IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S119 of 2019

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

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BRADFORD JAMES ROBINSON
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

1. These submissions are in a form suitable for publication on the Internet.

Part II: Propositions to be advanced in Oral Argument

The purpose of an arrest under s.99 of the Law Enforcement (Power and Responsibilities) Act (LEPRA) is to take the arrested person before an authorised officer to be dealt with according to law.

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2. Arrest is the commencement of the criminal process.[1] The purpose of the power to arrest is found in the requirement in s.99(3) to take the arrested person before a Court as soon as is reasonably practicable to be dealt with according to law.[2] The "reasons" in s.99(1)(b) cannot properly be read as separate and independent *purposes* of arrest. Rather they provide reasons why a police officer would arrest and then charge as distinct merely from charging. The "nature and seriousness of the offence"[3], cannot be a "purpose" of arrest.

3. The further requirements in s 99(1)(b) conform to the recognition that arrest is a power of "last resort".[4]

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[1] *Christie v. Leachinsky* [1947] AC 573 at 584 per Viscount Simon; *Williams v. The Queen* (1986) 161 CLR 278 at 306 per Wilson and Dawson JJ; *Dowse v. New South Wales* (2012) 226 A Crim R 36 at 46 (per Basten JA, McColl and Hoeben JJA agreeing.)

[2] *Wright v. Court* (1825) 4 B & C 596; *Clarke v. Bailey* (1933) SR (NSW) 303 at 309 per Davidson J, Street CJ and James J agreeing; *Bales v. Parmeter* (1935) 35 SR (NSW) 182 at 190 per Jordan CJ, Stephen and Street JJ agreeing; *Drymalik v. Feldman* [1966] SASR 227 at 233-234 per Curiam (Napier CJ, Bright and Mitchell JJ); *R v. Banner* [1970] VR 240 at 249 per Curiam (Winneke CJ, Smith and Gowans JJ); *Williams* at 305-306 per Wilson and Dawson JJ **[JBA – 3, Tab 41, p.1217, Line 32-1218, Line 29]**; *Foster v. The Queen* (1993) 67 ALJR 550 at 555 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ **[JBA – 2, Tab 26, p.797, Line 40 (first column) – Line 30 (second column)]**; *Zaravinos v. State of New South Wales* (2004) 62 NSWLR 58 at 66 **[JBA – 3, Tab 43, p.1259, Line 15]** and at 71-72 **[JBA pp.1264, Line 47-1265, Line 20]** per Bryson JA, Santow JA and Adams J agreeing; *North Australian Aboriginal Justice Agency Limited v. Northern Territory of Australia* (2015) 256 CLR 569 at 587 [23] per French CJ, Kiefel and Bell JJ **[JBA – 3, Tab 35, p.988, Lines 20-30]** ("*NAAJA*").

[3] Section 99(1)(b)(ix)

[4] *Lake v. Dobson* (NSW Court of Appeal, unreported, 19 December 1980) **[JBA – 2, Tab 30, p.862, Line 20]**; State of New South Wales v. Smith (2017) 95 NSWLR 662 at 690 [103] per McColl JA, Leeming JA and Sackville AJA agreeing **[JBA – 2, Tab 33, p.926, Line 15]**.

For a person to be "dealt with according to law" by an authorised officer, it is necessary that he or she be charged.

4. For an authorised officer[5] to be seised of jurisdiction to deal with a person brought before him or her it is necessary that a Court Attendance Notice ("**CAN**") be filed, thereby commencing a criminal proceeding.[6] The requirement contained in s.99(3), therefore necessarily presupposes that the arrested person will be charged, and is entirely consistent with the long-recognised purpose of the conferral of a power to arrest.

Unless s.99 is invoked for the purpose of taking the person before an authorised officer to be dealt with according to law, it will have been invoked for an extraneous purpose and thereby 10 *be unlawful.*[7]

An arrest for the purpose of investigation is unlawful. Neither the introduction of s.99(4) nor the existence of Part 9 alters that position.

5. Part 9 does not confer a separate power of arrest.[8] Section 99(4) emphasises that Pt 9 is able to be invoked only after a lawful arrest. Section 99(4) was introduced for clarification[9] and supports the respondent's position by emphasising the need for the arrest to be lawful. The extrinsic materials, concerning both Part 9 and its predecessor support the respondent's position.

The arrest of Mr Robinson was to investigate and, therefore, unlawful.

6. The findings in the Court of Appeal and the statement of the parties' position are at **CAB** 20 **38 [11], CAB 69 [128] and CAB 90 [192].** It is common ground that, at the time of the arrest, Constable Smith had not formed the intention to charge Mr Robinson with any offence and that he did not consider himself to have sufficient evidence to do so. The arrest of Mr Robinson can have been for no other purpose than that of investigation (through interviewing him) whether he had committed the offence.

The recognition of time to deliberate upon whether to charge the arrested person within the time prescribed by s.99(3) should be rejected.

7. What was said by Mason and Brennan JJ in *Williams* at p.298 does not, read in its proper context, support the allowance of such time. Wilson and Dawson JJ specifically rejected such an allowance, speaking only of time to "formulate" a charge.[10] [11]

30 *There is no inconsistency between the test of suspicion on reasonable grounds in s.99(1)(a) and the requirement of a contemporaneous intention to charge that person.*

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[5] Defined in s.3 of LEPRA [**JBA – 1, p.19**].
[6] *Local Court Act 2007* (NSW) ss 3 and 9; *Criminal Procedure Act 1986* (NSW) ss 47 and 192
[7] *Bales* at 188, 190 [**JBA 570, Line 29-50, 572, Line 20-35**]; *Drymalik* at 231 [**JBA 787, Line 20-30**]; *Zaravinos* at 71-72 [**JBA – 3, p.1264, Line 45-1265, Line 20**]; *Dowse* at 46 [**JBA – 2, p.776, Line 20-32**].
[8] Section 113 *LEPRA*
[9] Tink/Whelan Report – **Respondent's Book of Further Materials [p.36, Line 35]**.
[10] *Williams* at 312, but regarded any further time within the period "as soon as is reasonably practicable" to be "unacceptably open ended".
[11] *Williams* at 311.

8. All the cases already referred to concern a test of reasonable suspicion but, nevertheless, recognise that the only purpose of an arrest is to take the person before a Court "to be dealt with according to law". That was true both of the common law and of s.352 of the *Crimes Act* and cognate provisions.

9. The issue raised by the appellant was dealt with directly by Mason and Brennan JJ[12] and by Wilson and Dawson JJ[13] in *Williams*.

10. The *Criminal Procedure Act* 1986 provides at s.47(2) (in respect of indictable offences) and at s.172(2) (in respect of summary offences) that a CAN may be issued in respect of a person if the person has committed "or is suspected of having committed" an offence.
10 Those provisions appear to contemplate the commencement of proceedings on the basis of the suspicion of which s.99(1)(a) speaks.

11. The recognition of the asserted inconsistency is contrary to principle. The expression "proper case for prosecution" is not susceptible of exhaustive definition without obscuring the importance of proving the *absence* of reasonable and probable cause.[14] Those cases that speak of "belief" about probable guilt, "... do not sufficiently encompass cases where the prosecutor acts upon information provided by others." In those cases where a police officer is *not* basing his suspicion on what he has been told, but on what he has, himself, perceived, there is no sensible distinction to be drawn between the test of suspicion on reasonable grounds and that of a belief in the person's guilt, if that be the
20 test.

Section 105 of LEPRA does not derogate from or subvert the conventional purpose of arrest.

12. The evident purpose of s.105, generally, and s.105(3) in particular, is to make clear that the s.99(3) obligation will not subsist if the original motivation for the arrest does not, itself, subsist. It forecloses the argument run in *Wiltshire v. Barrett*[15].

The literal fulfilment of the requirements of s.99(1)(a) and (b) is insufficient to render an arrest under s.99 lawful.[16]

13. The purpose evinced by s.99(3) must also be behind the arrest. Absurdities would arise if that constraint is not observed. Bad faith is no answer unless the purpose of the arrest is recognised to be that for which the respondent contends.

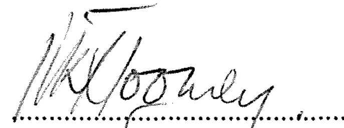
30 *The principle of legality is against the construction contended for by the appellant.*

14. This case is an obvious one for the application of the principle of legality.[17] There is not only no provision in LEPRA which states with irresistible clarity that the purpose of the

[12] at p.300.
[13] "There must be a charge" – at p.305 [**JBA – 3, p.1217, Line 38**].
[14] *A v NSW* (2007) 230 CLR 500 at 528 [81]
[15] [1966] QB 312 (C of A) at 330 per Davies LJ.
[16] *Drymalik* at 231; *Zaravinos* at 66-72.
[17] *NAAJA* at [23].

power of arrest is no longer to take the person before a Court and have them dealt with according to law, but that purpose in fact subsists in sub-s (3) of s.99, itself.

Dated: 3 September 2019



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