IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D5 of 2016

BETWEEN:

ANTHONY PRIOR

Appellant

AND:

ROBERT MOLE

Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUE THE APPEAL PRESENTS

2. The single issue this appeal gives rise to is whether a police officer had reasonable grounds to believe, based on his observations of the appellant's behaviour, his experience of patterns of behaviour of people who are intoxicated, and the presence of members of the public who appeared alarmed by the appellant's conduct, that, because of his intoxication, the appellant "may intimidate, alarm or cause substantial annoyance to people" or "is likely to commit an offence" within the meaning of s128(1)(c)(iii) or (iv) of the *Police Administration Act* (NT) (**PAA**), so as to permit his lawful apprehension.

3. The issue must be resolved on the basis of the factual findings of the courts below regarding the bases of the officer's belief. Those bases themselves, as distinct from their sufficiency for the purposes of s128(1)(c)(iii) or (iv) of the PAA, are not the subject of this appeal.

4. The appellant was convicted of offences which occurred following his apprehension. They were: (a) unlawfully assaulting a police officer whilst in the execution of his duty contrary to s189A of the *Criminal Code* (NT), constituted by twice spitting on the officer's face and shirt; and (b) behaving in an indecent manner in a public place contrary to s47(a) of the *Summary Offences Act* (NT), constituted by removing his penis from his jeans and attempting to urinate on a police car from the back of another police car while stopped at traffic lights.

5. The issue arises for determination because, if the apprehension was unlawful, then: (a) the assaulted police officer was not acting in the execution of his duty

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when spat on[1]; and (b) the evidence of all of the charged conduct would be inadmissible pursuant to s138(1) of the *Evidence (National Uniform Legislation) Act* (NT) (**ENULA**).[2]

6. Because the bases for the officer's belief are not in dispute, it is not an issue in this appeal (contrary to the appellant's submissions) whether a police officer's "prior experience of persons who exhibit similar characteristics to someone the police officer proposes to apprehend" provides reasonable grounds for forming the requisite belief.[3] That suggested basis of belief was not a basis on which the apprehending officer relied for his belief. It is wholly irrelevant. All the more so because that was not the appellant's case at trial and was not put in cross-examination to the apprehending officer.

PART III: NOTICE UNDER s78B, *JUDICIARY ACT 1903*

7. Notice is not required by s78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS CONTESTED

8. The following facts additional to those identified by the appellant were found by the Supreme Court. None of these facts were rejected or overturned by the Court of Appeal.[4]

9. The public place where the appellant was drinking was the footpath immediately in front of the Westralia Street shops and between two shops that sold alcohol.[5] As the police officers drove past the shops, the appellant shouted abuse at them in an angry, abusive and defiant manner.[6] As the officers parked their car in front of where the appellant was standing, he sat down on a shop window ledge and picked up a large plastic bottle containing red wine.[7] He did not offer to stop drinking and move on but continued to behave in a belligerent and defiant manner towards police.[8] When questioned by the police officers, he abused them, his demeanour was belligerent and aggressive and he was slurring his words.[9] The appellant's behaviour was noticeably impaired and showed that his judgement was noticeably impaired

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[1] *Majindi v Balchin* [2011] NTSC 40.
[2] The apprehension was held to be lawful by the Court of Summary Jurisdiction, the Supreme Court of the Northern Territory (*Prior v Mole* [2015] NTSC 65) and the Court of Appeal of the Northern Territory (*Mole v Prior* (2016) 304 FLR 418).
[3] Cf Appellant's Submissions, [3], [41], 2nd sentence.
[4] *Mole v Prior* (2016) 304 FLR 418 at [1]-[8] **Appeal Book (AB) 208-210**.
[5] *Prior v Mole* [2015] NTSC 65 at [15] **AB 162**.
[6] *Prior v Mole* [2015] NTSC 65 at [15] **AB 162-163**.
[7] *Prior v Mole* [2015] NTSC 65 at [18] **AB 163**.
[8] *Prior v Mole* [2015] NTSC 65 at [26] **AB 165-166**.
[9] *Prior v Mole* [2015] NTSC 65 at [20] **AB 164**.

and that he did not appreciate the effect that his behaviour was having on others.[10]

10. There were members of the public present; the parents of two children looked quite alarmed, grabbed their children and quickly put them into the car and told one of the officers that what they were hearing was not nice.[11]

11. One of the officers began writing out an infringement notice[12] for the appellant for consuming liquor in a regulated place and causing a nuisance to other people under s101V of the *Liquor Act* (NT).[13] The apprehending officer's evidence was that he thought the appellant would defy any direction the police gave him to stop drinking in a public place.[14]

12. The apprehending police officers were credible and reliable witnesses.[15]

13. After the appellant was told that he was being placed in protective custody, he became more abusive and a caged police vehicle was called for.[16] He got angry when his mobile phone was taken from him and he began to swear and become more aggressive.[17] As police closed the door of the caged vehicle, the appellant spat and his spit hit one officer in the face and on his shirt; the appellant then spat on the officer a second time.[18] He was then placed under arrest for assaulting the officer in the course of his duty.[19]

14. The caged vehicle with the appellant in the back drove from the shops with the police vehicle of the apprehending officers following behind.[20] When both

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[10] *Prior v Mole* [2015] NTSC 65 at [24] **AB 165**.
[11] *Prior v Mole* [2015] NTSC 65 at [21] **AB 164**.
[12] "Infringement notice" means an infringement notice within the meaning of the *Fines and Penalties (Recovery) Act* issued under the *Liquor Regulations* (s4(1), *Liquor Act*). An infringement notice may be given by a police officer if they reasonably believe a person has committed a police infringement offence (r7A, *Liquor Regulations*). A police infringement offence is an offence against a provision of the *Liquor Act* specified in Schedule 2, Part 1 of the *Liquor Regulations*, and the prescribed amount for an infringement notice is the amount equal to the monetary value of the number of penalty units specified for the offence (r7(1), (3), *Liquor Regulations*). The maximum penalty for an offence under s101V (an offence of strict liability) is a fine of 5 penalty units (s101V). If an infringement notice is issued, the penalty is 0.5 of a penalty unit (r7A and Schedule 2, Part 1, *Liquor Regulations*). At the relevant time, the monetary value of a penalty unit was $144 (r2, *Penalty Units Regulations*; s6(1), *Penalty Units Act*; definition of "penalty unit", s17, *Interpretation Act*). Liquor may also be seized and tipped out or destroyed under s101Y.
[13] *Prior v Mole* [2015] NTSC 65 at [19] **AB 163-164**. Cf Appellant's Submissions, [7] which characterise the appellant's conduct as an offence against s101U(1) of the *Liquor Act*, which is comprised of consuming liquor at a regulated place. The issue of a regulated place contravention notice is not available in relation to an offence against s101V (s101Z(1)(b)).
[14] *Prior v Mole* [2015] NTSC 65 at [23] **AB 165**.
[15] *Mole v Prior* (2016) 304 FLR 418 at [11(1)] **AB 211**. See also Court of Summary Jurisdiction, Transcript of Proceeding (14 May 2015) (**Transcript**) at 62 **AB 93**.
[16] *Prior v Mole* [2015] NTSC 65 at [29] **AB 167**.
[17] *Prior v Mole* [2015] NTSC 65 at [29] **AB 167-168**.
[18] *Prior v Mole* [2015] NTSC 65 at [30] **AB 168**.
[19] *Prior v Mole* [2015] NTSC 65 at [30] **AB 168**.
[20] *Prior v Mole* [2015] NTSC 65 at [31] **AB 168**.

vehicles were stopped at traffic lights near the shops carpark, the appellant continued to shout abuse and spit.[21] He then stood up, undid the zipper of his jeans, withdrew his penis and attempted to urinate on the police car behind.[22]

PART V: APPLICABLE PROVISIONS, STATUTES, REGULATIONS

15. Further applicable provisions to those identified by the appellant are set out in Annexure A.

PART VI: STATEMENT OF ARGUMENT

Findings of the Court below

Reasonable grounds to believe the appellant is likely to commit an offence

16. The Supreme Court[23] found, beyond reasonable doubt, that the apprehending officer had reasonable grounds for believing that the appellant would continue to commit the offence under s101U of the *Liquor Act* of drinking in a regulated place because of his intoxication, as required by s128(1)(c)(iii) of the PAA.[24] The Court of Appeal upheld this finding.[25] This was sufficient to dismiss the appeal against the conviction of unlawful assault of a police officer in the execution of his duty (subject to the exclusion of the evidence about that conduct being found to be obtained improperly or in consequence of an impropriety under s138(1) of the ENULA).

Reasonable grounds to believe the appellant may intimidate, alarm or cause substantial annoyance to people

17. The Court of Appeal overturned the alternative finding of the Supreme Court[26] that there was a reasonable doubt about whether there were reasonable grounds for the apprehending officer to believe that the appellant "was likely to" intimidate, alarm or substantially annoy other people. The Court of Appeal held that it was clearly established on the balance of probabilities[27] that the apprehending officer had reasonable grounds for believing that the appellant

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[21] *Prior v Mole* [2015] NTSC 65 at [31] **AB 168**.
[22] *Prior v Mole* [2015] NTSC 65 at [31] **AB 168**.
[23] As the appeal from the Court of Summary Jurisdiction was an appeal by way of rehearing, the Supreme Court made the factual findings set out in its reasons for judgment based on the transcript of the proceeding and exhibits admitted into evidence, and no further evidence was received (*Prior v Mole* [2015] NTSC 65 at [5], [14] **AB 159, 162**). See ss176A and 177(1), *Justices Act* (NT). Cf Appellant's Submissions, [53]-[54].
[24] *Prior v Mole* [2015] NTSC 65 at [26], [36] **AB 165, 171**.
[25] *Mole v Prior* (2016) 304 FLR 418 at [69]-[75] **AB 240-243**, including rejection of various submissions challenging the Supreme Court's findings of fact.
[26] *Prior v Mole* [2015] NTSC 65 at [37] **AB 171**.
[27] Being the standard of proof required to establish the facts necessary for deciding a question whether evidence should be admitted or not under s138(1) (s142(1), ENULA).

"might" intimidate, alarm or cause substantial annoyance to people as required by s128(1)(c)(iv) of the PAA.[28]

Exclusion of evidence about charged acts under s138(1), ENULA

18. Having found that the appellant was lawfully taken into custody, the Court of Appeal upheld the prosecution appeal against the Supreme Court's[29] exclusion of the evidence about the charged acts under s138(1) of the ENULA on the basis that it was obtained in consequence of an impropriety, namely that the apprehension was ill advised and unnecessary.[30] The Court of Appeal held that the evidence was not obtained in consequence of an impropriety because the apprehension did not constitute conduct that was clearly inconsistent with the minimum standards which society should expect and require of those entrusted with powers of law enforcement.[31]

Findings of fact: the belief and the grounds for the belief

19. The apprehending officer's evidence[32], accepted by the Supreme Court[33], was that the apprehending officer believed that the appellant's behaviour would intimidate, alarm or cause substantial annoyance to any other person and there were members of the public present, or if police did not apprehend him he would most likely commit further offences such as drinking in a regulated place or disorderly behaviour.

20. The Court of Appeal found that the apprehending officer's decision to apprehend the appellant under s128 of the PAA was based on:[34]

(a) the behaviour of the appellant at the relevant time, which was aggressive, abusive, indicative of intoxication, displayed a lack of judgement and included blatant drinking in a public place in the presence of police; *and*

(b) the officer's experience over many years of the patterns of behaviour of people found intoxicated, drinking in the daytime in public areas close to liquor outlets, and displaying similar behaviour to the appellant; *and*

(c) the presence of members of the public who appeared to be alarmed by the appellant's actions.[35]

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[28] *Mole v Prior* (2016) 304 FLR 418 at [62]-[63] **AB 235-237**.
[29] *Prior v Mole* [2015] NTSC 65 at [70]-[71] **AB 191-192**.
[30] *Mole v Prior* (2016) 304 FLR 418 at [56] **AB 233**.
[31] *Mole v Prior* (2016) 304 FLR 418 at [48]-[55] **AB 229-233**, applying the test identified in *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at [23] per Basten JA (Barr J agreeing), who in turn was applying the test of impropriety identified in *Ridgeway v The Queen* (1995) 184 CLR 19 at 36 per Mason CJ, Deane and Dawson JJ (see Basten JA at [16]-[20], [22]; see also Hall J at [97]-[102]).
[32] Appellant's Submissions, [14].
[33] *Prior v Mole* [2015] NTSC 65 at [28] **AB 167**.
[34] *Mole v Prior* (2016) 304 FLR 418 at [53], [63], [72] **AB 231-232, 237, 241**.

Asserted error of the Court below

21. The appellant complains that it was not open for the Court to find that either precondition in s128(1)(c)(iii) or (iv) was met,[36] presumably on either standard of proof (the balance of probabilities applying in respect of ground 1(a)[37], and beyond reasonable doubt applying in respect of ground 2(a)).

22. The appellant's formulation[38] of what the words "has reasonable grounds for believing" in s128(1)(c) of the PAA require goes beyond the well-established formulation that: (i) those words require both that the person upon whom the power is conferred must form the requisite belief and that the belief must be based on reasonable grounds;[39] and (ii) that belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition; and (iii) that the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.[40]

23. The appellant's formulation is a paraphrase of the statutory words which is not helpful and apt to mislead,[41] particularly because it draws in observations made by members of the Court in claims for statutory review and/or prerogative relief based upon jurisdictional error (or unreasonableness) in the exercise of a power to confer a statutory privilege or immunity resting upon the decision maker's "satisfaction" of a specified matter.[42] Section 128(1) does not require a police officer to be "satisfied" about anything. These observations contribute little to debate about the scope and content of a requirement that a police

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[35] The Court of Appeal (at [62] **AB 236**) refers to unchallenged evidence from the other officer (Constable Fuss), but the apprehending officer's (Constable Blansjaar's) own evidence was that the parents with small children "were quite alarmed" (as quoted by the Supreme Court at [27] **AB 166**).
[36] Appellant's Submissions, [50]-[65].
[37] Section 142, ENULA.
[38] Appellant's Submissions, [50].
[39] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [56] per French CJ, citing *Lloyd v Wallach* (1915) 20 CLR 299 at 304 per Griffith CJ (Powers J agreeing at 314); at 308-309 per Isaacs J; at 312-313 per Higgins J; *Moreau v Federal Commissioner of Taxation* (1926) 39 CLR 65 at 68 per Isaacs J; *Boucaut Bay Co Ltd (In liq) v The Commonwealth* (1927) 40 CLR 98 at 106 per Isaacs A-CJ (Gavan Duffy, Powers and Rich JJ agreeing at 108); *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 179-181 per Brennan J; at 183-187 per Lockhart J (Bowen CJ agreeing at 176).
[40] *George v Rockett* (1990) 170 CLR 104 at 116 per the Court.
[41] See *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [60] per Hayne J, referring to the words "reasonable grounds".
[42] Cf Appellant's Submissions, [31], [47]-[48], citing *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at [131]-[137] per Gummow J (concerning the Minister's decision to grant or refuse a protection visa if "satisfied" or not of various matters including any criteria prescribed by the statute), in turn citing *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ (concerning the Industrial Authority's decision to alter a rate of remuneration if "satisfied" that the rates are anomalous); *Wei v Minister for Immigration and Border Protection* (2015) 327 ALR 28 at [33] per Gageler and Keane JJ (concerning the Minister's decision to cancel a student visa if "satisfied" the holder had not complied with a condition of the visa); and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [103] per Crennan and Bell JJ (concerning the Minister's decision to grant a protection visa if "satisfied" that the applicant was a non-citizen to whom Australia owed protection obligations, in turn citing *Eshetu* at [147] per Gummow J).

officer "has reasonable grounds for believing" specified matters, and whether or not the requirement was met.[43]

24. Essentially, the appellant complains of a lack of probative evidence which could rationally bear upon the finding that the apprehending officer had reasonable grounds for believing the matters in either s128(1)(c)(iii) or (iv).

Appellant's behaviour and the circumstances

25. The appellant says the apprehending officer's evidence, that his grounds for believing the appellant would commit a future offence were his "general demeanour", his "behaviour" and "the circumstances", is not sufficiently particularised to rationally bear upon the matters in s128(1)(c)(iii) or (iv).[44] That evidence (in cross-examination) followed the officer's more detailed evidence in chief about each of those matters which gave rise to the findings as set out in paragraph 20 above.[45]

26. A person's recent past behaviour is a reasonable predictor of their future behaviour.[46] The appellant appears to accept this, but only where the apprehending officer has observed the person behave in the same way on numerous prior occasions[47] (see further paragraphs 31 to 38 below). True it is that the appellant's behaviour was observed by the apprehending officer on only one occasion, and across a relatively short period.[48] However:

(a) the future behaviour under consideration was what the appellant "may" or was "likely to" engage in within a relatively short space of time into the future (ie after police left the scene);

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[43] The appellant's reference to *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [26] per French CJ and at [67] per Hayne, Kiefel and Bell JJ (Appellant's Submissions, [48]) is addressed in paragraphs 39 to 46 below in relation to appeal ground (1)(b).

[44] Appellant's Submissions, [55], [65].

[45] See also the observation of Heydon JA in *Woodley v Boyd* [2001] NSWCA 35 at [36] (Davies and Foster AJJA agreeing) that "In assessing how a reasonable police officer would have behaved in the circumstances ... their characterisations of the plaintiff's conduct have significance. Those parts of their evidence in which they used general words of characterisation were both admissible and weighty. The impressions recorded were based in some measure on facts which were likely to have been too evanescent and complicated in their nature to be noticed, recollected and separately and distinctly related to the court."

[46] Courts routinely deal with bail and violence order applications (amongst others) on the basis of predictions of a person's future behaviour founded on evidence or assertions about their past behaviour.

[47] Appellant's Submissions, [45].

[48] The description "very briefly" was applied, not to the entirety of the period of observation of the appellant's behaviour, but only to the period during which he stood at the police car and had a conversation with the officers about why he had given them "the bird": Cf Appellant's Submissions, [62], referring to Transcript p8 **AB 15**.

(b) the predicted behaviour was precisely what the appellant had been doing, namely committing the offence of drinking in a regulated place under the *Liquor Act*, and/or causing alarm to other people;[49]

(c) the appellant was intoxicated, his judgement was noticeably impaired, and he was blatantly engaging in the behaviour notwithstanding the presence of police;[50] and

(d) it is not apparent why a longer period of observation of the appellant's behaviour would have been necessary for the apprehending officer to have formed a belief on reasonable grounds about the appellant's potential future conduct.

27. The Court of Appeal rejected the appellant's submission that an absence of evidence that the appellant had the means to purchase more alcohol, or that it would be sold to him given his intoxication, denied the existence of the relevant belief.[51] The Court found that the appellant was not obviously a person without means (having with him a backpack and a mobile phone), and that more alcohol could have been procured by others (the appellant had been drinking in the company of two other men[52]), it being readily available.[53] These unchallenged findings of fact render the appellant's similar submission in this Court[54] untenable.

28. As regards s128(1)(c)(iii) in particular, the Court of Appeal found that other people present appeared to be alarmed by the appellant's behaviour,[55] his behaviour towards police showed that his judgement was noticeably impaired and that he did not appreciate the effect his behaviour was having on others,[56] and that there was no reason for police to think that his behaviour and lack of insight would change if he was not apprehended,[57] so there was a rational basis for police to believe that he might similarly confront other people entering

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[49] *Prior v Mole* [2015] NTSC 65 at [28] **AB 167**. The appellant's dismissal of the grounds identified by the Supreme Court which comprise the elements of the offence of s101U of the *Liquor Act* is therefore misplaced: Appellant's Submissions, [55]. In addition, there was evidence to support the belief held by Constable Fuss that the appellant may cause substantial annoyance to people (Transcript, p8 **AB 15**), because that officer began writing an infringement notice for an offence against s101V of the *Liquor Act* (consume liquor in a regulated place and cause a nuisance to people): *Prior v Mole* [2015] NTSC 65 at [19] **AB 163-164**.

[50] *Mole v Prior* (2016) 304 FLR 418 at [53] **AB 232**.

[51] *Mole v Prior* (2016) 304 FLR 418 at [69]-[70] **AB 240**.

[52] *Mole v Prior* (2016) 304 FLR 418 at [1], [69] **AB 208, 240**.

[53] *Mole v Prior* (2016) 304 FLR 418 at [70] **AB 240**.

[54] Appellant's Submissions, [52].

[55] *Mole v Prior* (2016) 304 FLR 418 at [62] **AB 236**. Notwithstanding the Court's reference to evidence from Constable Fuss, this evidence came from Constable Blansjaar: see Transcript p29 **AB 35**. The evidence from Constable Fuss was that the appellant was causing substantial annoyance to police *and the public*: see Transcript p8 **AB 15**.

[56] *Mole v Prior* (2016) 304 FLR 418 at [72] **AB 241**.

[57] *Mole v Prior* (2016) 304 FLR 418 at [72] **AB 241**.

or leaving the shops.[58] Consequently, it is erroneous to submit that: (i) the Court of Appeal did not explain why conduct towards police gave rise to a likelihood that such behaviour would continue after they left;[59] or (ii) it was not established,[60] or there was an absence of admissible evidence,[61] that the appellant's behaviour had intimidated, alarmed or caused substantial annoyance to people.

Because of the person's intoxication

29. The belief required by s128(1)(c) must be that "because of the person's intoxication" they "may" do something within (ii) or (iii) or are "likely to" do something within (iv). The appellant asserts that the apprehending officer did not have reasonable grounds to believe that the appellant may or was likely to behave as set out above *because of his intoxication.*[62] The rationale for this assertion is unclear.

30. The facts found by the Court of Appeal (referred to in paragraph 20 above) are wholly consistent with the conclusion that the predicted future behaviour *was* because of his intoxication, as opposed to some other (unidentified) reason. Further, the potential offence the officer identified for the purposes of s128(1)(c)(iv) involved the consumption of liquor.

Police officer's prior experience

Wrong characterisation of the experience

31. The appellant takes issue, as the central issue in his appeal, with the inclusion in the "reasonable grounds for [belief]" of the apprehending officer's prior policing experience of persons who "exhibited similar characteristics" to the appellant.[63] The appellant did not put this case at trial, and did not cross-examine the apprehending officer about the appellant's "characteristics" or how they featured in the officer's belief.[64]

32. It is both wrong and misleading to describe the prior policing experience which informed the apprehending officer's decision under s128(1) as being experience of the "characteristics" of "a class" of people and to then challenge the inclusion, in the grounds, of experience with a class of people who had a certain "appearance" or belonged to a particular "race".

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[58] *Mole v Prior* (2016) 304 FLR 418 at [62] **AB 236**.
[59] Appellant's Submissions, [61].
[60] Appellant's Submissions, [62].
[61] Appellant's Submissions, [64].
[62] Appellant's Submissions, [51], [60].
[63] Appellant's Submissions, [41], [56]-[60].
[64] See Transcript, pp31-43 **AB 37-49**, esp pp41-42 **AB 47-48**.

33. The Court of Appeal's finding was that the officer had experience over many years of the *patterns of behaviour* of people found intoxicated, drinking in the daytime in public areas close to liquor outlets, and people displaying similar *behaviour* to that displayed by the appellant.[65] The "pool of experience"[66] was of people who were intoxicated and being aggressive, abusive, belligerent, with impaired judgement and disregard for the effects of their behaviour on others, and blatantly continuing to drink in a public place in the presence of police. That pool of experience was a reasonable inclusion in the grounds upon which it was believed that, because of his intoxication, the appellant may intimidate, alarm or cause substantial annoyance to people or is likely to commit the offence of consuming liquor in a regulated place. A police officer's experience and observation over a number of years of the patterns of behaviour of intoxicated people is evidence of their experience or observation which, given similar circumstances, the officer would expect to be repeated.[67] It is a rational basis for forming a belief on reasonable grounds about the possible or likely future behaviour of an intoxicated individual.

Wrong construction of the provisions

34. Each of s128(1)(c)(ii), (iii) and (iv) require an apprehending officer to have reasonable grounds for a belief about an individual's future behaviour. On the appellant's construction of "reasonable grounds", a police officer's prior experience (unless it is experience with the individual concerned) is irrelevant.[68] The practical implication of this is that the operation of s128 is confined to individuals whom the apprehending officer "has on numerous occasions previously witnessed" "intimidate and harass people in a public place".[69] The latter phrase is not found in s128(1)(c)(iii) or (iv). This reasoning would require an apprehending officer to have, on numerous occasions, previously witnessed the individual intimidate, alarm or cause substantial annoyance to people, or commit offences.

35. There is no warrant for the importation of such a constraint in: (i) the terms of s128 (particularly given the word "may" and the words "is likely to"); (ii) the PAA generally; (iii) the purpose of the provision; or (iv) the extrinsic material which aids its construction.[70]

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[65] *Mole v Prior* (2016) 304 FLR 418 at [53], [74] **AB 231-232, 242**.
[66] Appellant's Submissions, [59]-[60].
[67] See *R v Fazio* (1997) 69 SASR 54 at 62-63, citing *Weal v Bottom* (1966) 40 ALJR 436 (at 438 per Barwick CJ (Kitto J agreeing), at 442 per Taylor J (Kitto J agreeing). See also *R v Barker* (1988) 34 A Crim R 141 at 143-144 per King CJ (Matheson and O'Loughlin JJ agreeing).
[68] Appellant's Submissions, [44]-[46].
[69] Appellant's Submissions, [45].
[70] Applying the proper approach to statutory construction as set out, for example, in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per the Court, citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

36. Consistently with the appellant's construction of s128, the power of police officers to, without warrant, arrest and take any person into custody under s123 where an officer believes on reasonable grounds[71] that the person is about to commit an offence would similarly be constrained. So would the power of police officers to enter, by reasonable force if necessary, a place if an officer believes on reasonable grounds that a person at the place is in imminent danger of suffering personal injury at the hands of another person or a contravention of an order under the *Domestic and Family Violence Act* is about to occur at the place (s126(2A) of the PAA).[72] Such a constraint upon the exercise of these powers is not supported by the terms of the PAA and would be inimical to the purposes for which the powers were conferred.

37. The relevant form of s128(1) was inserted (along with a new definition of "intoxicated" in s127A) by the *Alcohol Reform (Prevention of Alcohol-Related Crime and Substance Misuse) Act 2011*, the objects of which include the prevention of the commission of alcohol-related offences, the prevention of misuse of alcohol, and the protection of people from harm or nuisance resulting from misuse of alcohol by others, which objects are facilitated by, *inter alia*, measures for preventing the commission of alcohol-related offences, such as prohibitions on access to, and consumption of, alcohol by people who are misusing alcohol, and increased availability of intervention aiming to reduce misuse (s3).

38. The appellant's construction of s128(1) is wrong.

Ground 1(b): Exercise of power exceeded limits of power

39. The appellant's argument on this ground[73], founded on the decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, must be that the apprehension under s128 of the PAA was a disproportionate exercise of an administrative decision that exceeded the purpose which the statutory power serves such that it was unreasonable, an abuse and not a proper exercise of the power.

40. This is an alternative basis for the ground that the appellant was apprehended in contravention of an Australian law; it presupposes that ground 1(a) fails such

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[71] The appellant appears to accept, based on the observation of French CJ in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [56], that "has reasonable grounds for believing" is to the same effect as "believes on reasonable grounds": Appellant's Submissions, [29].

[72] See also s126(2AA) allowing a search for firearms or offensive weapons if the officer believes, on reasonable grounds, that to leave such weapon at the place could place a person in imminent danger of suffering personal injury or an aggravation thereof; s147J allowing entry and control of a place and establishment and maintenance of a crime scene if a police officer suspects on reasonable grounds that a relevant offence is about to be committed at a place.

[73] Appellant's Submissions, [66]-[70]. The appellant did not run this ground of appeal in the Supreme Court or the Court of Appeal.

that the preconditions in s128(1)(c)(iii) or (iv) (or both) for the apprehension were satisfied.

41. The appellant's argument contains numerous erroneous propositions. First, it is said that the appellant was taken into custody to prevent him committing the offence of consuming alcohol in a regulated place. This ignores the Court of Appeal's finding that he was also apprehended because he might intimidate, alarm or cause substantial annoyance to people.

42. Secondly, it is assumed that issuing a contravention notice or an infringement notice for the offence he was found to be committing when police arrived was an alternative to apprehending him under s128. It was not. Issuing a notice would be directed to the appellant's past conduct, not his potential future conduct, which is the subject of s128. The appellant did not establish that there was a relevant alternative to apprehension available to the apprehending officer which addressed the appellant's potential future conduct.

43. Thirdly, it is said that there was no probative evidence that the appellant had intimidated, alarmed or caused substantial annoyance to people, and that "the only relevant evidence" was that the appellant was intoxicated. That is contrary to the findings regarding the preconditions the subject of appeal ground 1(a), which must be assumed to be upheld for the purpose of addressing this ground.

44. Fourthly, it is said that the apprehending officer took the appellant into custody because there was a good chance that if he was not apprehended he would acquire more alcohol and continue drinking. As a complete statement, that is contrary to the evidence of the apprehending officer, who gave that answer in response to a question about his reason for not simply giving the appellant a warning.[74] It is also contrary to the findings of the Court of Appeal about the broader bases for the officer's decision to apprehend the appellant (see paragraph 20 above). Again, those findings must be assumed to be upheld.

45. In any event, unlike the ill-defined discretion considered by the Court in *Li*,[75] s128 specifies the mandatory preconditions for the exercise of the power, so no additional matters ought be inferred. Those specified preconditions do not include consideration of the seriousness of the likely future offence or an apprehending officer's options to address a person's past offending behaviour, or some comparison of the consequences for his liberty flowing from the two.[76] Those matters can only define the standard of legal reasonableness and

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[74] Transcript, p42 **AB 48**.
[75] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [67] per Hayne, Kiefel and Bell JJ, citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 per Dixon CJ.
[76] Being the matters identified by the appellant as the "disproportion" comparators: Appellant's Submissions, [67], [69].

constrain the exercise of the power in s128 if, on its true construction, the scope and purpose of the statute conferring the power and its real object so provide.[77] The objects of the Act which inserted the new s128 into the PAA (see paragraph 37 above) confirm that the purpose of the power is to prevent the commission of alcohol-related offences, the misuse of alcohol, and the protection of people from harm or nuisance resulting from misuse of alcohol. The power has both a protective and a preventative function.[78] An exercise of the power for the purpose of preventing an intoxicated person, because of their intoxication, from possibly intimidating, alarming or causing substantial annoyance to people, or from likely future consumption of alcohol in a regulated place is, upon the true construction of the statute, within the bounds of legal reasonableness.

46. Further, unreasonableness is an exceptional remedy,[79] and is not a vehicle for challenging a decision on the basis that the decision maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision maker.[80] The apprehension of the appellant under s128 in the circumstances does not suggest an error in reasoning which cannot be identified[81] nor does it necessarily bespeak error.[82]

Ground 1: Operation of s138, ENULA

47. If the Court finds that the preconditions for the exercise of the power of apprehension were not met, or that the apprehension exceeded the limits of the discretion, the appellant bears the burden of establishing the evidence of the appellant's conduct after the apprehension was "obtained in contravention of an Australian law"[83] within the meaning of s138(1)(a) of the ENULA.[84] The appellant has made no submission regarding the operation of s138.

48. Nevertheless, it is conceded that:

    (a) If the preconditions in s128(1)(c)(iii) and (iv) of the PAA for the exercise of the power of apprehension were not met, or the apprehension exceeded

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[77] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [66]-[67] per Hayne, Kiefel and Bell JJ.
[78] *Mole v Prior* [2016] NTCA 2 at [35] **AB 222**.
[79] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [113] per Gageler J.
[80] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [30] per French CJ.
[81] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68] per Hayne, Kiefel and Bell JJ.
[82] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [85] per Hayne, Kiefel and Bell JJ.
[83] This is the content of appeal ground 1.
[84] *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ.

the limits of the discretion, the apprehension was in "contravention of an Australian law" within the meaning of s138(1) of the ENULA.[85]

(b) The appellant did not act in a way which amounts to such a disproportionate and serious reaction to the apprehension that the behaviour constituting the charged acts (assault police; indecent behaviour) cannot, as a matter of causation, be said to be a consequence of the apprehension.[86]

(c) The behaviour may objectively be considered the anticipated or expected outcome of the apprehension and so "obtained" for the purposes of s138(1) of the ENULA.[87]

(d) It was open to the Supreme Court to find on the evidence, as it did, that the evidence about the acts of the appellant after he was apprehended was "obtained" by the apprehension because his behaviour towards police was "entirely predictable", "to be expected" and there was "a very close connection between it and his apprehension".[88]

(e) It was open to the Supreme Court to find, as it did, that the evidence about the acts of the appellant should have been excluded under s138 because the undesirability of admitting the evidence outweighed the desirability of admitting it, taking into account the matters in s138(3).[89]

Appeal ground 2(b)

49. The appellant has made no submission about ground 2(b). This may be because the ground erroneously refers to the apprehending officer, Constable Blansjaar, and his apprehension of the appellant, rather than the officer, Sergeant O'Donnell, who was the subject of the charge of unlawfully assault police in the execution of duty contrary to s189A of the *Criminal Code* and who was assisting in placing the appellant in the police vehicle after his apprehension by Constable Blansjaar. Thus appeal ground 2(b) must succeed

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[85] "Contravention" is not defined, but its core meaning involves doing that which is forbidden by law or failing to do that which is required by law to be done: Ibid at [29] per French CJ. "Australian law" is defined to mean, in effect, a law (whether written or unwritten) of or in force in Australia or the Northern Territory (s3(1), Dictionary, Part 1, definition of "Australian law"; Dictionary, Part 2, cl 9, ENULA.

[86] Cf *Director of Public Prosecutions v Coe* [2003] NSWSC 363 at [23] per Adams J.

[87] *Director of Public Prosecutions v AM* (2006) 161 A Crim R 219 at [80(c)], [82]-[83] per Hall J. See also *Director of Public Prosecutions v Kaba* (2014) 247 A Crim R 300 at [472]-[474] per Bell J; *Monte v Director of Public Prosecutions (NSW)* [2015] NSWSC 318 at [97]-[99] per Bellew J; see also *Robinett v* Police (2000) 78 SASR 85 at 98, 99-101 per Bleby J; Director *of Public Prosecutions v Carr* (2002) 127 A Crim R 151 at [67]-[68] per Smart AJ.

[88] *Prior v Mole* [2015] NTSC 65 at [70] **AB 191-192**, applying the approach of Hall J in *Director of Public Prosecutions v AM* (2006) 161 A Crim R 219 at [80]-[85]. The Court of Appeal was not required to address this question, having held that the apprehension was both lawful and not an impropriety.

[89] *Prior v Mole* [2015] NTSC 65 at [71] **AB 192-193**.

or fail on the success or failure of appeal ground 2(a) which, in the absence of any distinction drawn by the appellant between the establishment of the evidence on the different standards of proof, must succeed or fail on the success or failure of appeal ground 1(a).

Part VII: Notice of contention or cross-appeal

50. The respondent has not filed any notice of contention or cross-appeal.

Part VIII: Estimate of time for respondent's oral argument

51. The respondent's oral argument is estimated to take ninety minutes.

Dated: 18 November 2016

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ANNEXURE A – FURTHER PROVISIONS, STATUTES, REGULATIONS

***Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011* (NT)**

3 Objects

(1) The objects of this Act are to support family and social welfare and improve the health and wellbeing of people in the Territory by providing a legislative framework for:

(a) the prevention of the commission of alcohol-related offences; and

(b) the prevention of misuse of alcohol or drugs; and

(c) the protection of people who are misusing alcohol or drugs from severe or serious harm because of the misuse; and

(d) the protection of people, particularly children, from harm or nuisance resulting from the misuse of alcohol or drugs by others.

(2) To achieve the objects, this Act establishes a tribunal with the power to make orders beneficial to people who are misusing alcohol or drugs.

(3) This Act also facilitates:

(a) measures for preventing the commission of alcohol-related offences, including:

(i) prohibitions on access to, and consumption of, alcohol by people who are misusing alcohol; and

(ii) increased availability of intervention aiming to reduce the misuse; and

(b) compulsory assessment of people reasonably believed to be misusing alcohol or drugs; and

(c) compulsory treatment for the recovery and rehabilitation of people with dependency on alcohol or drugs; and

(d) appropriate intervention for people who are misusing alcohol or drugs; and

(e) referral for income management of people who are misusing alcohol or drugs.

***Evidence (National Uniform Legislation) Act* (NT)**

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

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141 Criminal proceedings – standard of proof

(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond a reasonable doubt.

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

142 Admissibility of evidence – standard of proof

(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

(a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question arising under this Act;

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters that the court must take into account include:

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question.

***Liquor Act* (NT)**

101V Consumption of liquor at regulated place causing nuisance

(1) A person commits an offence if the person:

(a) consumes liquor at a regulated place; and

(b) while consuming the liquor, causes a nuisance to other people.

Maximum penalty: 5 penalty units.

(2) An offence against subsection (1) is an offence of strict liability.

***Police Administration Act* (NT)**

126 Power to enter to make arrest or preserve peace

(1) Where a member of the Police Force has, under a warrant, power to arrest a person, he may enter a place, by force if necessary, and with such assistance as he thinks necessary at any time of the day or night or between such times as may be specified in the warrant, for the purpose of arresting the person if the member believes on reasonable grounds that the person is at the place.

(2) Subject to subsection (3), where a member of the Police Force may, without warrant, arrest a person, the member may enter, by force if necessary, and with such assistance as he thinks necessary, a place at any time of the day or night for the purpose of arresting the person if the member believes on reasonable grounds that the person has committed an offence punishable by a term of imprisonment exceeding 6 months and that he is at the place.

(2A) A member of the Police Force may, by reasonable force if necessary, enter a place if he believes, on reasonable grounds, that:

(a) a person at the place has suffered, is suffering or is in imminent danger of suffering personal injury at the hands of another person; or

(b) a contravention of an order under the *Domestic and Family Violence Act* has occurred, is occurring or is about to occur at the place,

and remain at the place for such period, and take such reasonable actions, as the member considers necessary:

(c) to verify the grounds of the member's belief;

(d) to ensure that, in the member's opinion, the danger no longer exists;

(e) to prevent a breach of the peace or a contravention of the order; or

(f) where a person at the place has suffered personal injury, to give or arrange such assistance to that person as is reasonable in the circumstances.

(2AA) A member of the Police Force may, having entered a place under subsection (2A), search the place for firearms or offensive weapons if the member believes, on reasonable grounds, that:

(a) a firearm or offensive weapon is located at the place; and

(b) to leave it at the place could place a person in imminent danger of suffering personal injury or an aggravation of personal injury already received,

and may seize any firearm, offensive weapon or similar article found as the result of the search.

(2AB) A firearm seized under subsection (2AA) shall be dealt with in accordance with the *Firearms Act*.

(2AC) A member who searches a place under subsection (2AA) is authorised to use the force that is reasonably necessary:

(a) to open any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, found at the place; and

(b) to carry out a search of a person at the place.

(3) Nothing in this section shall limit or prevent the exercise of any other powers of a member of the Police Force pursuant to any other law in force in the Territory whereby a member may enter a place, whether with or without a warrant.

147J Authority to enter place and establish crime scene

(1) If a member of the Police Force suspects on reasonable grounds that a relevant offence has been, is being, or is about to be, committed at a place, the member may:

(a) enter and take control of the place and anything at the place; and

(b) remain at the place to establish and maintain a crime scene if the member is satisfied it is reasonably necessary to do so to preserve, or search for and gather, evidence of the commission of a relevant offence; and

(c) exercise crime scene powers at the place.

...