into account

Sentence Indication Bargaining

A series of Australian decisions heavily criticised sentence indication bargaining

The Pressures to Plead

**Page 87**

**●Winchester (1992) 58 A Crim R 345**

*The court determined that the degree of discount afforded depends according to the "reason" why the defendant pleaded guilty:*

- *If the guilty plea was the result of contrition (remorse), it depends on the degree to which recognition of guilt was inevitable (ie, more discount when the guilty plea was less inevitable)*
- *If the guilty plea was the result of trying to save the court time and costs, the discount depends on how soon the plea was entered.*

**Topic Five – Sentencing and Punishment** **Page 88**

1. Sources of law

2. Justifications for punishment

3. Purposes of sentencing

Judicial discretion

Striking the balance

4. Confining judicial discretion **Page 89**

Prescription of maximum penalties

General power to reduce penalties (s 21CSPA)

Penalties that may be imposed **Page 90**

Division 3 – Non-custodial alternatives

CSPA s10 Dismissal of charges and conditional discharge of offender

The principle of proportionality **Page 91**

Factors to consider in sentencing Page 91

s 21A(2) – Aggravating factors (eg)

s 21A(3) – Mitigating factors (eg) Page 92

CSPA Court to take other matters into account

s22 Guilty plea to be taken into account Page 93

Guideline judgments CSPA Part 3, Div 4 (ss36-42A)

Jurisic Guideline – Death by Dangerous Driving

**(Guideline Judgment Cases)** Page 93

**●Jurisic (1998)**

*Guideline judgment for death by dangerous driving. Discusses benefits of guideline judgments: “Tension between maintaining maximum flexibility in the exercise of discretion, on one hand, and ensuring consistency in sentencing decisions, on the other.”*

**●Henry (1999) – post Jurisic – armed robbery**

*Application accepted for guideline judgement*

**Page 94**

**●Ponfield (1999) – break and enter**

*No pattern of leniency – rejected application for guideline judgement*

**●Muldrock (2011)**

*Sentencing discretion at common law → principles of proportionality, parity, totality and avoidance of double punishment - “erred by treating the provision of the standard non-parole period as having determinative significance”*

Instinctive Synthesis

The sentencing process (CSPA)

**Page 95**

**Readings: Sentencing and punishment**

★The Australian Law Reform Commission on the Objectives of Purposes of Sentencing

ALRC, Sentencing of Federal Offenders Discussion Paper 70

Purposes of Sentencing in NSW Legislation

**Page 96**

★“Just Deserts”: the rise of the new retributivism and critique

Alternate Forms of Punishment (Restorative Justice)

Legislative Constraints

**Page 97**

Guideline Judgments

Preventative Detention

Sentencing Methodologies and Principles

**Page 98**

Intuitive synthesis/two-tier

★Garland – ‘Philosophical Argument and Ideological Effect’