IN THE HIGH COURT OF AUSTRALIA

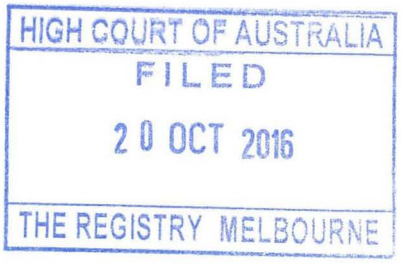
DARWIN REGISTRY

No. D5 of 2016

BETWEEN:

ANTHONY PRIOR

Appellant



and

ROBERT MOLE

Respondent

APPELLANT'S SUBMISSIONS

Part I: We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

1. Section 128(1) of the *Police Administration Act* (NT) (the **PA Act**) relevantly provides:

> *A member may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:*
>
> *(a) the person is intoxicated; and*
>
> *(b) the person is in a public place or trespassing on private property; and*
>
> *(c) because of the person's intoxication, the person*
>
> *(i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or*
>
> *(ii) may cause harm to himself or herself or someone else; or*

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North Australian Aboriginal Justice Agency
61 Smith Street
Darwin NT 0801
Telephone: (08) 8982 5100
Fax: (08) 8982 5199

(iii) may intimidate, alarm or cause substantial annoyance to people; or

(iv) is likely to commit an offence.

2. If a police officer relies on s 128(1)(c)(iii) and/or (iv) of the PA Act, is the power conditioned on both:

   (a) the formation by the police officer of a belief, based on reasonable grounds, that because of the person's intoxication the person may intimidate, alarm or cause substantial annoyance to people, or is likely to commit an offence because of that intoxication, or both; *and*

   (b) the existence of facts sufficient to induce that state of mind in a reasonable police officer?

3. If the answer to that question is 'yes', can a police officer's prior experience of persons who (to the police officer's mind) exhibit similar characteristics to an intoxicated person whom the police officer proposes to apprehend, when the police officer has no prior knowledge of the person to be apprehended, provide reasonable grounds for forming the requisite belief, such as to enliven the power? For the reasons below, this question should be answered 'no'.

Part III: Section 78B Notice

4. It is not considered that notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of reasons for judgment

5. The citation of the reasons for judgment of the intermediate court is *Mole v Prior* (2016) 304 FLR 418. The citation of the reasons for judgment of the primary judge is *Prior v Mole* [2015] NTSC 65 (28 September 2015).

Part V: Narrative statement of facts

6. At 3:30pm on New Year's Eve, 2013, the appellant, Mr Prior, and two other Aboriginal men were drinking red wine in a public place, within 2 km of licensed premises; they also had some bottles of beer.[1]

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[1] *Mole v Prior* (2016) 304 FLR 418 at 419 [1], [2] (Riley CJ, Kelly and Hiley JJ); *Police v Anthony Prior (No 21359150)*, Court of Summary Jurisdiction (Northern Territory) Transcript of Proceedings (14 May 2014) at 26–28 (according to page numbers appearing at bottom of page) (**Transcript**).

7. Mr Prior was therefore committing an offence against s 101U(1) of the *Liquor Act (NT)* (the **Liquor Act**) by consuming liquor at a regulated place. The penalty for that offence was forfeiture of any liquor seized under s 101Y(1)(b) of the Liquor Act, which provides that if a police officer believes on reasonable grounds that a relevant offence is being committed by a person, the officer may, without a warrant, seize any opened or unopened container in the person's possession or immediate vicinity that the officer has reason to believe contains liquor, and may immediately empty the container if it is opened or destroy the container (including the liquor in it) if it is unopened.[2] The police officer may also give the person a regulated place contravention notice.[3]

8. Constables Fuss and Blansjaar drove by in a marked police car; Mr Prior raised the middle finger of his right hand and shouted something.[4]

9. Constable Fuss turned the police car around, and stopped near Mr Prior. Constable Blansjaar alighted, came over and spoke to Mr Prior, realised Mr Prior was drinking wine, and poured out all of the opened and unopened bottles of alcohol.[5] Constable Fuss then began to write out an infringement notice.[6]

10. Mr Prior appeared to be, and was, intoxicated. He swore at the police.[7]

11. Then Constable Blansjaar apprehended Mr Prior and placed him in custody, purportedly under s 128 of the PA Act.[8]

12. In cross-examination, Constable Blansjaar agreed that the following part of his statement was essentially correct:[9]

> *Fuss and I immediately approached the defendant. Whilst speaking to him in relation to his behavior it was apparent to me that he had been drinking alcohol and was affected by liquor. The defendant's breath smelled strongly of liquor and his general appearance was dishevelled. His eyes were bloodshot and he was very belligerent to Fuss and I. When Fuss ... asked the defendant why he was making*

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2 Liquor Act s 101Y(3).

3 Liquor Act s 101Z.

4 *Mole v Prior* (2016) 304 FLR 418 at 419 [2] (Riley CJ, Kelly and Hiley JJ).

5 Transcript at 27–8.

6 *Mole v Prior* (2016) 304 FLR 418 at 419–20 [3] (Riley CJ, Kelly and Hiley JJ).

7 *Mole v Prior* (2016) 304 FLR 418 at 419 [1], 420 [4] (Riley CJ, Kelly and Hiley JJ).

8 *Mole v Prior* (2016) 304 FLR 418 at 420 [6] (Riley CJ, Kelly and Hiley JJ).

9 Transcript at 33 (Blansjaar).

insulting hand gestures towards us the defendant stated: "Because youse are just cunts and last week you gave me the finger". I immediately informed the defendant I was now taking him into protective custody.

13. Constable Blansjaar had no grounds for believing, and did not believe, that Mr Prior was unable to adequately care for himself,[10] nor that Mr Prior might cause harm to himself or someone else.[11] He had no prior knowledge of Mr Prior, and did not know who he was.[12]

14. In evidence in chief, Constable Blansjaar said: [13]

I formed the opinion that his current behaviour with the [sic] intimidate, alarm or cause substantial annoyance to any other person and there were members of the public present. Or if we left him there he would commit - or if I left him there he was most likely going to commit further offences, in particular in relation to the Liquor Act or Summary Act.

15. In cross-examination, Constable Blansjaar explained that he determined that Mr Prior's conduct in raising his middle finger at the police officers 'may intimidate, cause alarm, substantially annoy other people'.[14] However, he gave no evidence of any belief that Mr Prior might, if the police officers left without apprehending him, intimidate, alarm or cause substantial annoyance to people because of his intoxication.

16. Constable Blansjaar admitted that he himself was not intimidated,[15] and he gave no other evidence of his grounds for believing that Mr Prior might intimidate, alarm or cause substantial annoyance to people if the police officers were to leave.[16]

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10 Transcript at 35; PA Act s 128(1)(c)(i).

11 Transcript at 35-36; PA Act s 128(1)(c)(ii).

12 Transcript at 27, 31, 36, 41.

13 Transcript at 28.

14 Transcript at 36; PA Act s 128(1)(c)(iii).

15 Transcript at 36. See also *Coleman v Power* (2004) 220 CLR 1 at 26 [16] (Gleeson CJ).

16 Constable Blansjaar was cross-examined on his assertion that the applicant giving 'the bird' to the police officers might have intimidated people, but neither in evidence in chief nor in cross-examination did he draw any connection between that conduct and the prospect of him engaging in future conduct *because of his intoxication* that might intimidate, alarm or cause substantial annoyance to people, were the police officers to depart (Transcript at 36–40).

17. Constable Blansjaar was cross-examined about the grounds for his belief that, if the constables left, Mr Prior would commit a further offence against s 101U of the Liquor Act, in circumstances where all Mr Prior's liquor had been destroyed. The exchange was as follows:[17]

> *What I'm asking you is you had no reason to think that if you just said look, can you stop drinking, you're not allowed to drink in here – you're not allowed to drink here, that would have been effective?--Just his general demeanour. My experience as a police officer tells me that there's a good chance if we left he would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking.*
>
> *But this wasn't a person that you know had done that before, was it?--No, no.*
>
> *That was just an assumption that you made, wasn't it?--Well the assumption was based on a very short dealing but his behaviour during that was very telling.*
>
> *But you would agree, wouldn't you, that it was an assumption?--If you're referring to knowledge of his history, I guess you could say an assumption but it's an educated assumption made on the circumstances right down there and my experience.*
>
> ...
>
> *So even after you poured the grog out you still formed the belief that you thought he'd continue drinking, even though you'd just poured out all his grog?--If we left there he most likely would have purchased more.*

18. Constable Blansjaar's statement did not include any evidence of a belief that, because Mr Prior was intoxicated, he might intimidate, alarm or cause substantial annoyance to people, or be likely to commit an offence.[18]

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17 Transcript at 42.

18 Transcript at 40–1.

Part VI: Argument

Appeal Grounds 1(a) and 3(a) – The precondition in s 128(1)(c) was not met

19. Constable Blansjaar had no power to apprehend Mr Prior or take him into custody under s 128(1) of the PA Act, because the precondition in s 128(1)(c) was not met.[19]

20. For the reasons in paragraphs 22 to 49 below, s 128(1)(c), properly construed, conditioned the lawful exercise by Constable Blansjaar of the power it confers on:

    (a) the existence of facts sufficient to induce the belief required by s 128(1)(c)(iii) or (iv) (the only provisions relied on) in a reasonable police officer; and

    (b) Constable Blansjaar having formed the belief required by s 128(1)(c)(iii) or (iv) reasonably and on a correct understanding of the law, on the basis of those facts.

21. For the reasons in paragraphs 50 to 65 below, on the evidence given in the Court of Summary Jurisdiction, Southwood J should have been satisfied on the balance of probabilities that one or both of the conditions identified in paragraph 20(a) and (b) above were not satisfied.

What s 128(1)(c) requires

Text

22. The following features of s 128(1) are apparent from its text.

23. *First*, before the power in s 128(1) to apprehend a person and take that person into custody is enlivened, each of the conditions in s 128(1) must be met. Relevantly, where s 128(1)(c)(iii) and (iv) are relied on, this means that the police officer must:

    (a) have reasonable grounds for believing that the person is intoxicated; *and*

    (b) have reasonable grounds for believing that 'because of the person's intoxication' the person may intimidate, alarm or cause substantial annoyance to people or is likely to commit an offence.

24. *Second*, it follows that s 128(1)(c) cannot be satisfied only because the police officer has reasonable grounds for believing that the person is intoxicated, which is sufficient to satisfy only s 128(1)(a).[20] To satisfy s 128(1)(c)(iii) or (iv), the police officer must also

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19 *George v Rockett* (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

20 *Ashley v Millar* [2015] NTSC 63 at [5] (Barr J).

have reasonable grounds for believing that, because of the person's intoxication, the person may intimidate, alarm or cause substantial annoyance to people or is likely to commit an offence.

25. *Third*, by requiring 'reasonable grounds for believing' each of the requisite matters, s 128(1)(c)(iii) and (iv) require 'the existence of facts which are sufficient to induce that state of mind in a reasonable [police officer]'.[21]

26. Section 128(1)(c) of the PA Act requires that the police officer has 'reasonable grounds' for believing that, because of the person's intoxication, one of the four matters in (i) to (iv) pertain. This is an objective test, requiring more than that the decision-maker *thinks* that he or she has reasonable grounds.[22]

27. This was the point – as the High Court explained in *George v Rockett*[23] – of Lord Atkin's dissent in *Liversidge v Anderson.*[24] In *Liversidge,* Lord Atkin criticised the view that, 'the words "if the Secretary of State has reasonable cause" merely mean "if the Secretary of State thinks that he has reasonable cause."' [25] His Lordship observed that the result of such a construction was:[26]

> *... that the only implied condition is that the Secretary of State acts in good faith. If he does that - and who could dispute it or disputing it prove the opposite? - the minister has been given complete discretion whether he should detain a subject or not. It is an absolute power which, so far as I know, has never been given before to the executive ...*

28. The statutory words 'reasonable grounds' are to be given their ordinary meaning.[27]

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21 *George v Rockett* (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Majindi v Northern Territory* (2012) 31 NTLR 150 at 166 [48] (Mildren J).

22 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 429 [10] (Gleeson CJ and Kirby J, citing *Bradley v The Commonwealth* (1973) 128 CLR 557 at 574–5; *Nakkuda Ali v M F De S Jayaratne* [1951] AC 66; *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952).

23 *George v Rockett* (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

24 [1942] AC 206.

25 [1942] AC 206 at 226 (Lord Atkin).

26 [1942] AC 206 at 226.

27 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 445 [60] (Hayne J).

29. *Fourth*, not only must there *be* reasonable grounds for believing each of the requisite matters, but the police officer exercising the power must himself or herself form the belief required by each of those matters, and that belief must be formed on the basis of the grounds identified. This is the natural meaning of the words 'the member has reasonable grounds for believing', and the only meaning that gives work to the verb, 'has'. This proposition is consistent with the observation by French CJ in *Stuart v Kirkland-Veenstra*,[28] that '[t]he term "has reasonable grounds for believing", when conditioning the exercise of a statutory power by reference to the person upon whom the power is conferred, is generally construed as meaning that the person must form the requisite belief and the belief must be based on reasonable grounds'.[29]

30. *Fifth*, the grounds identified must be rationally connected to the belief formed by the police officer.[30] That is the ordinary meaning of 'reasonable grounds *for* believing' that the requisite matters pertain.

31. *Sixth*, the belief formed by the police officer on each of the requisite matters, on the basis of the grounds identified, must be reasonable and must be the belief required by law. That is the natural meaning of the text of s 128(1)(c), and is in any event a requirement to be implied because the power is conditioned on the formation of a state of mind.[31]

32. *Seventh*, s 128(1) is a power directed to a particular individual. It requires the police officer to form a belief in relation to that individual. Specifically, s 128(1)(c) requires the police officer to form a belief as to what the individual may or is likely to do

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28 (2009) 237 CLR 215 at 240 [56].

29 The requirement that the officer exercising the power *have* the 'reasonable grounds for believing' may be contrasted with the requirement in the provision under consideration in *George v Rockett* (1990) 170 CLR 104 (s 679(b) of *The Criminal Code* (Qld), the terms of which are set out at 107), which empowered a justice to issue a warrant if it appeared to the justice 'that *there are* reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft or place – … (b) Anything … as to which *there are* reasonable grounds for believing that it will … afford evidence as to the commission of any offence' (emphasis added). As the Court observed, that language did not import a requirement that the justice 'must not only be satisfied that there are reasonable grounds for suspicion and belief but the justice must also entertain the relevant suspicion and belief': ((1990) 170 CLR 104 at 112, by reference to the decision of the Full Court of the Supreme Court of Queensland in *Hedges v Grundmann; Ex parte Grundmann* (1985) 2 Qd R 263).

30 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 430 [11] (Gleeson CJ and Kirby J, dissenting).

31 *Wei v Minister for Immigration and Border Protection* (2015) 327 ALR 28 at 35 [33] (Gageler and Keane JJ, citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 (Gummow J)).

because of that individual's intoxication. Section 128(1) does not confer a general power to apprehend: for example, to maintain 'good order', to prevent the commission of an offence,[32] or by reference to a public place that is a 'hot spot' for offences. The power conferred by s 128(1) only applies in the very limited circumstances specified in s 128(1), and is addressed to what the police officer believes in relation to the individual the officer proposes to apprehend.

Effect on fundamental rights

33. Section 128(1) authorises the deprivation of liberty; liberty is a 'fundamental freedom'[33] and an 'inherent individual right'[34] that cannot be interfered with except in accordance with a law by which Parliament has made unmistakably clear its intention to allow such an interference.[35]

34. Section 128(1) reflects an attempt by the legislature to balance[36] at least two purposes:

    (a) one is to protect the person apprehended, other people, or society, from harm the person apprehended might cause because of their intoxication – this 'protective'[37] purpose is reflected in the conferral of the power to apprehend;

    (b) the other is the need to protect a person proposed to be apprehended from an arbitrary invasion of their liberty – this purpose is reflected in the conditions imposed on the exercise of the power to apprehend.

35. To insist on strict compliance with the statutory conditions governing the power of apprehension is simply to give effect to the latter purpose.[38] The requirement that the police officer have 'reasonable grounds for believing' is intended to limit otherwise arbitrary powers.[39]

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32 See PA Act s 123.

33 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J).

34 *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 79 (Isaacs J), quoted by Gageler J in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369at 404 [158].

35 *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

36 See *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632–33 [40]–[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

37 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16 at 36 [69] (Gageler J).

38 See *George v Rockett* (1990) 170 CLR 104 at 111 (Mason CJ, Brennan, Deane, Dawson. Toohey, Gaudron and McHugh JJ).

39 *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 558 at 571 (Lockhart J, Bowen CJ agreeing).

36. Further, where there is a constructional choice as to the content of those conditions, the 'principle of legality' favours a construction of s 128(1) that minimises the encroachment of s 128(1) on liberty.[40] In other words, the conditions in s 128(1) should be given the strictest meaning that can be supported by the language in which they are expressed.

Legislative history

37. Section 27(1)(a) of the *Police and Police Offences Ordinance 1923-1960* empowered any member of the police force to apprehend, without warrant, 'any person whom he finds drunk ... with intent to provoke a breach of the peace or whereby a breach of the peace might be occasioned, in any road, street, thoroughfare, or public place'.

38. When the PA Act was enacted in 1979, s 128 provided that where a member of the Police Force had reasonable grounds for believing that a person was intoxicated with alcohol or a drug and that that person was (a) in a public place, or trespassing on private property; and (b) because of his intoxicated condition, likely to (i) commit an offence; (ii) use physical force against another person; (iii) cause damage to the property of another person; (iv) intimidate, alarm or cause substantial annoyance to another person; (v) unreasonably disrupt the privacy of another person; (vi) cause bodily harm to himself or expose himself to bodily harm; (vii) expose himself to having an offence committed upon or against him; or (viii) be unable to adequately care for himself and be not likely to be adequately cared for by any other person, the member could, without warrant, apprehend and take that person into custody.[41]

39. In 1983, s 128 was amended, by removing the additional condition in s 128(1)(b), so that the power could be exercised whenever a member of the Police Force had reasonable grounds for believing that a person was intoxicated in a public place.[42] In his second reading speech, the Chief Minister explained that the additional requirements removed by the amendment were 'restrictive' and had 'presented difficulties in practical application'.[43] He said 'a drunken person has little or no control over his conduct and, whilst he may not come within one of the prescribed categories at the time of coming

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40 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16 at 19–20 [11] (French CJ, Kiefel and Bell JJ).

41 See *Jabaltjari v McKinlay* (1982) 18 NTR 8 at 9-10 (Toohey J).

42 *Police Administration Amendment Act 1983 (No 5)* (NT) s 3.

43 Northern Territory, Legislative Assembly Debates, 24 November 1982 at 3462 (Chief Minister).

under the observation of the law, after the police have gone, he could become a danger to himself or to other persons.'[44] Noting that 'the sight of a drunken person should not have to be tolerated by decent law-abiding citizens', the Chief Minister expressed the belief that 'a police officer should be given clear authority to remove drunks from public places rather than require him to gaze into a crystal ball to establish what might happen the moment his back is turned'.[45] The Opposition Leader objected to the amendment, observing that about 14,000 people per year had been apprehended under the pre-amended version in the previous few years, and noting the potential for abuse of the amended provision.[46]

10 40. In 2011, s 128 was amended to its present form, as part of a comprehensive set of amendments to deal with alcohol and drug related issues.[47]

The facts to be established

41. The central issue in this appeal is whether the facts relied on by Constable Blansjaar constituted 'reasonable grounds' on which Constable Blansjaar could and did reasonably form the belief required by s 128(1)(c)(iii) and (iv), on a correct understanding of the law. More specifically, the question is whether Constable Blansjaar's prior policing experience of persons who (to the his mind) exhibited similar characteristics to Mr Prior, provide reasonable grounds for Constable Blansjaar believing that because of Mr Prior's intoxication, he might intimidate, alarm or cause
20 substantial annoyance to people or be likely to commit an offence.

42. In *George v Rockett*,[48] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ explained that the objective circumstances sufficient to show a reason to believe something (by contrast to those required to show a reason to suspect something):

> *...need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on*

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44 Northern Territory, Legislative Assembly Debates, 24 November 1982 at 3463 (Chief Minister).

45 Northern Territory, Legislative Assembly Debates, 24 November 1982 at 3463 (Chief Minister).

46 Northern Territory, Legislative Assembly Debates, 23 March 1983 at 227 (Opposition Leader).

47 Department of Justice (NT), *Enough is Enough: Alcohol Reform* (2011) 7; *Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011* (NT) s 84.

48 (1990) 170 CLR 104 at 116.

more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

43. As to the existence of reasonable grounds for the purposes of s 128(1), Mildren J explained in *Majindi v Northern Territory*,[49] by reference to *George v Rockett*,[50] that s 128 requires 'the existence of facts which are sufficient to induce the state of mind [for believing the matters in s 128(1)(a), (b) and (c)] in a reasonable person'.[51]

44. Two points may be made about the facts relied on to establish 'reasonable grounds' for the purpose of the belief required by s 128(1)(c)(iii) and (iv).

45. *First*, the facts must be capable of being objectively ascertained. Insofar as the circumstances relied on are based on instinct, impression, 'gut feel' or 'educated assumption', those matters are not capable of being objectively ascertained. An obvious example of a fact that is capable of being objectively ascertained is the outcome of a police officer's prior experience with the individual about whom the belief is formed – for example, where the police officer has on numerous occasions previously witnessed the individual intimidate and harass people in a public place because the individual was intoxicated.

46. *Second*, a police officer's past experience of other individuals does not rationally bear upon the issue of whether this particular individual, because of their intoxication, may intimidate, alarm or cause substantial annoyance to people, or is likely to commit an offence. Section 128(1)(c) requires a belief in relation to 'the person'. The police officer's past experience of other individuals is not relevant to that question, unless it rationally bears on the likely conduct of the person.

47. As to the existence of the state of belief in the mind of the police officer, the observations of Gageler and Keane JJ in *Wei v Minister for Immigration and Border Protection*,[52] citing Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries*

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49 (2012) 31 NTLR 150.

50 (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), by reference to Lord Atkin's dissent in *Liversidge v Anderson* [1942] AC 206.

51 (2012) 31 NTLR 150 at 166 [48].

52 (2015) 327 ALR 28.

Ltd,[53] are apposite: it is 'a state of mind which must be formed reasonably and on a correct understanding of the law'.[54] This required the police officer to 'feel an actual persuasion',[55] 'an inclination of the mind towards assenting to, rather than rejecting'[56] the proposition that because of his intoxication Mr Prior might intimidate, alarm or cause substantial annoyance to people, or was likely to commit an offence. As Gummow J explained in *Minister for Immigration v Eshetu*,[57] the prosecutor in *Connell* had submitted that there was 'not any evidence upon which a reasonable person could form the [relevant] opinion'.

48. The subjective and objective requirements in s 128 provide the context for the 'legal standard of reasonableness'[58] or 'framework of rationality'[59] indicated by s 128(1) of the PA Act. The precondition can only be satisfied where the requisite belief – that 'because of the person's intoxication' the protective concern exists to the degree stipulated in s 128(1)(c)(i), (ii), (iii) or (iv) – is supported by, and rationally related to, 'probative material or logical grounds'.[60]

49. Consistently with the protective nature of the power, the protective concerns are expressed in solely prospective terms: they are concerned to protect the person, or other people, from the *future* harmful consequences of the person's intoxication. But the proposition of the Chief Minister in moving the 1983 amendments – that intoxication *per se* provides reasonable grounds for prospective concern, because a drunk person has little control over their conduct – cannot survive the introduction of s 128(1)(c), which requires reasonable grounds beyond those sufficient to meet s 128(1)(a).

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53 (1944) 69 CLR 407 at 430 (Latham CJ).

54 *Wei v Minister for Immigration and Border Protection* (2015) 327 ALR 28 at 35 [33] (Gageler and Keane JJ).

55 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 at 23 [64] (Gageler J), quoting *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J).

56 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 at 23 [64] (Gageler J), quoting *George v Rockett* (1990) 170 CLR 104 at 116 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

57 (1999) 197 CLR 611 at 653 [135].

58 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [67] (Hayne, Kiefel and Bell JJ).

59 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26] (French CJ).

60 *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at 638 [103] (Crennan and Bell JJ), quoting *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 657 [147] (Gummow J).

Not open to find that precondition to s 128(1)(c) was met

50. Section 128(1)(c) required Constable Blansjaar, before exercising the power to apprehend Mr Prior, to form a reasonable belief based upon the existence of facts that bore rationally on that belief and were sufficient to induce that belief in the mind of a reasonable police officer, that, *because of his intoxication* Mr Prior might intimidate, alarm or cause substantial annoyance to people, or was likely to commit an offence.

51. In this case, the ground relied on for the purposes of s 128(1)(c)(iv) was that Mr Prior was likely to consume liquor in a public place. On Constable Blansjaar's evidence, there was no probative material that tended to establish that it was likely Mr Prior would consume further liquor, let alone that he would do so because of his intoxication.

52. Indeed, his intoxication made it *less* likely that he would be able to commit a further offence, because s 102 of the Liquor Act provided that a licensee or an employee of a licensee must not sell or otherwise supply liquor to a person who is 'drunk'. A person is 'drunk' if 'the person's speech, balance, coordination or behaviour appears to be noticeably impaired' and 'it is reasonable in the circumstances to believe the impairment results from the person's consumption of liquor'.[61] This is relevantly identical to the meaning of 'intoxicated' for the purpose of s 128(1)(a) of the PA Act.[62] It follows that if – as is accepted for the purpose of this appeal – there were reasonable grounds for believing that Mr Prior was intoxicated, then (at least until he sobered up) it would be an offence for a licensee to sell him more alcohol.

53. The learned Magistrate held that the condition in s 128(1)(c) was met, saying:[63]

> *The police are entitled to be proactive in seeing – in policing the streets. And that's what I think they were reasonably doing based upon their assessment of the defendant, in terms of his demeanour – and that was the word used by Blansjaar.*
>
> *He gave evidence that he thought that the man was aggressive, belligerent, unsteady on his feet and there would be further offending if they didn't take him into custody. I've no reason to disbelieve him. In some ways - and he says, Blansjaar, he made the assumption based upon his experience, his education - he used the word 'educated assumption' that this man would continue to offend and he needed to be taken into custody to stop him doing that, based upon his general*

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61 Liquor Act s 7.

62 PA Act s 127A.

63 Transcript at 62–3.

demeanour there was a good chance he would continue drinking.

Now that assumption may have been wrong. But it doesn't mean it was unreasonable, in my view.

54. Apart from Mr Prior's intoxication (which is itself insufficient), the learned Magistrate identified only three grounds that could possibly constitute a fact that reasonably grounded the requisite belief: Mr Prior was aggressive, Mr Prior was belligerent, and Constable Blansjaar had experience that allowed him to make an 'educated assumption'. Aggression and belligerence towards the constables bears no logical relationship to any likelihood that Mr Prior would commit a further offence under s 101U of the *Liquor Act*. That leaves Constable Blansjaar's 'educated assumption'.

55. Justice Southwood held that there were reasonable grounds for believing that Mr Prior would commit a further offence under s 101U of the *Liquor Act*, because of his intoxication, for the following reasons: (a) Mr Prior was near two liquor shops; (b) he had alcohol in his possession; (c) he was drunk; (d) he was drinking in company there, before the police arrived; (e) he abused the police when they arrived; (f) he then sat down and continued drinking; (g) he did not offer to stop drinking, and continued to be belligerent and defiant; (h) the police presence did not cause him to change his behavior; and (i) there was no evidence that he and his companions did not have the means to purchase more alcohol.[64] Reasons (a), (b), (c), (d) and (f) are no more than the elements of the offence under s 101U; (e) has no apparent relevance to whether he would commit a further offence under s 101U; (g) and (h) show only that the police presence did not cause him to stop committing the s 101U offence, necessitating the seizure and destruction of the alcohol.[65] It is clear from Constable Blansjaar's cross-examination that his grounds for believing that Mr Prior would commit a *future* offence were Mr Prior's 'general demeanour' and 'behavior'; 'the circumstances'; Constable Blansjaar's 'experience as a police officer' and an 'educated assumption' based on that experience.[66]

56. The Court of Appeal recognized that the 'officers acted to a certain degree on stereotyping the [appellant]'.[67] Although their Honours described this as 'highly

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64 *Prior v Mole* [2015] NTSC 65 (28 September 2015) at [26]. See also [36].

65 Under s 101Y(1)(b) and (3) of the Liquor Act.

66 Transcript at 41–2.

67 *Mole v Prior* (2016) 304 FLR 418 at 430 [53] (Riley CJ, Kelly and Hiley JJ).

undesirable', they then held that Constable Blansjaar was entitled to take into account his 'experience over many years of the patterns of behaviour of people found intoxicated, drinking in the daytime in public areas close to liquor outlets'[68] and his 'dealings with people displaying similar behaviour to that displayed by the [appellant]'.[69]

57. It was not suggested that Mr Prior could be taken into protective custody simply because he was found committing an offence under s 101U of the Liquor Act. Constable Blansjaar knew nothing about Mr Prior. But he and Constable Fuss both believed they could predict Mr Prior's future behavior, based on assumptions made by reference to past experience with other people. The reason, presumably, that Constable Blansjaar felt able to make an 'educated assumption', was because he had classified the other people with whom he had policing experience in Queensland and the Northern Territory, and Mr Prior belonged to the same class.

58. There are two reasons why Constable Blansjaar's assumption could not provide reasonable grounds for believing that the conditions in s 128(1)(c)(iii) and/or (iv) were met and why the Court of Appeal erred in holding[70] that it could.

59. *First*, an undifferentiated pool of experience about other people cannot provide a reasonable ground for reasonably believing something about what a person whom the police officer has never met will do. That is because the relevant content of the pool of experience is not identified, and it is therefore not possible to preclude the possibility that arbitrary assumptions are at play. The exercise of the power under s 128(1) on the basis of a person's appearance, for example, would be no less arbitrary, and no more rational, than a decision to dismiss a teacher for having red hair.[71] Any decision involving a distinction based on race would be unlawful.[72]

60. *Second*, Constable Blansjaar's reliance on an unparticularised pool of experience makes it impossible to conclude that, in forming the requisite belief, he correctly understood and applied the statutory test – that the further crime had to be likely *because of*

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68 *Mole v Prior* (2016) 304 FLR 418 at 430 [53] (Riley CJ, Kelly and Hiley JJ).

69 *Mole v Prior* (2016) 304 FLR 418 at 435 [74] (Riley CJ, Kelly and Hiley JJ).

70 *Mole v Prior* (2016) 304 FLR 418 at 435 [74] (Riley CJ, Kelly and Hiley JJ).

71 *Short v Poole Corporation* [1926] Ch. 66 at 91, referred to in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 (Lord Greene MR).

72 *Racial Discrimination Act 1975* (Cth), s 9(1). See *Iliafi v The Church of Jesus Christ of Latter-day Saints Australia* (2014) 221 FCR 86 at 101–2 [44] (Kenny J).

Mr Prior's intoxication.[73]

61. Justice Southwood rightly questioned whether there were reasonable grounds for Constable Blansjaar believing that because of his intoxication Mr Prior might intimidate, alarm or cause substantial annoyance to people, noting that '[h]is defiant and belligerent behavior seems to have been solely directed at the police who were not alarmed or intimidated'.[74] The Court of Appeal held that Constable Blansjaar did have reasonable grounds for that belief, apparently relying on Constable Fuss's perception that other persons appeared alarmed by Mr Prior's conduct towards the police officers. But their Honours did not explain why the conduct towards police gave rise to any likelihood that such behaviour would continue after they left. Justice Southwood's reasoning in this regard should be preferred.

62. The decision to place Mr Prior into protective custody was made after 'speaking to him very briefly'.[75] Insofar as Constable Blansjaar relied on Mr Prior's general demeanor and behavior as the objective facts for the reasonable grounds for the belief, that demeanour and behavior did not constitute an offence, and nor was it established that the demeanor or behavior had intimidated, alarmed or caused substantial annoyance to people. Insofar as Mr Prior was said to be causing substantial annoyance to police *before* he was taken into protective custody, Constable Blansjaar agreed that essentially what Mr Prior had done was make an inappropriate gesture to police, and behave in 'a disorderly, offensive manner'.[76] The gesture did not intimidate Constable Blansjaar or frighten him.[77] It is not an offence simply to be angry with the authorities.[78] As Gummow and Hayne JJ observed in *Coleman v Power*, 'by their training and temperament police officers must be expected to resist the sting of insults directed to them'.[79]

63. Insofar as Mr Prior was said to be causing substantial annoyance to people other than the police, there had been no reports of any disturbance, violence, threat of violence or

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[73] An analogy may be drawn with the decisions discussed by Gummow A-CJ and Kiefel J in *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at 623 [34].

[74] *Prior v Mole* [2015] NTSC 65 (28 September 2015) at [27]. See also [37].

[75] Transcript at 8.

[76] Transcript at 36.

[77] Transcript at 36.

[78] *Ferguson v Walkley* (2008) 17 VR 647 at 656 [36] (Harper J).

[79] (2004) 220 CLR 1 at 79 [200] (Gummow and Hayne JJ).

harm to anyone else.[80] Constable Blansjaar had not seen Mr Prior cause harm to anyone else or threaten anyone else.[81] Constable Blansjaar gave evidence that he considered that in certain circumstances the gesture could intimidate others,[82] but there was no evidence that Constable Blansjaar had formed the belief that Mr Prior's gesture might have intimidated others.

64. In the absence of admissible evidence to the effect that Mr Prior had intimidated, alarmed or caused substantial annoyance to people, there was no rational basis to conclude that, because of his intoxication, he would do so in future if not apprehended.

65. Constable Blansjaar's reference to 'the circumstances', without any particularisation of what facts or matters he was relying on, could not, on any view, meaningfully found reasonable grounds for believing that that because of Mr Prior's intoxication, Mr Prior might intimidate, alarm or cause substantial annoyance to people or is likely to commit an offence.

Ground 1(b) – the exercise of power nevertheless exceeded the limits of power under s 128(1)

66. The Court of Appeal distinguished between cases concerning the use of arrest powers where a summons would have been sufficient, on the one hand, and disproportionate use of the power in s 128, on the other.[83] Both are powers to interfere with liberty,[84] and should be exercised only to the extent necessary to achieve the statutory purpose. Use of a statutory arrest power where a summons would be sufficient might be characterised as unlawful because it involves 'taking a sledgehammer to crack a nut'[85] or an 'obviously disproportionate response'.[86]

67. Likewise, the decision to take Mr Prior into protective custody in case he committed a further offence, rather than writing him a contravention notice or infringement notice in respect of the offence he had been found committing, was out of all proportion to the

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80 Transcript at 32, 36.

81 Transcript at 35–6.

82 Transcript at 36.

83 *Mole v Prior* (2016) 304 FLR 418 at 425–8 [32]–[42] (Riley CJ, Kelly and Hiley JJ).

84 As the Court of Appeal correctly recognised: (2016) 304 FLR 418 at 428 [43].

85 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 352 [30] (French CJ).

86 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [74] (Hayne, Kiefel and Bell JJ).

protective purpose[87] of the power conferred by s 128 of the PA Act.

68. There was no probative material before Constable Blansjaar that Mr Prior was unable to adequately care for himself; had caused harm to himself or to someone else; or that he had intimated, alarmed or caused substantial annoyance to people. The only relevant evidence before Constable Blansjaar was that Mr Prior was intoxicated.

69. On his own admission, Constable Blansjaar took Mr Prior into protective custody because there was 'a good chance if we left he would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking.' Given that the penalty for consuming liquor at a regulated place was forfeiture of any liquor seized[88], and a contravention notice, apprehending Mr Prior and taking him into custody to prevent anticipated future liquor consumption exceeded the limits of the power under s 128(1) of the PA Act.

70. In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[89] the plaintiff's counsel expressed concern that Div 4AA of the PA Act appeared to contemplate the arrest and taking into custody of a person for an infringement notice offence for which the maximum penalty is non-custodial and, therefore, for which arrest and taking into custody may not be necessary.[90] Nettle and Gordon JJ considered that such concerns were unwarranted as '[t]he powers of police to arrest a person and take him or her into custody are only to be exercised for the purposes for which the powers are granted and, therefore, only for a legitimate reason.'[91] Similarly here, the decision to take Mr Prior into protective custody to prevent a further infringement notice office was a disproportionate and illegitimate purpose for the exercise of the power in s 128(1) of the PA Act.

Part VII: Applicable provisions

71. The applicable statutory provisions and regulations are set out in Annexure A.

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87 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16 at 36 [69] (Gageler J).

88 Liquor Act s 101Y(1)(b).

89 (2015) 326 ALR 16.

90 (2015) 326 ALR 16 at 74 [240] (Nettle and Gordon JJ).

91 (2015) 90 ALJR 38 at 74 [241] (Nettle and Gordon JJ).

Part VIII: Orders sought

72. The Appellant seeks the following orders:

(a) The appeal is allowed.

(b) The orders of the Court of Appeal are set aside.

(c) Mr Prior's convictions are quashed.

(d) A verdict of acquittal in respect of all counts is entered.

Part IX: Estimate of time

73. The Appellant estimates it will take ninety minutes to present his oral argument.

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Date: 20 October 2016

B E WALTERS
Castan Chambers
walters@vicbar.com.au
(P) 0411 020 967

E NEKVAPIL
Owen Dixon Chambers West
emrys@vicbar.com.au
(P) 03 9225 6831

F BATTEN
Castan Chambers
fiona.batten@vicbar.com.au
(P) 03 9225 6294

Counsel for the Appellant