

# Robinson v State of NSW

*s99 Law Enforcement (Powers & Responsibilities) Act (NSW) 2002*

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The decision in Robinson<sup>1</sup> was handed down by the NSW Court of Appeal on 16 October 2018 and dramatically changed the interpretation of the law relating to arrest without warrant. If an arrest is deemed to be unlawful, then any admissions made during it can be excluded from evidence pursuant to the court's discretion. This article aims to assist practitioners appearing in the Local Court of NSW.

## Arrest Without Warrant

Prior to Robinson, it had been thought that the process of arrest and charging involved two separate decisions – the decision to arrest and then the subsequent decision to charge. However, the majority of the Court of Appeal held that the charging decision must be made before the decision to arrest. If the police officer does not have an intention to charge at the time of the arrest, then the arrest is unlawful.<sup>2</sup>

## The Facts of Robinson

Mr Robinson attended a Sydney police station in response to attempts by police to contact him. Upon attendance he was immediately arrested, without warrant, for breach of an apprehended violence order. The appellant was offered, and accepted, the opportunity to participate in a record of interview. He was released without charge after the interview.

Mr Robinson commenced proceedings against the State of New South Wales, claiming damages for wrongful arrest and false imprisonment. The District Court judge dismissed the claim and accepted the arresting officer's evidence that a decision whether to charge the appellant depended on what he said in the interview and that, at the time of the arrest, he had not decided to charge him.

## Court of Appeal

On appeal, the key issue was whether the arrest was lawful in circumstances where there was no positive intent to lay charges at the time of arrest. The majority (McColl JA & Basten JA, Emmett AJA dissenting) held that the power to arrest exists, and must be exercised, for the purpose of bringing the person arrested before a justice as soon as reasonably practicable.<sup>3</sup> As no decision whether to charge the appellant had been made at the time of arrest, the arrest was not for the purpose of commencing the criminal process and was unlawful.<sup>4</sup>

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1 Robinson v State of New South Wales [2018] NSWCA 231

2 [127] per McColl JA, [194] per Basten JA

3 [46]; [95]; [136]; [154]

4 [128]-[129]; [194]

# Application

Robinson was handed down on 16 October 2018. On 18 October 2018 I appeared in a domestic violence matter in western Sydney. My client had been detained by police in the absence of an intent to charge him. As such, I persuaded the court that his arrest was unlawful and succeed in having the admissions he made during that arrest excluded from evidence.

My client was staying in a hotel and had had an argument with his partner. The man in the room next door called police and said that he had assaulted her. When police arrived they immediately detained my client. They then spoke to the alleged victim and the man who phoned police. After that my client made admissions which were recorded on the police body worn video.

In cross-examination the arresting officer conceded that when he detained my client he had not decided to charge him. He was merely detaining him 'for the purposes of investigation'. It wasn't until after he had spoken to the alleged victim, the witness from the room next door and recorded my client's admissions on his body worn video that he decided to charge him with assault and breach AVO.

Her Honour agreed that the arrest was unlawful as the police had not made the decision to charge when they detained my client. Her Honour further decided to exclude the admissions pursuant to her discretion under s138 Evidence Act on the basis that they were improperly obtained.

# Conclusion

From now on it is essential to cross-examine every arresting officer as to when they made the decision to charge. If it was made after the arrest, then the arrest was unlawful. If they claim to have made the decision before the arrest, then make them explain the reasons they had at the time. They are not able to rely on information that came to them after the event.

I'm available every day if you have any interesting issues.

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