

***Criminal Law Guidebook* Second Edition – Chapter 3: The Criminal Justice System and Criminal Procedure**

The following is a suggested solution to the problem question on page 69. It represents an answer of an above average standard.

The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook* Second Edition has been used in devising this solution.

First, it is important to determine whether Reggie is under arrest when he is initially approached and spoken to by the police and, if so, from what time the arrest was effected. This status impacts on the legality or otherwise of subsequent police actions. On the basis of the detailed information supplied by Carmelita and considering the nature of the attack upon her and the injuries occasioned, it is strongly arguable that the police have reasonable grounds to suspect the commission of one or more offences¹ by Reggie and could arrest him without a warrant. Further, the police must be satisfied that arrest is reasonably necessary² and in this case it could be necessary to protect the safety or welfare of Carmelita, and because of the nature and seriousness of the alleged offences.

At common law, ‘an arrest only occurs when it is made plain by what is said or done by police to the person in question that the person is not free to leave if he chooses’.³ On the given facts, four police officers approached Reggie in the vicinity of the Pink Pussyfoot nightclub in the early hours of the morning. Detective Boots then asked him to accompany them to the police station to assist with their inquiries about the attack on a dancer from the nightclub. There is no mention of ‘arrest’ or forcible removal to indicate to Reggie that he is under arrest at that point of time. Initially it could be argued that Reggie voluntarily attended the police station in response to a request to assist with inquiries.⁴ The fact that there were four officers surrounding Reggie in the early hours of the morning may, however, leave him with what he feels to be no choice in the matter, and a belief that he wouldn’t be allowed to leave if he wanted to. Certainly the further actions of the police after taking Reggie to the police station including the search, taking a sample of hair, photographing and fingerprinting, and detaining him in the police cells without charge while awaiting recording equipment until 10.00 am that morning, would give Reggie reasonable grounds to believe that he was not free to leave the custody of the police officers and was under arrest.

If the prosecution argue that there was no arrest, they would need to establish this through evidence that Reggie had been informed that he was not under

¹ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 99(1)(a). In Victoria and South Australia, it is the commission of an indictable offence: *Crimes Act 1958* (Vic) s 459; *Criminal Law Consolidation Act 1935* (SA) s 271. In this case it is likely that the offence committed is a sexual assault or a serious physical assault upon Carmelita as well as the earlier stalking of her outside the nightclub and at the block of units where she lives, which are all indictable offences.

² *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 99(1)(b)(i) – (ix).

³ *R v Coombe* (Unreported, CCA (NSW), 24 April 1997). This is also reflected in *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 110(2)(c).

⁴ *The Queen v S and J* (1983) 32 SASR 174.

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arrest and was free to go.⁵ There is no evidence of the police officers saying these things to Reggie, and having regard to all the circumstances of Reggie's apprehension by the police, it is strongly arguable that he was not voluntarily assisting the police with their enquiries, but was under arrest from approximately 2.30 am that morning. If this incident occurred in New South Wales there is a requirement that the police must comply with s 202(1)(a) – (c) *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) and provide details of the police officer's name and place of duty and the reason for the exercise of the power of arrest.⁶ Detective Boots did not supply these details in exercising the power of arrest and this failure may impact upon the later admissibility in court of any evidence obtained from Reggie.

Second, there is an issue as to the legality of the search conducted on Reggie in the interview room at the police station where a length of rope was found in one of the pockets of his trousers. If a search is conducted as an incident to arrest when the suspect is in lawful custody, then it is authorised as long as it is a 'frisk' or 'ordinary' search and not an intimate or strip search.⁷ At the point of time that the search of Reggie is conducted, it is strongly arguable that he is under arrest and the finding of the rope will be admissible in evidence. Again, in New South Wales there is a requirement that the police must comply with the safeguards contained in s 202(1) *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) when exercising the power of search of a person.⁸ There is no evidence that this was done when Reggie was searched in the interview room and this failure may impact on the admissibility of the evidence of the rope at trial.

Alternatively, if it is found that Reggie is not under arrest at this time and is merely assisting the police with their enquiries, then the search is illegal and any evidence obtained (such as the rope) may not be admissible in evidence. In that event, if the incident occurred in New South Wales, the prosecution could rely on the police powers under s 26 *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) to frisk search Reggie in a public place if they suspect on reasonable grounds that he has a dangerous implement in his custody. The police have information from Carmelita that she saw the man pushing what appeared to her to be a piece of rope into the pocket of his trousers and she felt a rope around her neck at the time of the attack. Consequently the police in these circumstances may have a suspicion that Reggie has custody of a rope, which is a 'dangerous implement' in the sense that it is 'made or adapted for use for causing injury to a person' or is 'intended ... to be used to injure or menace a person'.⁹

In South Australia, the police could rely on the power to stop, search and

⁵ Ibid per White J at 189.

⁶ There are no comparable legislative requirements of this kind in Victoria and South Australia.

⁷ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) ss 23, 30, and 31; and *Summary Offences Act 1953* (SA) ss 81(1)–(3).

⁸ See above n 6.

⁹ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 3 – (c) and (d) of 'dangerous implement' definition.

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detain a person who is reasonably suspected of having on his person 'evidence of the commission of an indictable offence',¹⁰ based on the information from Carmelita about a rope and the rope burns she sustained during the attack. Accordingly, the search may be found to be legal in accordance with these statutory powers and the rope would then be admissible in evidence against Reggie.

Third, there is an issue as to the legality of the taking of the sample of Reggie's hair, as the available facts suggest that Reggie was not given an opportunity to 'consent' to the taking of the sample of hair, but rather was told that it was going to be taken by Detective Boots. Reggie would be a 'suspect' under the relevant legislation¹¹ as the police have reasonable grounds to suspect he has committed an offence.¹² In New South Wales and Victoria, forensic procedures may be carried out with the suspect's, Reggie's, informed consent¹³; by order of a senior police officer in the case of a non-intimate procedure where Reggie does not consent¹⁴; or by order of a magistrate or authorised justice where it involves an intimate forensic procedure and Reggie does not consent.¹⁵

If this incident occurred in South Australia, an order by a senior police officer, that is, one of or above the rank of inspector is required to authorise a forensic procedure.¹⁶ On the facts provided, the removal of strands of hair from Reggie's head by Detective Boots does not appear to be a legal procedure, as Reggie did not reply to the detective's request for consent. Silence is equivocal and cannot be taken to infer consent by Reggie to the procedure, even though he apparently did not voice any objection when the hair was actually removed from his head. Further, there is no evidence to suggest that another senior police officer of the appropriate rank was requested to make an order authorising the non-intimate¹⁷ procedure of removing some of Reggie's hair from his head.

Accordingly, any DNA profiling of the hair from Reggie's head compared to the forensic material obtained from the swabs taken from Carmelita at the hospital, would arguably not be admissible as evidence against Reggie in any trial for the attack on Carmelita. Such evidence will be inadmissible against a person if the statutory procedures have not been followed.¹⁸ The evidence may still be admitted, however, if the court finds that the desirability of

¹⁰ *Summary Offences Act 1953* (SA) s 68(1)(b)(iii).

¹¹ *Crimes (Forensic Procedures) Act 2000* (NSW) s 3; *Crimes Act 1958* (Vic) s 464R; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 14.

¹² It must be an 'indictable offence' in Victoria and a 'serious offence' in South Australia.

¹³ *Crimes (Forensic Procedures) Act 2000* (NSW) ss 9–13; *Crimes Act 1958* (Vic) s 464S.

¹⁴ *Crimes (Forensic Procedures) Act 2000* (NSW) ss 17–20; *Crimes Act 1958* (Vic) ss 464SA – 464SB.

¹⁵ *Crimes (Forensic Procedures) Act 2000* (NSW) s 23–26, *Crimes Act 1958* (Vic) s 464T.

¹⁶ *Criminal Law (Forensic Procedures) Act 2007* (SA) ss 3, 14–19.

¹⁷ A non-intimate forensic procedure includes the taking of a sample of a person's hair – *Crimes (Forensic Procedures) Act 2000* (NSW) s 3; *Crimes Act 1958* (Vic) s 464 (non-intimate sample); *Criminal Law (Forensic Procedures) Act 2007* (SA) s 3 (forensic procedure).

¹⁸ *Crimes (Forensic Procedures) Act 2000* (NSW) s 82; *Crimes Act 1958* (Vic) s 464ZE; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 47.

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admitting the evidence outweighs the undesirability of admitting evidence that was not obtained in compliance with the provisions of the Act.¹⁹

Fourth, the facts are not clear as to whether Reggie was actually photographed and fingerprinted by another police officer after the hair sample was taken, and prior to Detective Boots conducting the recorded interview. It is permissible for the police to photograph and fingerprint a person in lawful custody for the purposes of future identification²⁰. In South Australia this power is qualified by a requirement either that the person has been charged with an offence or that a magistrate has authorised the identification procedure²¹. Neither of these actions had been taken by the police at the point when it appears the arrangements were made for photographing and fingerprinting Reggie, so these procedures were potentially unlawful in South Australia. In New South Wales and Victoria, however, as long as Reggie was under arrest at this time, which seems to be the case, these identification procedures were lawful.

Fifth, there is an issue about the legality of the detention of Reggie for questioning by the police. If Reggie is under arrest, which is strongly arguable, then he may be detained for questioning for the purpose of the police investigating whether he committed the offences for which he was arrested²².

In New South Wales there is a requirement that a custody manager, that is a police officer not connected with the investigation, be appointed and caution Reggie as to his right to silence and his rights generally under Part 9 of the *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW)²³. A similar requirement that a police officer or investigating official caution and inform a suspect of their statutory rights exists in South Australia²⁴ and Victoria²⁵. Reggie can then be detained for a reasonable time having regard to all the circumstances²⁶, but in New South Wales this must not exceed the 'maximum investigation period' of six hours²⁷ or in South Australia the 'prescribed period' of detention of four hours²⁸ unless the period is extended by a magistrate or authorised officer²⁹.

¹⁹ *Crimes (Forensic Procedures) Act 2000* (NSW) s 82(4) – (7); 'circumstances justify the reception of the evidence' – *Crimes Act 1958* (Vic) s 464ZE(2) – (3); 'should be admitted in the interests of the proper administration of justice despite the contravention' – *Criminal Law (Forensic Procedures) Act 2007* (SA) s 47(1)(e), (2).

²⁰ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 133, *Crimes Act 1958* (Vic) s 464K(1) – fingerprints only; *Summary Offences Act 1953* (SA) s 81(4).

²¹ *Summary Offences Act 1953* (SA) s 81(4a)–(4g).

²² *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) Part 9; *Crimes Act 1958* (Vic) s 464A; *Summary Offences Act 1953* (SA) s 78.

²³ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 122.

²⁴ *Summary Offences Act 1953* (SA) s 79A(3).

²⁵ *Crimes Act 1958* (Vic) ss 464A(3), 464C(1).

²⁶ *Crimes Act 1958* (Vic) s 464A(1)–(4).

²⁷ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 115(2).

²⁸ *Summary Offences Act 1953* (SA) s 78(2).

²⁹ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) ss 118–120 (for up to a further six hours); *Summary Offences Act 1953* (SA) ss 78(2), (4) (not exceeding 8 hours).

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There are no facts to suggest that a custody manager or other police officer cautioned Reggie or informed him about any of his rights under the relevant legislation. It is simply stated that Reggie was taken to the interview room at 10.00 am and charged at a later time, which arguably gives a total detention time of somewhere between eight and nine hours without considering any periods to be disregarded in calculating the investigation period³⁰. These 'disregarded' time periods would include waiting for recording facilities to become available, however, the detention period appears to be excessive. Further, there are no facts to suggest that action was taken for authorisation to extend the detention period, so it is strongly arguable that Reggie's detention was unlawful if the incident occurred in New South Wales or South Australia.

Similarly, in determining what constitutes a reasonable time in Victoria, there are various matters to be taken into consideration³¹. The prosecution may argue that various matters reasonably connected with the investigation of the offence, including the search, conduct of identification procedures and waiting for the availability of recording equipment to interview Reggie, all contributed to the eight or nine hours of detention. Again, however, having regard to Reggie's detention in the cells for what seems to be several hours, it is strongly arguable that this was not a reasonable time and amounted to unlawful detention in Victoria as well as in the other jurisdictions.

The provision of refreshments³² and the reference to 'blood-sucking, money-grubbing lawyers' seem to give weight to there being an arrest and detention for questioning in the circumstances. Clearly this comment by Detective Boots is not a proper notification to Reggie of his right to communicate with a legal practitioner before any investigative procedure is undertaken³³, and may result in any evidence from such a procedure then being unlawfully obtained. Reggie denied all the allegations in relation to the stalking of, and eventual serious assault upon Carmelita, and did not make any admissions about ownership of the rope found on his person, so the fact that he was unlawfully detained and not properly informed of all his statutory rights should ultimately have no impact on the evidence which is admissible to establish any criminal charges laid against Reggie. Overall, the rope found during the search may be admissible in court, but the failure of the investigating police to follow proper statutory procedures would arguably result in any other evidence obtained during Reggie's detention being inadmissible at trial.

Finally, the reasons for the refusal of bail by the bail authority would be dependent on a number of factors, notably the charges actually laid against Reggie. He has been charged, but the actual charges have not been specified in the facts provided. It is likely that given the nature of Carmelita's injuries, Reggie was charged with the sexual assault/rape or the serious physical

³⁰ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 117; *Summary Offences Act 1953* (SA) ss 78(2a)–(3c).

³¹ *Crimes Act 1958* (Vic) s 464A(4).

³² *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 130.

³³ *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW) s 123; *Summary Offences Act 1953* (SA) s 79A(1)(b)(i); *Crimes Act 1958* (Vic) s 464C(1)(b).

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assault of Carmelita together with 'stalking'. On the basis of those charges, the bail authority in South Australia would then have considered the presumption as to bail or any statutory requirement for the refusal of bail³⁴. In New South Wales and Victoria, the bail authority or bail justice would have determined whether the offence is one for which the accused person must 'show cause' why their detention is not justified.³⁵ A sexual assault or rape charge where both the accused and the alleged victim are adults does not raise a presumption against bail or a requirement to 'show cause' why bail should not be refused. In Victoria, bail must be refused where an accused is charged with 'stalking' and falls within the terms of s 4(4)(b)(i) or (ii) *Bail Act 1977* (Vic). It is not entirely clear on the known facts whether Reggie would come within the terms of that sub-section, but if he did, then he must show cause as to why his detention in custody is not justified.

Depending on the presumption or 'show cause' determination, the bail authority would then have assessed the bail concerns to determine whether there are any unacceptable risks if the accused is released from custody³⁶. In South Australia the bail authority should release the applicant on bail unless having regard to various matters they consider the applicant should not be released on bail.³⁷ The bail authority only has to be satisfied as to any matter on the balance of probabilities when making a bail decision³⁸. The matters to be taken into account broadly cover the probability of Reggie appearing in court, including his criminal history, circumstances and community ties; Reggie's interests, including his need to be free to prepare for his appearance in court or obtain legal advice, and the period that he may have to spend in custody if bail is refused; the protection of the alleged victim, Carmelita; the strength of the prosecution case; and the safety of the community having regard to the nature and seriousness of the offence, interference with witnesses or evidence and the likelihood of commission of further serious offences while on bail.

There is limited information provided from which to compare Reggie's situation to the statutory bail concerns, notably there is no information as to the probability of Reggie appearing in court to answer the charges. This is an important concern in the assessment as to whether to grant bail.³⁹ It is arguable that the more serious the circumstances of the offence, the greater the probability of the accused failing to appear in court. This may have been an important factor in the bail authority's decision to refuse bail for Reggie having regard to the serious nature of the offence committed on Carmelita.

Reggie's stalking of Carmelita for some weeks before the attack may be evidence of the need to protect her from Reggie. In addition, the fact that Reggie was found in the early hours of the morning in the vicinity of the Pink

³⁴ *Bail Act 1985* (SA) s 10A.

³⁵ *Bail Act 2013* (NSW) ss 16A–16B; *Bail Act 1977* (Vic) ss 4(2) & 4(4).

³⁶ *Bail Act 2013* (NSW) ss 17–18; *Bail Act 1977* (Vic) s 4(3).

³⁷ *Bail Act 1985* (SA) s 10(1).

³⁸ *Bail Act 2013* (NSW) s 32(1).

³⁹ *Bail Act 2013* (NSW) s 17(2)(a); *Bail Act 1985* (SA) s 10(1)(b)(i); *Bail Act 1977* (Vic) s 4(3)(c).

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Pussyfoot nightclub with a rope in his pocket, two weeks after the attack on Carmelita, may raise legitimate concerns for community safety and provide evidence of a risk that Reggie would commit further serious offences if released on bail. These are the most likely reasons for refusal of bail by the bail authority on the basis of the limited information provided.