

Escape from Lawful Custody¹ s 142

The prosecution must prove that the defendant:

1. Was in lawful custody.

A person is in lawful custody if he has been arrested and detained or imprisoned in a manner that has been authorised by law.^{2,3}

It will be necessary to direct the jury either:

(a) There is no other evidence to suggest that the defendant was not in lawful custody as stated. In those circumstances the jury must proceed on the basis that the prosecution have proved this element of the offence, or

(b) There is evidence to suggest that the defendant was not in lawful custody at that time. The defendant has the responsibility of proving on the balance of probabilities that he was not in lawful custody.

2. Escaped from that lawful custody.

To escape is to gain freedom from the person or place that has restricted or controlled that freedom. The prosecution must prove that the defendant was aware that he was not free to leave⁴ and that he acted deliberately to withdraw from actual custody.⁵

¹ Section 142 *Code*. The direction is to be modified if the offence is aiding to escape: s 141; for “harbouring”, *Darch v Weight* [1984] 1 WLR 659

² The appropriate direction will depend on the evidence. See s 145B *Code* which facilitates proof of lawful custody for the purposes of offences in this Chapter. For the distinction between a person in the Chief Executive’s (Corrective Services) custody and a person in the custody of the Commissioner of Police, see ss (7)- (8) *Corrective Services Act* 2000 (opn 1. 7. 2001).

³ If it is alleged that the defendant was in lawful custody whilst detained after arrest, or for investigation or questioning, or whilst being transported by police to a corrective services facility, or in a watch-house facility it will be necessary to direct the jury to the relevant evidence, and to explain the legislation or court order under which the defendant was detained.

If it is alleged that the defendant was in lawful custody because he is detained under the authority of the Chief Executive (Corrective Services), it will be necessary to direct the jury to the evidence of the relevant witness authorised by the Chief Executive pursuant to s 145B *Code* to give evidence.

⁴ The lawfulness of a detention may fluctuate with the circumstances but if the defendant understood that he was under arrest in order to be taken before a court the position was the same as if he had been arrested: *Michaels* (1995) 184 CLR 117 at 126.

⁵ To continue the crime of escape there must be a conscious and intentional act of withdrawal from actual custody: *R v Scott* [1967] VR 276.