A Little Knowledge is a Dangerous Thing or When is an Arrest Not an Arrest?

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Summary

The decision of the High Court in *Williams v the Queen* generated considerable concern amongst law enforcement agencies that its practical application would effectively throttle the effective investigation of crime. A number of Australian legislatures responded by reforming the law to permit the police to question suspects held in detention. Recently, in its decision in *Sammak v The Queen,* the Tasmanian Court of Criminal Appeal provided the police with another mechanism for evading the constraints placed upon their powers of interrogation by *Williams*. It did so by recognising a distinction between being under arrest and being in police custody in a general sense that is less than arrest. This decision is of relevance in most other Australian jurisdictions, even those where the law has been reformed to partially abrogate the effect of *Williams*. This is because it potentially provides the police in those jurisdictions with a means for evading even the lesser constraints imposed on them by that reforming legislation. The implications of this decision for suspects' rights are troubling. The decision in *Sammak*, however, is open to challenge on a number of grounds. These are considered in this paper as are its implications for suspects' rights.

The Court in *Sammak* also decided that a person could only be found to be under arrest if he was aware that he was not free to leave. This aspect of the decision is also criticised in this paper.

Introduction

The decision of the Tasmanian Court of Criminal Appeal in *Sammak v The Queen*,[1] provides the police with a mechanism for circumventing the restraints imposed on their investigative powers by the decision of the High Court in *Williams v The Queen*.[2] As the situation which arose in *Sammak* is likely to occur on a regular basis in police investigations, the decision in this case will have considerable importance for future determinations

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1 Tasmanian Unreported Judgment No 33/1993.

2 (1986) 161 CLR 278.

of police investigative powers and obligations and suspects' rights. This is particularly true for those jurisdictions where the law has remained unchanged since the decision in *Williams*, that is in New South Wales,[3] Western Australia, Queensland and Tasmania. However, the decision in *Sammak* may also be of significance in other jurisdictions which responded to *Williams* with a flurry of legislative activity which expanded police powers of detention and partially abrogated that decision. It will be argued here that in these jurisdictions, *Sammak* may provide the police with the means of escaping even the more liberal constraints of this legislation.[4]

Since Sir Robert Peel established the police force in England in 1829, practitioners, judges and law reformers have fretted over issues concerning the extent of police powers of arrest, detention and interrogation; issues like — what is meant by detention in police custody? Can it take different forms? If it can, do these different forms give rise to different obligations in the police and different rights in the citizens detained? What are the constituent elements of police detention — the sine qua non for a finding that a person actually is in police detention or under arrest in the sense of being imprisoned?

Periodically the courts and legislatures have attempted to grapple with these issues and to clarify the law surrounding them. Often the results have been less than salutary, with the law being jettisoned into a mire of further complexity and confusion. It is my contention that the recent Tasmanian Court of Criminal Appeal decision in *Sammak* has achieved just such an unhappy result. In that case, the Court reached the conclusion that there is a distinction between an arrest and the detention of a suspect in police custody, being something less than an arrest. That lesser form of custody may exist, even where the police have no intention of allowing the suspect to depart and could lawfully arrest him if they chose to do so. The Court further concluded that this distinction has implications for the right of the police to interrogate the suspect. In particular, it was held that where a person has not been arrested, even though that person is in police custody, then the machinery of section 34A *Justices Act* 1939 (Tas) and section 303 *Criminal Code* 1924 (Tas) will not be activated. These provisions, which have equivalents in one form or another in all Australian jurisdictions,[5] enact in statutory form the common law requirement for the police to bring an arrested person before a judicial officer without delay to enable the question of bail to be determined. In *Williams*, the High Court interpreted these sections in accordance with the common law as preventing the police from arresting or detaining a person for the purpose of interrogation and also as preventing any delay in taking a person before a magistrate to enable interrogation to be completed.

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3 *The Crimes Arrest and Detention Amendment Bill* was introduced in the NSW Legislature on 21 April 1994, while this article was in press.

4 In the Northern Territory and South Australia police powers of detention for interrogation have been expanded by s137(2) *Police Administration Act* 1988 (NT) and s78 *Police Offences Amendment Act* 1985 (SA). These Acts do not preclude the potential application of Sammak in these jurisdictions, cf the Victorian and Commonwealth legislation which eliminates the possibility of the approach in *Sammak* being adopted, see s23B(2)(b) *Crimes Act* 1914 (Cth) and s464C *Crimes (Custody and Investigation) Act* 1988 (Vic).

5 Section 352 *Crimes Act* 1900 (NSW); s137(1) *Police Administration Act* 1988 (NT); s552 Criminal Code (Qld); s13(2) *Bail Act* 1985 (SA); s23(3) *Crimes Act* 1914 (Cth); s6(1) *Bail Act* 1982 (WA); s464A *Crimes (Custody and Investigation) Act* 1988 (Vic); the New South Wales, Queensland and Western Australian provisions are in essentially similar terms to the Tasmanian legislation. In the remaining jurisdictions, the police have been empowered to question suspects after arrest. However, this power is still subject to time restraints.

The distinction made by the Court in *Sammak* is one which might also be made in respect of legislation governing the police powers of arrest in all other Australian jurisdictions except Victoria and cases covered by the Commonwealth *Crimes Act* 1914. Section 464C *Crimes (Custody and Investigation) Act* 1985 (Vic) contains a definition of "being under arrest" which encompasses the different custodial situations distinguished in *Sammak*. It therefore excludes the possibility of there being a detention in police custody less than arrest. Section 23B(2)(b) of the Commonwealth *Crimes Act* 1914 also precludes the possibility of *Sammak* being applied to that legislation. It is in the same terms as section 464C of the Victorian legislation. In those jurisdictions where the law has been reformed to enable the police to detain suspects for questioning and the relevant legislation does not contain a definition of "arrested person" which ousts the distinction made in *Sammak*, then that distinction might be applied to enable the police to evade whatever time constraints the legislation imposes upon the period for which a person can be detained for questioning. This is the case with the Northern Territory *Police Administration Act* 1988 and the South Australian *Police Offences Act* 1985. As noted above, in New South Wales, Queensland and Western Australia where the law has remained the same as in Tasmania, the decision in *Sammak* has the most obvious practical application.

The majority of the Court in *Sammak* also decided that a person cannot be found to be under arrest unless he is conscious of his confinement.

The decision in *Sammak* clearly represents a judicial attempt to deal with the practical problems perceived to have been created by the decision in *Williams*. It was the general view of law enforcement agencies at the time that *Williams* was decided, that its practical application would throttle the effective investigation of crime. It was felt that the emphatic and unambiguous pronouncement that the police possessed no power either at common law or under the then existing legislation to arrest or detain a suspect for questioning, placed unrealistic and inappropriate constraints upon police powers of investigation. The police claimed that, in those places where justices are permanently available, they would be effectively prevented from questioning any arrested person.

The primary purpose of this paper is to examine the decision in *Sammak* and to consider its implications for police investigative procedures and suspects' rights. In doing so, I will touch upon particular aspects of a number of the issues concerning police detention identified above. I will begin by outlining the facts and decision in *Sammak's* case. Then, in an endeavour to provide the basis for a meaningful evaluation of this case and its implications, I will consider three issues: (i) what is meant by detention in police custody; (ii) has the law previously recognised different levels of police detention, or, more specifically, has the law drawn any distinction between being under arrest and being in police custody in some sense less than being under arrest; and, (iii) must a suspect know that he is not free to leave, before he can be said to be under arrest? In the final part of this paper I will consider the implications of this case for suspects' rights and police investigative procedures.

The Decision in Sammak

Briefly, the facts of *Sammak's* case are as follows: Sammak was convicted of one count of stealing on his own plea, and of two further counts by jury verdict. He appealed the last two convictions on the basis that the trial judge had erred in not excluding, in the exercise of the discretion, confessional evidence which had been obtained whilst the accused was being unlawfully detained by the police. Sammak had been stopped by the police outside a jeweller's shop and told that enquiries were being undertaken into the theft of property from shops in Hobart. He was asked to accompany the police to the police station which

he did, arriving at CIB Headquarters in Sandy Bay at about noon. He gave a false name to the police and his true identity was not established until two hours later. The Crown case was that between 2.30 pm and 8.00 pm Sammak made a number of confessions including one recorded in note form by the police officers from his oral admissions, a statement written in his own hand and a confession recorded on video-tape during a police interview. Immediately after the video recorded interview Sammak was taken to police headquarters in Hobart where he was charged. He was detained in the cells until 10.00 am the following day when he was taken before a justice of the peace. In all, the accused was in police custody for 22 hours before being taken before a magistrate. There was no suggestion in the evidence that at any time prior to the completion of the video recorded interview the accused was told that he was under arrest or that he was being charged with any offence. However, on the voir dire the police who gave evidence conceded that the accused would have been prevented from leaving had he attempted to do so at any time after he had been spoken to in the vicinity of the jeweller's shop. The trial judge therefore concluded that from that moment Sammak was under arrest within the meaning of section 34A *Justices Act* and section 303 of the *Criminal Code*. The judge held that arrest marks the commencement of a period in detention and that an arrest is an act or words, or both, which deprives the individual of liberty. Since the accused in this case was not free to leave from the moment he was spoken to by police outside the shop he was, from that point on, under arrest. The police were therefore under a duty to take him before a judicial officer shortly after his identity had been correctly established, which was two hours after his initial detention.

The Court of Appeal, however, disagreed with this reasoning. They found that, while the evidence was sufficient to enable the trial judge to conclude that the accused was "in custody in a general sense" that is, in a sense that would be relevant for the purposes of the Judges' Rules, or the discretion rule, it was insufficient to enable the judge to conclude that the accused had been arrested. Accordingly it was insufficient to give rise to a statutory duty under section 34A *Justice Act* or section 303 *Criminal Code*. Two of the Judges, Zeeman and Crawford JJ, further held that there was also no evidence that the police had unlawfully detained the accused in any other sense. This being the case, there was no necessity for them to consider the recent decision of the High Court in *Foster v R*,[6] and they did not.

The finding that, on the facts, the accused was not under arrest appears to have been based on two factors. First, no formal arrest was made. The accused was not told that he was under arrest, nor that he was being charged with any offence nor that he was not free to leave at any time. Secondly, the majority found there was no evidence that the accused formed any belief at any relevant time that he would not have been permitted to leave should he have attempted to do so, even though that was in fact his position. On this analysis, before there can be an arrest for the purpose of section 34A and section 303 the police must communicate to the suspect that he is not free to leave. It follows from this that if the police do not indicate to the suspect one way or the other (either by words or conduct) that he is under arrest, there will be no arrest even if the suspect believes he is under arrest. This is so, even if the police deliberately refrain from revealing to the suspect that he is not free to go.[7] Similarly, the mere fact that the police intend to prevent the suspect from leaving should

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6 (1993) 113 ALR 1.

7 This situation arose in *O'Donoghue* (1988) 34 A Crim R 397 where it was held by the New South Wales Court of Criminal Appeal that the mere fact that a suspect believes he is not free to leave will not mean that he is under arrest if that belief is formed solely on the basis of his own misconception that a police officer's

he try to do so will not constitute an arrest if the suspect does not realize that this is their intention, and believes that he is, in fact free to go. Again, the result here will be the same even if the police deliberately conceal their intentions from the suspect.[8] If, even unknowingly, the suspect is not free to leave, then the suspect may still be in custody for the purposes of the Judges' Rules, according to the court in *Sammak*. The suspect need not be under arrest.

Cox J appears to have differed from the other judges in his interpretation of the accused's custodial position. He found the police had conveyed to the suspect that he was no longer free to depart. Nevertheless, the judge held there had been no arrest and that therefore section 34A and section 303 had no application. Cox J appears to require that there be a *formal* arrest before section 34A and section 303 will operate.

It is the writer's contention that this decision is open to challenge upon three grounds. First, the Court was wrong in basing its decision as to the application of section 34A *Justices Act* and section 303 *Criminal Code* on the existence of a distinction between detention in custody for the purpose of the Judges' Rules and being under arrest. In either case there is an "imprisonment" in law and the law does not permit the police to imprison a person other than for the purpose of bringing him or her before a judicial officer (except in limited statutorily defined circumstances). The flaw in the Judges' reasoning appears to lie in their failure to distinguish between lawful and unlawful imprisonment when considering the potentially different applications of the relevant statutory provisions and of the Judges' Rules. Accordingly, in considering whether or not section 34A and section 303 had been activated the court pursued the wrong line of enquiry. Instead of asking whether the accused was under arrest or in some lesser form of detention, the Court should have enquired whether the accused was "imprisoned" or not. If he was "imprisoned" then the question would be whether that "imprisonment" was lawful. If it was, then section 303 and section 34A applied. If it was not lawful then there would be no need to resort to section 34A or section 303. The detention would be, in any case, unlawful and as such, provide strong grounds for the court to exercise its discretion and exclude any police evidence tainted by that unlawfulness. The second argument is that, if there had been no arrest, that in itself would render the detention unlawful. The police have no power to detain a person other than by effecting a valid arrest. Thirdly, it will be argued that the Court was wrong in finding that a suspect's knowledge of his confinement is a necessary precondition for an arrest. This finding again confuses the issue of whether there has been an arrest at all with the issue whether that arrest is lawful. Moreover, in reaching this conclusion the Court failed to consider the requirement contained in section 27(9) *Criminal Code*, which imposes upon the police a duty to arrest wherever they may lawfully do so.

What is "Detention in Police Custody" — Can it Take Different Forms?

Rule 3 of the Judges' Rules uses the term "persons in custody". It states "Persons in custody should not be questioned without the usual caution first being administered".[9] The

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request constituted a command and the police have done nothing by their words or conduct to make it plain that he is not free to leave.

8 See also Teh, G L, "Detention for Interrogation", (1973) 9 *MULR* at 11.

9 In South Australia and Victoria, as well as in the Commonwealth *Crimes Act* 1914, the Judges' Rules have achieved expanded statutory recognition, see: *Crimes Act* 1914 (Cth), ss23F-S; *Crimes (Custody and*

explanation of this Rule contained in the *Tasmanian Police Commissioner's Standing Orders* states that a person must be taken to be in custody even though not arrested or charged, if the person is in the company of police officers and is not entirely free to leave their company (paragraph 408.16(3)).

The use of the term "in custody" in this rule and in its explanation in the *Police Commissioner's Standing Orders* creates the impression that there may be some form of *lawful* police restraint less than arrest. It is submitted, however, that *lawful* detention constitutes "a single entity in law".[10] The technical term for police detention is "imprisonment". Any form of restraint by the police is in law an imprisonment whether it follows from a formal arrest or otherwise.[11] Neither at common law nor under statute (except in limited and specifically designated situations) is a police officer empowered to detain a person otherwise than by a lawful arrest.[12] It must therefore follow that anyone who is in *lawful* custody is under arrest.[13]

If these principles are applied to the judgments in *Sammak*'s case it becomes apparent that the Judges were wrong in finding that Sammak could be "in custody in a general sense" which is less than arrest. The correct position, it is submitted, is that which was stated by Hanna J in the Irish Case, *Dunne v Clinton:*[14]

> In law there can be no half-way house between the liberty of the subject, unfettered by restraint, and an arrest. If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time. If, having been examined, he is asked, and voluntarily agrees, to remain in the barracks until some investigation is made, he is still a free subject, and can leave at any time. But a practice has grown up of "detention", as distinct from arrest. It is, in effect, keeping a suspect in custody, perhaps under as comfortable circumstances as the barracks will permit, without making any definite charge against him, and with the intimation in some form of words or gesture that he is under restraint, and will not be allowed to leave. As, in my opinion, there could be no such thing as notional liberty, this so-called detention amounts to arrest, and the suspect has in law been arrested and in custody during the period of his detention. The expression "detention" has no justification in law in this connection, and the use of it has in a sense helped to nurture the idea that it is something different from arrest, and that it relieves the guards from the obligation to have the question of the liberty of the suspected person determined by a Peace Commissioner or the Court. If the word "detention" were deleted from the police vocabulary and the word "arrest" substituted there would be a clearer understanding as to the obligations upon the guards. If it is necessary or advisable for the investigation of crime that there should be some intermediate period conforming to the present practice, it must be authorised by the Legislature. It is a deprivation of the liberty of the subject, and it is fundamental that that cannot occur in cases such as this, save by the order of a Peace Commissioner or a Court.

Investigation) Act, 1985 (Vic), s464A; *Police Offences Act*, 1985 (SA), s79A. The terminology used in these enactments differs from and is defined differently to that used in the Judges' Rules quoted here. The Judges' Rules elsewhere in Australia do not have the force of law and use the same terminology as those operating in Tasmania.

10 Above n7 at 14.

11 *R v Banner* [1970] VR 240 at 249.

12 *R v Inwood* [1973] 1 WLR 647; *Bales v Parmenter* (1935) 35 SR (NSW) 182.

13 See also Smith, J C, "The New Judges' Rules — A Lawyer's View" (1964) *Crim LR* at 176; Teh, G L, above n8 contra. Williams, Granville, L. "Requisites of a Valid Arrest" (1954) *Crim LR* at 6.

14 [1930] IR 366 at 372.

The flaw in the reasoning of the Tasmanian Court appears to result from their failure to distinguish between lawful imprisonment or arrest and unlawful detention, when considering the application to police detention of legal principles and rules and administrative guidelines. The writer's argument is that only where a suspect has been *unlawfully* detained can she or he be found to be "in custody for the purpose of the Judges' Rules" but not under arrest within the meaning of section 34A *Justice Act* and section 303 of the *Code*. In all other situations if a person is "in custody" she or he is also under arrest. In this context, the term "unlawful detention" is used to designate detention which is unlawful from the outset and does not include originally lawful detention rendered unlawful by a failure to comply with some statutory or common law obligation.[15]

The terms "imprisonment", "arrest" and "in police custody" do not only apply to lawful restraint. They also apply where a person has been unlawfully detained. In *Spicer v Holt*,[16] Viscount Dilhorne said, "arrest is an ordinary English word. Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases".

However, the legal implications of the two types of detention are normally quite distinct, the one possible exception to this being that the Judges' Rules may apply regardless of whether the detention is lawful or unlawful. In all other respects, the consequences of the two types of detention will differ. The most significant difference, of course, is that unlawful detention is a civil wrong giving rise to an action for false imprisonment. It may also constitute a criminal offence.[17] The next major distinction is that the duties and restraints imposed on the police where there has been a lawful detention, including the duty contained in section 34A *Justices Act* and section 303 *of the Code*, can have no application to an unlawful detention. The custodial situation referred to in section 34A and section 303 must mean a valid and lawful arrest. Where someone has been quite unlawfully restrained so as to give rise automatically to a suit for false imprisonment, they cannot be under arrest for the purpose of section 34A or section 303. The Court has no more jurisdiction to grant bail where there has been an unlawful arrest than it would have if no arrest had been effected at all.[18] The suspect's access to liberty is either his or her own two feet, or, if the police compel him or her to remain, via the ancient *Writ of Habeas Corpus*. As far as the exercise of the trial judges' discretion to exclude evidence is concerned, section 34A and section 303 are irrelevant. These sections render *lawful* restraint unlawful for a failure of compliance. Where the restraint is already unlawful, there is no *need* to resort to these provisions to motivate the trial judge's discretion. That will be exercised having regard to the already existing unlawfulness.

Quite separate considerations arise however, in relation to the application of the Judges' Rules to unlawful detention. In *Smith v R*,[19] Williams J made it clear that the Judges' Rules apply whether a person has been unlawfully or lawfully detained or whether their co-operation with the police is on an entirely voluntary basis. The judge said:

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15 For example, if the police fail to inform the arrestee of the reason for his arrest, that will make the arrest unlawful: *Christie v Leachinsky* [1947] AC 573.

16 [1976] 3 All ER 71 79.

17 *R v Banner*, above n10 at 249.

18 *R v Jones, Ex P Moore* [1965] Crim L R 222.

19 (1956-57) 97 CLR 101 at 129.

> The term "in custody" in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody.

Prima facie it seems questionable that administrative guidelines formulated for the express purpose of providing rules for the proper treatment of suspects can have any logical application to a situation of wrongful detention. Arguably, the detainee simply should not be in police custody and nothing in the Judges' Rules can or should apply to add any legitimacy to the police conduct. However, it is possible to envisage circumstances where their application to unlawful detention is justifiable. For example, the detention may appear, prima facie, to be lawful and its illegality may not emerge until some time after the initial detention. A suspect may have been detained because a police officer *unreasonably* (although honestly) believed he or she had committed an indictable offence. In such a situation it is as well to extend the protection of the Judges' Rules to the suspect. Such a person would be "in custody for the purpose of the Judges' Rules" though not under arrest for the purpose of section 34A *Justices Act* or section 303 *Criminal Code*. However, this can only occur where the suspect has been unlawfully detained. In all other situations, barring those specifically designated by statute, if the suspect is "in custody" he or she is also under arrest for the purpose of section 34A and section 303.

The issue of unlawful imprisonment, in the sense designated above, was not open in *Sammak's* case. The police did have grounds on which they could properly have restrained the accused. Accordingly, this was not a case which could give rise to a finding that the accused was "in custody for the purpose of the Judges' Rules" but not under arrest. If this analysis is correct then it must follow that unless Sammak was in fact not subject to any restraint at all, he was under arrest for the purpose of section 34A and section 303 and the Court of Criminal Appeal was wrong in finding that he was not under arrest.

There are other flaws of reasoning in the judgments in this case. For example, in his analysis of the facts, Zeeman J endeavours to have his cake and eat it too. On the one hand he found that there had been no detention because the accused did not know he was not free to leave. Nevertheless, he found that the accused was "in custody". With respect, Zeeman J cannot have it both ways. If there was no detention, then the accused could not be "in custody". If the accused was "in custody" then he was ipso facto in detention, and, furthermore, unless he had been falsely imprisoned, he was under arrest. The finding that there was no evidence that the accused formed any belief that he could not leave is, in fact, incredible. For part of his period in detention, he was kept in the police cells. It beggars belief that a person would remain in such a location if he or she thought they could go.

Cox J's judgment also suffers from flaws in logic. The judge found that the accused had been "unlawfully detained" because he had been detained for the purpose of interrogation. The police do not have the power to detain for interrogation. Such detention, he held, however, was of a "much milder kind", than detention which contravened section 34A and section 303. The flaw in reasoning here derives from a failure to recognize that detention for interrogation is unlawful purely and simply because such detention is a contravention of section 34A and section 303. The police do not have power to detain for interrogation because they only have power to detain a suspect in order to take him or her before a judicial officer. Accordingly, a finding that the accused's detention was unlawful because it was for the purpose of interrogation, must also of necessity be a finding that the detention was unlawful because it was not for the purpose of taking the accused before a

magistrate. Consequently, the unlawfulness of the detention in *Sammak's* case cannot have been of a "much milder kind" than detention in contravention of section 34A and section 303. It was of the same kind. Of relevance here as well, is the decision of the High Court in *Foster*,[20] where it was held that unlawful detention in police custody for the sole purpose of interrogation is a matter of such exceptional seriousness as to require the trial judge to consider excluding the police evidence in the exercise of his discretion. If Cox J had considered the decision in *Foster*, it is submitted that he would have had considerable difficulty in maintaining the existence of different degrees of seriousness in unlawful police detention.

However, the principal flaw in Cox J's reasoning is his finding that the accused was not in fact under arrest. This finding can be challenged on two grounds. First, if the principles outlined earlier are correct, then a finding that the accused was in custody must also amount to a finding that he was under arrest. Second, on Cox J's interpretation of the facts all the necessary components for an arrest are present, the police had conveyed to the accused by their words or conduct that he was no longer a free man. On the formulation of arrest in *R v Inwood*[21] nothing more is necessary to constitute an arrest. In that case the Court of Appeal held:

> It all depends on the circumstances of the case whether in fact it has been shown that a man has been arrested, and the court considers it unwise to say that there should be any particular formula followed. ... There is no magic formula, only the obligation to make it plain to the suspect by what is said and done, that he is no longer a free man.

Has the Law Previously Recognised Different Levels of Detention?

On what basis then did the Court in *Sammak's* case reach the conclusion that there is a distinction between being under arrest for the purpose of section 34A and section 303 and being "in custody in a general sense" short of arrest? Zeeman J relied upon two cases, *Smith v R*[22] and *Alderson v Booth*.[23] The former, he held, contained the correct construction of the term "in custody" whilst the latter detailed the requirements of a valid arrest. The judge did not, however, state which factors in each statement relied upon constituted the distinguishing features for the two concepts. Close scrutiny of the relevant passages suggests that the formulation given in *Smith* describes conduct which would *technically* constitute an arrest within the requirements laid down in *Alderson v Booth*.

In *Smith*, Williams J stated:

> The term "in custody" in the Judges Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody. ... The inference is plain enough that the police intended him to believe that he had to remain there and that they would have taken steps to prevent him leaving if he had attempted to do so. ... He was in the control of the police from the moment he entered the police station.

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20 Above n6.
21 [1973] 1 WLR 647 at 653.
22 (1956–57) 97 CLR 101.
23 [1969] 2 QB 216.

> He was not told he could not leave because he made no attempt to do so but it is unbelievable that he would have just sat there if he had thought he could leave.[24]

In *Smith* there was conduct on the part of the police which was intended to make the accused believe and which did make him believe that he was not free to leave and there was submission by the accused to the detention imposed. How is this different from the requirements for arrest contained in *Alderson v Booth*? In that case Lord Parker CJ stated that:

> an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion.[25]

It is submitted that there *is* no material distinction between this statement and the formulation of the term "in custody" in *Smith*.

Cox J (in defining the expression "in custody") also referred to statements of Smith J in *R v Amad*:[26]

> Now for the purposes of the discretion rule and for the purposes also of the Commissioner's Standing Orders, a person is to be regarded as in custody not only after formal arrest, but also when he is in, say, a police vehicle, or on police premises, and the police by their words and conduct have given him reasonable grounds for believing, and caused him to believe that he would not be allowed to go should he try to do so.

Again this description is on all fours with the definition of arrest in *Alderson v Booth*.

It is submitted that the concept which is being described in all these cases is that of arrest even though in *Smith* and *Amad* the expression "in custody" is employed. No significance can be attached to the courts' use of this term in these cases, because that was the term in the Judges' Rules which they were in the process of construing. Similarly, no significance can be attached to the fact that the courts in *Amad* and *Smith* stated that a person could be in custody otherwise than by virtue of an arrest. The distinction which was intended to be made was between a formal and an informal arrest, not between an arrest and some lesser form of custody. In fact the concern appears rather to have been to make clear that conduct other than a *formal* arrest or arrest after a charge has been preferred, may constitute an arrest.

Is there any other basis on which a distinction between being "in custody in a general sense" and being under arrest might be justified? Apart from statutory provisions which specifically provide for custodial detention short of arrest, it is submitted that the law runs counter to the existence of such a distinction. From cases like *Williams v R*,[27] *R v Iorlano*,[28] *Cleland v R*,[29] *R v Banner*[30] and *Bales v Parmenter*,[31] it is clear that the basic principles which they propound apply to all forms of legitimate police restraint — both formal and informal. For example in *Bales v Parmenter*, Jordan CJ stated, in a passage cited with approval in *Williams v R*[32] that:

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24 Above n22 at 129.
25 Above n23 at 220–221.
26 [1962] VR 545.
27 (1986) 161 CLR 278.
28 (1983) 151 CLR 678.
29 (1982) 151 CLR 1.
30 [1970] VR 240.
31 (1935) 35 SR (NSW) 182.
32 Above n27 at 307.

> No person is entitled to impose any physical restraint upon another except as authorised by law. ... Where the imposition of physical restraint is authorised by law, it may only be imposed for the purpose for which it is authorised ... it may be imposed by a police officer in the course of arresting and bringing before a magistrate a person for whose arrest no warrant was issued, but whom the officer, with reasonable cause, suspects of having committed a crime or offence punishable whether by indictment or summarily under any Act. ... Any detention which is reasonably necessary until a magistrate can be obtained is of course, lawful, but detention which extends beyond this cannot be justified under the common law or statutory power.[33]

In *R v Banner* the Full Court of the Supreme Court of Victoria stated:

> Police officers have, of course, power to arrest and detain a citizen where they have reasonable and probable grounds for suspecting that a felony has been committed, and that he is the person who committed it. But this power is exercisable only for the purpose of taking him before a magistrate to be dealt with according to law for that felony. They have no power to arrest *or detain* a citizen for the purpose of questioning him or of facilitating their investigations: ... If the police do so act in purported exercise of such a power their conduct is not only destructive of civil liberties but it is unlawful. For to imprison any person without lawful justification is a civil wrong for which damages are recoverable and may also constitute a common law misdemeanour punishable by fine and imprisonment. ... The fact that there was *no formal arrest* does not alter the position. *Every restraint of the liberty of one person under the custody of another is in law an imprisonment whether or not there has been a formal arrest.*[34] (Emphasis of author)

In *Williams v R* Wilson and Dawson JJ stated:

> A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before a justice to be dealt with according to law. That, as we conceive it, is one of the foundations of the common law. ... The imprisonment of a person can only be justified by lawful warrant or in the limited circumstances where he is held under lawful arrest for the purpose of obtaining the warrant of a justice for any further detention.[35]

In the same case Mason and Brennan JJ stated: "The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes".[36]

These cases all use the terms "detention", "arrest" and "custody" interchangeably and without distinction. As noted earlier, these terms are all encompassed within the global term "imprisonment". Accordingly, all restraints imposed upon police power lawfully to imprison a citizen must apply no matter whether that imprisonment is termed "detention", "arrest", "restraint", or "being in custody".

Moreover, the policy considerations identified by the Courts as providing the justification for statutory provisions like section 34A and section 303 and the common law principles from which they derive are formulated in general terms and are of general application. They cannot logically be limited to any particular form of police restraint. The principal policy consideration in this area is the law's jealous protection of the individual's right to personal liberty. Only by ignoring this consideration is it possible to

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33 Above n31 at 188–189.
34 Above n30 at 249.
35 Above n27 at 306.
36 Id at 292.

maintain any distinction in principle between the police obligations applying to formal arrest and other lawful custodial situations. In fact, in *Sammak* the Court of Criminal Appeal appears to have done just that. No reference is made there to the broad principles behind the statutory provisions under consideration.

There are situations, however, where a distinction has been made between arrest and a lesser form of custody. For example, under section 10(2) of the *Road Safety Alcohol and Drugs Act* 1980 (Tas) a police officer is empowered to take a person "into custody" who has refused to submit to a breath analysis, for the purpose of taking him or her to a place where a breath analysis can be carried out. The power under this provision has been held not to amount to a power of arrest: *Garwood v Schultz*.[37] This interpretation can be justified on two grounds. First, the section itself authorises the detention of the suspect for a purpose other than the purpose of being taken before a judicial officer. Secondly, if these sections were interpreted in such a way that section 34 and section 303 applied to them, then they might well render it impossible for the police to perform the investigative procedures they are required to undertake under the Act. However, the distinction which the court has drawn here in relation to arrest and custody serves a specific statutory purpose and should be given no broader application. This line of authority then is clearly distinguishable from *Sammak's* case.

In other cases where the courts have been dealing with legislative extensions of police powers of arrest or with arrest in the context of resisting arrest, wilful obstruction or escape, a very narrow and strict construction has been given to the legislation with the result that unless all the formalities of arrest have been scrupulously observed, the Courts have held there has been no arrest.[38] In these cases, however, the existence of a lawful arrest was a precondition to a lawful prosecution and the principal concern of the courts was to *limit* the powers of the police and to ensure that any restraints upon those powers were strictly enforced. The aim was twofold: to protect the rights of the accused and to protect citizens' rights to personal liberty generally. Their purpose was *not* to extend the investigative powers of the police. For example, in *Freeman v McGee,* Dickson J stated: "anybody who seeks to arrest another by virtue of a statute must take care to pursue strictly the power conferred by the enactment".[39]

The point made in these cases is that where the requirements for a formal arrest have not been completed, the detention by the police is *unlawful.* In addition, any subsequent investigations they undertake are, for that reason, also unlawful, and the citizen has a right to resist the police and to re-establish his own freedom. This line of cases, therefore, provides an alternative basis upon which the Court of Criminal Appeal could have found Sammak's detention to be unlawful. It was unlawful simply because there had been no arrest. However, in pursuing its apparent primary concern — the advancement of the investigative powers of the police and the restriction of the application of section 34A and section 303, the Court of Criminal Appeal overlooked this possibility. To summarise the argument so far: the decision of the Court was wrong on two alternative grounds. First, the Court was wrong in finding that there had been no arrest for the purpose of section 34A and section 303. The finding that the accused was "in custody" necessarily entailed a finding that he was "under arrest", unless he had been *unlawfully* imprisoned. Alternatively,

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37 [1982] Tas SR 120.

38 *Alderson v Booth* [1969] 2 QB 216. *Campbell v Tormey* [1969] 1 WLR 189.

39 (1857) Legge 1009 at 1009.

if there had been no arrest, then it was open to the Court to find that the accused's detention in custody was unlawful simply because there had been no arrest. This latter argument will be expanded in the next section of this paper.

Is Knowledge a Pre-requisite for Arrest?

The evidence in *Sammak* showed that if at any time after he had first been spoken to by the police the accused had attempted to depart he would have been prevented from doing so. However, because the majority in the Court of Appeal could find no evidence that he knew this, they held that he was not under arrest. On this analysis knowledge of compulsion is a prerequisite not only for a valid arrest, but for any arrest at all. This conclusion is open to two objections. First, it confuses the issue of whether there has been a lawful arrest with the question whether there has been any arrest at all. Secondly, in reaching their conclusion, Zeeman and Crawford JJ failed to consider the ramifications of section 27(9) *Criminal Code*. This section imposes upon the police a duty to arrest where it is lawful for them to do so.

The principles set out earlier show that *any* detention by the police is by definition an imprisonment. Whether or not a person has been imprisoned depends on whether his or her liberty is restrained: *R v Banner*; *Spicer v Holt*. Whether or not a person has been lawfully imprisoned or arrested depends on whether all the requirements necessary to effect a lawful arrest have been completed. According to *Alderson v Booth*, *Campbell v Tormey* and *R v Inwood* a valid arrest requires that the fact of the arrest be brought home to the suspect. In other words, a suspect must know of the arrest before there can be a valid arrest. This does not mean, however, that if a suspect does not know of his or her detention, then no detention exists. Nor should it be interpreted to mean that the police have a legal right to detain a suspect short of a complete arrest. They cannot refrain from notifying a suspect that he or she is not free to leave and, yet, lawfully detain him. However, Zeeman and Crawford JJ's judgment produces just that result. In effect their argument is that if the police do not complete all the requirements necessary to effect a valid arrest by failing, either deliberately or inadvertently, to bring to the suspect's attention the fact that he or she is no longer at liberty to depart, the detention is, nevertheless, capable of being lawful. The converse should in fact be true. If a full arrest has not been completed any detention will be unlawful. Exceptions may, of course, exist in cases where the circumstances are such that the police cannot complete the arrest, provided they do all that is reasonably possible to complete it.[40]

There are strong policy arguments in support of this submission. Every citizen has a right to be apprised of their true custodial position. If freedom of movement is to be restricted then that should be made unambiguously clear. As Teh[41] notes, suspects in police custody are in a vulnerable position. They should therefore be afforded all the possible protections and restraints the law imposes on police powers of arrest and investigation.

A further, legal ground in support of the argument put forward here is provided by section 27(9) of the Code. In *Sammak*, the Court failed to consider the implications of this provision. On the facts of this case the police were not only clearly in a position where they could lawfully have arrested the accused but they also had no intention of permitting

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40 *Wheatley v Lodge* [1971] 1 All ER 173; *Police v Thompson* [1969] NZLR 513.

41 Above n8 at 41.

him to depart. They believed on reasonable grounds that he had committed the crime of stealing and, accordingly, section 27(2) of the Code empowered them to effect a lawful arrest. In these circumstances they also had a *duty* to arrest : section 27(9). The precise nature of that duty is, however, somewhat vague. It is generally regarded as being of "imperfect obligation".[42] In other words, it is generally accepted that the police have a discretion not to effect an arrest where they might lawfully do so in spite of the terms of section 27(9). However, once the principal reasons for the existence of the police discretion are acknowledged it becomes apparent that where the police do not, in any event, intend to allow a suspect to depart, their desire to avoid the obligations imposed by section 34A and section 303 can not provide a proper foundation for the exercise of this discretion. Commentators and Courts who have considered the operation of this discretion, generally cite the basis of its operation on broadly stated grounds and principles, including such matters as fairness to the public and service of the interests of justice. In particular they cite the harsh and intolerable consequences for citizens of forcing the police to enforce all the laws all the time; the inability of legislatures to formulate laws encompassing all conduct intended to be made criminal and excluding all other conduct; and the failure to eliminate poorly drafted and obsolete legislation.[43] Clearly these considerations are protective and compassionate in their aims.

Their general tenor suggests that in a situation such as arose in *Sammak's* case, the police discretion should not be construed so as to permit a suspect to be left in ignorance of the true custodial position or deprived of his or her right to make an application for bail, simply to enable the police to continue their interrogation unhindered. Section 27(9) might, therefore, have been applied in *Sammak's* case and been interpreted to require the police *formally* to effect the arrest which, on the facts, existed in all but their statement of it. The effect of applying section 27(9) in this way would have been either to activate the police obligations in section 34A *Justice Act* and section 303 *Criminal Code*, or to provide a basis for finding that the detention was unlawful because there had been no arrest.

Lack of knowledge of his confinement then was relevant to the issue of arrest in *Sammak's* case, but not in the way the Court thought that it was. It was relevant because it showed that the suspect's detention was unlawful, either because the police had failed to complete all the necessary requirements to effect a valid arrest and render the custodial situation lawful, or because it showed that they had failed to fulfil their duty under section 27(9) of the Code. The only way to avoid this conclusion is to argue that *Sammak* was not in any kind of detention at all, either lawful or unlawful. This again raises the issue of his state of knowledge. However, here the question is, can a person be said to be imprisoned in law if unaware of confinement?

This still appears to be a live issue because of conflicting authority in the law of tort. On the one hand there is the century and a half old case *Herring v Boyle*,[44] which suggests that before there can be an imprisonment in law a person must know of his or her confinement. On the other hand, in the more recent case, *Meering v Graham-White Aviation Co*

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42 *Albert v Lavin* [1982] AC 546 at 565 per Lord Diplock.

43 See for example *Wright v McQualter* [1970] 17 FLR 305; *R v Commissioner of Police of the Metropolis, Ex P Blackburn* [1968] 2 QB 118; *R v Commissioner of Police of the Metropolis*, Ex.P. *Blackburn* (No 3) [1973] 2 WLR 43; La Fave, W, "The Need for Discretion", in Sykes, G M and Drabek, T E (eds), *Law and the Lawless* (1969).

44 (1834) Cromp; M & R 377; 149 ER 1126.

Ltd,[45] the English Court of Appeal held that a person could be imprisoned without knowing the fact. There are, moreover, statements to the same effect from the House of Lords in *Murray v Ministry of Defence*[46] and in Australia, from the Victorian Supreme Court in *Myer Stores Ltd v Soo.*[47] In the criminal context where the courts have considered the concept, imprisonment, as opposed to lawful arrest, they have *not* formulated its constituent elements in terms of the suspect's state of knowledge. For example in *R v Banner* the Court stated: "Every restraint of the liberty of one person by another is in law an imprisonment".

Similarly in *Spicer v Holt,*[48] Viscount Dilhorne said, using the term "arrest" to denote *all* forms of restraint: "Whether or not a person has been arrested depends ... on whether he has been deprived of his liberty to go where he pleases".

On these formulations the issue is — was there any form of restraint on the person's liberty? If there was then there was an imprisonment in law. The person's knowledge of the restraint is immaterial. It is submitted that any construction of the term "imprisonment" which requires that, in all cases, a person have knowledge of confinement would in effect "drive a coach and four" through the way the Courts have administered the law of police detention. It would permit the police deliberately to hide from a suspect the fact that he or she is not free to leave their custody, and in so doing to deprive him or her not only of the ordinary legal protections attendant upon a formal arrest, but also of the protection afforded by the writ of *habeas corpus*, and of any other remedies available in civil law. The modern and ancient trend in the case law is consistently opposed to such a reading. Rather the jealousy with which the law has traditionally protected the individual's right to personal liberty suggests that an interpretation which has the potential to erode that liberty in the way suggested should be avoided. The fact that in *Sammak's* case it wasn't, suggests either that that case is a straw in the wind for the future development of the law or that it was wrongly decided.

Implications of the Decision in Sammak's *Case*

Following the decision in *Sammak's* case, there are now three possible custodial positions a suspect being questioned by the police might occupy. First, he or she might be under arrest, in the sense that all the requirements to effect a lawful arrest have been fulfilled. Secondly, he or she may be under no restraint at all and can stay or leave as he or she pleases. Thirdly, he or she may be "in custody in a general sense" meaning that while he or she is not free to leave he or she is nevertheless not under arrest. This appears to be the first time an Australian court has recognised the third category as comprising lawful police custody.[49] The Court did not make clear, however, what the obligations of the police are when a person is in their detention within the third custodial category. As he or she is "in custody for the purpose of the Judges' Rules" presumably the police must comply with those Rules. As section 34A and section 303 do not apply, the police would appear to be able to question the accused for as long as they like. As long as the suspect is not conscious

45 (1920) 122 LT 44.

46 [1988] 2 All ER 521 at 528.

47 [1991] Aust Torts Report 81–077 at 68, 634.

48 Above n16 at 79.

49 This category also appears to have been recognised by the English Court of Criminal Appeal in *R v Brown, The Times*, Dec 17 1976 — commented on by Michael Zander, *New Law Journal*, 17 April 1977 at 352, 379, "When is an Arrest Not an Arrest?"

of the fact that he or she is not in fact free to leave, the police interrogation may continue indefinitely, or, at least, until a charge is actually laid or the accused tires, objects to the interrogation and attempts to leave with the result that he or she is formally arrested. The practical reality is that a person in the third custodial category can neither leave nor rely upon section 34A or section 303. It is submitted that exactly the same possibility exists in other Australian jurisdictions, except where the law governing police powers of detention has been reformed and specifically defines the third custodial category as coming within the first, as is the case in Victoria and under the Commonwealth *Crimes Act* 1914.[50] Even in those jurisdictions where the law has been reformed to permit the police to question suspects after arrest, the decision in *Sammak* may provide a means for the police to extend the permissible period for questioning beyond the statutory limitations.

This aspect of the decision is of particular concern. There have always been areas of shadow and patches of grey in relation to the powers of the police when questioning suspects. These areas of shade, when coupled with the clear limitations that the law imposes upon police investigative powers, encourage practices which enable the evasion of the legal devices erected to protect suspects' rights.

The decision in *Sammak's* case, it is submitted, has legitimated a number of those practices. In particular it enables the police to rely on various subterfuges to detain suspects for interrogation contrary to the fundamental common law principle that detention for interrogation is unlawful. It permits the police to conceal from a suspect that he or she is not free to leave in order to avoid the legal restraints on police detention and interrogation. Further, it encourages police reliance on suspects' ignorance of their rights to engineer situations where they can claim that there has been either no detention at all or, at least, no arrest. Those most susceptible to such practices are, of course, those who are under-educated, unfamiliar with the law, or lacking in a criminal record. Ultimately such subterfuge erodes public confidence and trust in the police, makes a mockery of suspects' rights and brings the law and law enforcement agencies generally into disrepute.

The fine distinctions which this case erects between the categories, arrest, custody, and voluntary co-operation will make challenges to police evidence more difficult to make and to decide. Determination of the precise custodial status of the suspect and the consequent obligations of the police will prove equally difficult. Trial of these issues on the voir dire will consequently be more complex and confused. *Sammak's* case provides another instance of the legal tug-of-war between two competing concerns — the concern to protect the liberty of the individual and the concern to ensure the conviction of the guilty. It has been thought by some that the decision of the High Court in cases like *Williams* struck the balance too much in favour of the accused. *Sammak's* case pulls too far in the opposite direction. In any event it can safely be predicted that this case will refuel the controversy consequent on the decision in *Williams*. The argument advanced in this paper has been that the interpretation of the law in *Sammak* is incorrect. It follows that it should not stand. While it is beyond the province of this paper to consider in detail how the law of arrest should be reformed, it nevertheless seems appropriate to conclude the discussion with at least one tentative suggestion for reform. In the absence of judicial reinterpretation of the law[51] it is submitted that the legislature should intervene to amend the relevant legislation and preclude the possibility of the interpretation in *Sammak* being applied in future. This

50 See s464C *Crimes (Custody and Investigation) Act* 1988 (Vic), and s23B(2)(b) *Crimes Act* 1914 (Cth).

51 No appeal from the Court of Criminal Appeal decision in *Sammak* has been instituted.

could be achieved by including in the legislation a definition of arrest which encompasses all the custodial situations distinguished in *Sammak*. As noted earlier, precedent for such a development is provided by section 464C *Crimes (Custody and Investigation) Act* 1985 (Vic) and by section 23B(2)(b) *Crimes Act* 1914 (Cth). These provisions make it clear that wherever a person is in the company of the police and would not be allowed to leave if he or she wished to do so he or she is under arrest. Clearly these provisions prevent any argument that a person can be in custody though not under arrest. It is submitted that the enactment of equivalent provisions in all Australian jurisdictions would substantially clarify the law of arrest and, in addition, would increase protection for the individual's right to liberty and inhibit police resort to subterfuge to detain suspects for interrogation.