CITATION	*Northern Territory of Australia v Kellie* [2024] NTSC 73
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v KELLIE, Tahnee Lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	2024-00157-SC
DELIVERED:	30 August 2024
HEARING DATE:	13 August 2024
JUDGMENT OF:	Riley AJ

CATCHWORDS:

CIVIL PROCEDURE—Court of Appeal—Leave to appeal—Notice of appeal filed after expiration of appeal period under s 19(1) *Local Court (Civil Procedure) Act 1989* (NT)—Whether Rule 3.04(1) of the *Supreme Court Rules 1987* (NT) is applicable—Rule 3.04(1) has no application where time limit is provided for by an Act—Whether failure to institute appeal in time was due to exceptional circumstances—Exceptional circumstances found—Leave to appeal granted.

CIVIL PROCEDURE—Court of Appeal—Inadequacy of reasons—Prior dishonesty of respondent noted by Local Court Judge—Local Court Judge failed to adequately engage with prior dishonesty in finding in favour of the respondent—Reasons for decision inadequate—Appeal allowed.

Interpretation Act 1978 (NT) s 28
Local Court (Civil Procedure) Act 1989 (NT) s 19(1), s 19(2), s 19(5)

Police Administration Act 1978 (NT) s 145
Supreme Court Rules 1987 (NT), Rule 3.04(1), Rule 82.03, Rule 82.04(2)(a), Rule 82.04(2)(b)

Arnott v Beams [2022] NTSC 25; *Collins v Deflaw Pty Ltd* [2000] NTSC 64; *Eccles v Nikki Beach 1 Pty Ltd & Anor* [2019] NTSC 39; *Fennell v Kentz (Australia) Pty Ltd* [2023] NTSC 42*; Fleming v The Queen* (1998) 197 CLR 250; *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd* (2015) 35 NTLR 87; *Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd* [2020] NTCA 4; *Isles v Lyons* [2016] NTSC 11; *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Resi Corporation v Munzer* [2016] SASCFC 15; *Thorne v Kennedy* (2017) 263 CLR 85; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; *Wainohu v New South Wales* (2011) 243 CLR 181; *Weber v Nguyen Thi Phuong* [2001] NTSC 116; *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

REPRESENTATION:

Counsel:

Appellant:	D McLure SC with T Moses
Respondent:	K Foley SC with P Bellach and B Seignior

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	Top End Women’s Legal Service

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Kellie [2024] NTSC 73
No. 2024-00157-SC

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

TAHNEE LEE KELLIE
Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 30 August 2024)

[1] This is an appeal from a judgment of the Local Court delivered on 13 December 2023 in which the Local Court awarded damages in the sum of $120,000 to the respondent following a finding that a police officer, in the course of a search of the respondent, assaulted her by inserting one or more fingers into her vagina.

[2] The appeal is pursuant to s 19 of the *Local Court (Civil Procedure) Act 1989* (NT) ('LCCPA') and is confined to errors of law. The grounds of appeal centre upon: the adequacy of the reasons for decision; an assertion that certain findings were unreasonable and not supported by any evidence; that

a number of findings were in error; and finally, that the award of damages was manifestly excessive or unreasonable.

[3] An initial issue to be determined is whether leave to appeal was required and, if so, whether leave should be granted.

Leave to Appeal

[4] Section 19(1) of the LCCPA provides that a party to Local Court proceedings may appeal to the Supreme Court on a question of law from a final order of the Court: (a) within 28 days; or (b) with the leave of the Supreme Court, after the expiration of 28 days. In the present proceedings the decision of the Local Court was handed down on 13 December 2023 (over a year after final submissions) by, unusually, emailing the decision and accompanying reasons to the parties without any prior notice. The notice of appeal was filed on 19 January 2024.

[5] The appellant submitted that the appeal was within time notwithstanding that a period greater than 28 days had elapsed at the time the notice of appeal was filed. It was contended that, while s 19(1) of the LCCPA requires that the appeal be commenced within 28 days, s 19(5) goes on to provide that an appeal under the section "shall be brought in accordance with the Rules of the Supreme Court" ('SCR'). Rule 82.04(2)(a) of the SCR provides that an appeal is commenced by filing a notice of appeal "within any period required for the commencement of the appeal under an Act". Rule 82.04(2)(b) applies where no period is required under an Act and sets

the time for filing a notice of appeal to be "within 28 days after the day the decision being appealed from is made". Rule 3.04(1) then provides that "in calculating the time fixed by these Rules or by a judgment or order fixing, extending or abridging time, the period from 24 December to 9 January next following shall be excluded, unless the Court otherwise orders".

[6] The appellant submitted that r 3.04(1) applies to this appeal and, when the period from 24 December to 9 January is excluded, the appeal is within time. It was argued that s 19 of the LCCPA sets a timeframe for taking an action, being the period of 28 days, but that r 3.04(1) of the SCR governs how that timeframe is calculated by excluding certain dates around Christmas. It was submitted that the provisions are capable of harmonious operation.

[7] The difficulty with the appellant's submission is that s 19(1)(a) of the LCCPA clearly states that the appeal must be commenced within 28 days. Rule 3.04(1) of the SCR, on its face, applies in circumstances where there is a time period fixed by the SCR as is apparent from the express reference to "calculating the time fixed by these Rules… the period from 24 December to 9 January next following shall be excluded…". As the respondent submits, r 3.04(1) does not say "fixed by these Rules or by another Act". Here it is the section of the LCCPA, and not the SCR, which fixes the time for commencement of the appeal.

[8] Insofar as guidance in relation to the calculation of time is required that is to be found in s 28 of the *Interpretation Act 1978* (NT) under the heading "Reckoning of time". It is to be noted that s 28 provides additional time where the end of an appeal period falls on a public holiday or a Sunday but it does not provide for additional time over the Christmas vacation.

[9] Further, r 3.04(1) appears in Chapter 1 of the SCR which chapter, by virtue of r 1.02(3A), is expressed to be applicable to any matter respecting an appeal "only to the extent provided by rule 82.03". Rule 82.03, which appears in Chapter 2, provides that the rules in Chapter 1 apply "to any matter respecting an appeal not otherwise provided for in this Chapter (Chapter 2) with the necessary changes and to the extent that they are consistent with this Chapter". The time within which an appeal may be lodged in the present circumstances is specifically provided for in Chapter 2 by operation of r 82.04(2)(a) as "any period required for the commencement of the appeal under an Act" which, in the present case, is s 19(1)(a) of the LCCPA. That subsection clearly provides that an appeal must be commenced within 28 days. In those circumstances, r 3.04(1) does not have application.

[10] By way of contrast, in circumstances where the time limit is not provided for by an Act, r 82.04(2)(b) of the SCR sets a time limit of 28 days from the date the decision appealed from is made. Rule 3.04(1) will have application to any such time.

[11] I note that this approach to the application of s 19 of the LCCPA is broadly consistent with that adopted in *Isles v Lyons*[1] and *Collins v Deflaw Pty Ltd*.[2]

[12] In the circumstances it is, in my opinion, necessary for the appellant to seek leave to appeal pursuant to s 19(2) of the LCCPA. That section requires the Supreme Court to consider two matters being: (a) whether the failure to institute the appeal in time was due to exceptional circumstances; and (b) whether the Court is satisfied that the case of any other party to the appeal would be materially prejudiced because of the delay.

[13] In this case it is not suggested that any other party to the appeal would be materially prejudiced because of the delay. The relevant delay was between 10 and 19 January 2024. The focus is therefore upon whether there were relevant "exceptional circumstances".

[14] The nature of "exceptional circumstances" for present purposes was discussed by Grant CJ in *Eccles v Nikki Beach 1 Pty Ltd & Anor*[3] where his Honour said:

> The term "exceptional" in this context is to be construed as an ordinary and familiar adjective. It describes a circumstance which forms an exception which is out of the ordinary course, or unusual, special, or uncommon. To be exceptional circumstances need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

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1 [2016] NTSC 11.

2 [2000] NTSC 64.

3 [2019] NTSC 39 at [5].

[15] Further, in considering whether exceptional circumstances exist a court is limited to a consideration of the reasons for failure to commence the appeal within time and is not permitted "to consider the merits of the proposed appeal even if the decision sought to be appealed is demonstrably wrong".[4] In addition, a failure to institute an appeal within time because of the failure of a solicitor to do so through ignorance or negligence does not constitute an exceptional circumstance.[5]

[16] In the reasons for decision the hearing dates for the matter were recorded as 22 to 24 May 2022 and 1 November 2022. The parties advised that the hearing in fact took place on 19, 20 and 21 September 2022 with oral and written closing submissions on 7 November 2022. The decision was delivered over 12 months later on 13 December 2023. The parties were not notified that the decision was about to be handed down and it was delivered by officers of the Local Court by email on 14 December 2023 without any prior communication or notice to the parties. The notice of appeal was filed on 19 January 2024.

[17] The solicitor for the appellant wished to obtain the advice of counsel prior to lodging an appeal. Counsel who appeared at the trial was unavailable having taken leave over the Christmas period. The solicitor understood that r 3.04 of the SCR applied to extend the period during which notice could be given. When counsel returned from leave the solicitor obtained advice from

4 *Arnott v Beams* [2022] NTSC 25 at [18] and the cases referred to therein.

5 *Weber v Nguyen Thi Phuong* [2001] NTSC 116 at [8].

him and that advice was delivered on 12 January 2024. The settled notice of appeal was received by the solicitor on 18 January 2024 and filed in the Supreme Court on 19 January 2024.

[18] In support of its application for leave to appeal the appellant relied upon the cumulative effect of a number of matters including:

(a) the Local Court, having reserved the decision for over a year, delivered judgment by email without any prior communication or notice to the parties;

(b) the judgment was delivered shortly before Christmas with the appeal period substantially coinciding with a period of typically reduced activity due to the Christmas break;

(c) the appellant, as a model litigant, did not wish to commence an appeal without first obtaining advice of counsel;

(d) counsel who had appeared at the trial and was familiar with the proceedings was not immediately available due to other commitments and the time of year;

(e) there were anticipated practical difficulties in briefing other counsel at that time of the year;

(f) in relation to briefing fresh counsel the appellant informed this Court that the tender bundle, being the records before the Local Court other than pleadings and affidavits, numbered 767 pages and the Court Book comprising the pleadings and affidavits ran to 1103 pages. The CCTV and bodycam footage went for many hours;

(g) when advice was obtained the appellant acted promptly upon that advice and commenced the appeal;

(h) as is made clear by the argument in these proceedings there were legitimate issues to be resolved regarding the application of r 3.04(1) - a matter which has not previously been addressed by this Court. Differing views on the application of that provision were clearly open and although the solicitor concerned took a different view from that described above this does not mean that she was negligent or ignorant.

[19] The respondent addressed each of the matters upon which the appellant relied and, ultimately, submitted that the failure arose from an erroneous

belief on the part of the solicitor for the appellant as to the correct application of r 3.04(1). It was submitted that the failure arose from the making of an error "which is human but not exceptional".

[20] The failure arose in quite unusual circumstances. The significant delay in delivering judgment and the method by which the parties were informed of the decision by the Local Court, the time of the year, the unavailability of trial counsel because of the time of the year and other commitments and the unsettled state of the law all contributed to the appeal being lodged just out of time. Further, given the volume of materials to be considered and the time of the year, in my opinion, it was not practical to engage other counsel. The cumulative effect of the matters raised by the appellant is such as to justify a conclusion that exceptional circumstances are present in this case.

[21] Leave to appeal is granted.

Nature of appeal

[22] It is clear that a public explanation of reasons for final decisions is central to the judicial function.[6] The giving of adequate reasons is a necessary incident of the judicial process.[7] A failure to provide adequate reasons is an error of law because, inter alia, a failure to do so makes it impossible for a

6 *Wainohu v New South Wales* (2011) 243 CLR 181 at [54].

7 *Resi Corporation v Munzer* [2016] SASCFC 15 at [70].

court on appeal to determine whether or not a decision was based on an error of law.[8]

[23] The content of adequate reasons will depend upon the circumstances of the matter being considered. Such reasons do not, necessarily, have to be lengthy or elaborate in order to be adequate.[9]

[24] Some of the principles applicable to an appeal on a question of law were described by Grant CJ in *Fennell v Kentz (Australia) Pty Ltd*[10] in the following terms:

> a) If in evaluating the evidence of witnesses the tribunal below prefers one account to another, that decision is a question of fact and is not reviewable on appeal. Even where the reason given for preferring one witness to another is patently wrong, no appeal will lie.
> b) When making a finding of fact, if there is evidence which would support that finding, there is no error of law. That is so regardless of the tribunal's reasons for making that finding.
> c) A finding of fact cannot be disturbed on appeal on the basis that it is wrong, perverse, against the evidence or the weight of the evidence, or contrary to the overwhelming weight of evidence.
> d) There will only be an error of law if there is no evidence at all to support a finding of fact which is crucial to the ultimate determination.

[25] Further, in *Fennell v Kentz (Australia) Pty Ltd*,[11] it was repeated that, where an appeal is limited to a question of law, the purpose of requiring reasons

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8 *Pettitt v Dunkley* [1971] 1 NSWLR 376 approved in *Fleming v The Queen* (1998) 197 CLR 250 at [22].

9 *Thorne v Kennedy* (2017) 263 CLR 85 at [61].

10 *Fennell v Kentz (Australia) Pty Ltd* [2023] NTSC 42 at [91]; see also *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; and *Wilson v Lowery* (1993) 4 NTLR 79.

for decision is to provide an appellate court with adequate opportunity to see whether the finding does or does not involve error on a question of law. The only essentiality is that the reasons expose in broad terms why a point critical to the application has been resolved in a particular way.

[26] In *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd*,[12] it was said in relation to adequacy of reasons:

> This principle does not require a trial magistrate to give exhaustive reasons for every single incidental finding of fact. However, a mere recitation of the evidence and a bald statement of an ultimate conclusion may not be sufficient. The trial judge must refer to material evidence and make findings about material issues in the case. The judge is required to engage with the issues canvassed and explain why one view is accepted over the other.

The factual background

[27] The reasons for decision record that the respondent was lawfully arrested by police on 22 August 2020 after committing various property offences in Stuart Park. She alleged that during the course of a search of her person a female police officer, Police Auxiliary Shepherd, assaulted her by inserting one or more fingers into her vagina. The key issue in the proceedings was whether the fingers of the female officer penetrated the respondent's vagina and, if so, whether the action was deliberate.

[28] The assault was alleged to have taken place in the police watch-house at Palmerston and the events were recorded on video. However, as the Local

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11 [2023] NTSC 42 at [91].

12 (2015) 35 NTLR 87 at [39]; *Resi Corporation v Munzer* [2016] SASCFC 15 at [71].

Court Judge observed, the camera angles leave room for contention over the core issue between the parties.

[29] Having heard the evidence and reviewed the CCTV footage in relation to the crucial issue of the credibility of the respondent, his Honour made the following observations:

> 11. The Plaintiff has 16 pages of prior convictions and there are over 30 property or dishonesty offences in the first 10 pages of her priors. At the time of the search the Plaintiff was probably still intoxicated from both alcohol and amphetamines. She told a number of lies on the day of her arrest and search.
> 12. Generally, I regard the Plaintiff as having very little credibility and accordingly I examined her evidence with considerable circumspection.

[30] The circumstances leading up to the search of the respondent were described by his Honour in the following terms:

> **Events Before Arrest**
>
> 13. The offending prior to the alleged assault is relevant to the Plaintiff's general lack of credibility and her state of intoxication at the time of the search.
> 14. On Friday night 21 August 2020 the Plaintiff went out with a friend and consumed alcohol and amphetamines. It appears that she stayed up all night and on the morning of 22 August she unlawfully entered at least two units on Duke Street Stuart Park to steal property.
> 15. The Plaintiff and her friend pried open a louvred window at a unit on the fourth floor allowing them to reach around and unlock the front door. One of the three occupants saw the male co-offender and he then left the unit. The occupant then locked the front door not knowing the Plaintiff was still inside. The Plaintiff was in a bedroom and stole an Apple Mac laptop, Go Pro camera, and some other items which she placed in a bag.
> 16. The occupants eventually saw the Plaintiff and closed the bedroom and called the police. The Plaintiff climbed out of the window onto

a sloping roof some 4 stories from the ground. An occupant asked the Plaintiff what she had in the bags, and she said the bags were hers and that she was looking for a laundry. That was a lie.

17. The Plaintiff climbed down a drainpipe to the level below with the stolen items. Two other occupants blocked the plaintiff's path and she dropped her shoulder and charged at both of them.

18. The Plaintiff went back into the unit where a female occupant tried to take the bag from her, but the Plaintiff punched the occupant to the upper chest (a) number of times. The Plaintiff then moved out onto the balcony of the unit, and when the police arrived she climbed outside the balustrade and onto the balcony of a neighbouring unit. There she changed her clothes, leaving a pair of shorts and a pink earring behind on a balcony.

The Arrest

19. At 9 AM the police forced their way into that unit and located the plaintiff hiding under a vinyl barbecue cover. She was arrested and handcuffed.

20. As the Plaintiff was being escorted or carried downstairs, she was extremely abusive to the police and was generally resisting. The Police were using reasonable force, but she repeatedly said that she would have them charged with assault. The tendered body worn video shows no inappropriate police conduct during the arrest, and I find this accusation by the Plaintiff to be untrue.

21. She (t)old another lie that the occupants of the unit had "flogged" her. As she was being carried down the stairs by the police, she saw occupants of the unit (who looked appropriately shocked after the incident) and accused one of them of having sex with her partner. The Plaintiff's partner was in fact in gaol, and had been for a while, and the Plaintiff knew that this accusation was a lie.

22. Later that day she told a NAAJA lawyer that she was "at the place of a friends' friend when arrested" and "we were doing our laundry and two Asian people just came out of nowhere and started attacking us". Those were all lies.

23. The Plaintiff's appearance at the time of her arrest suggested she was under the influence of alcohol and/or illicit drugs. This was confirmed by her own lawyer during the guilty plea who told the Supreme Court that the plaintiff had been drinking extensively in the days leading up to the offending and that she had been consuming methamphetamine in a self-destructive matter.

[31] The respondent was taken to the Palmerston watch-house where events were recorded by a number of cameras some of which also recorded audio. His Honour observed that there had been some suspicion on the part of police officers that the respondent had concealed stolen property (jewellery) or drugs in her vagina. There was mention that in relation to the respondent this had occurred on another occasion.

[32] The evidence before the Local Court included a recorded conversation in which police referred to the suspicion that "you might have something inside of her" and that there were "some jobs and alerts where… where she has had stuff up there". One officer observed that "while we were driving she was really trying to get into herself" and there was discussion regarding a used tampon found at the time of her arrest. It was also said that at the time of a previous arrest "they had to go inside her… because she had drugs inside her."

[33] There was then recorded a discussion in which PA Shepherd said that an internal search could not be conducted because "you need another female". The appellant says that his Honour misconstrued these remarks. In any event, his Honour pointed out that s 145 of the *Police Administration Act 1978* (NT) requires a Court order for a non-consensual internal search and the internal search must be conducted by a Doctor.

[34] There followed a conversation regarding using a wand first and then, if necessary, informing the Watch Commander. His Honour concluded from

that conversation that PA Shepherd knew her colleagues suspected the respondent was hiding something in her vagina and she thought that the police officers wanted to conduct an internal examination of the respondent's vagina but a decision was to be made after a standard search had been conducted.

[35] There was video evidence of the search conducted by PA Shepherd. The description of the video evidence as provided by his Honour included that the respondent was wearing a skirt and that a metal detecting wand was employed and was placed between the respondent's thighs. The wand did not emit any sound. His Honour noted that the officer then attempted to place her hand under the respondent's skirt and "gently kicked (her) feet apart". The respondent was compliant and talking calmly. The description provided by his Honour continued as follows:

> 39. This frame (referring to stills taken from the video footage) is less than two seconds after the above. PA Shepherd quickly placed her hand above the Plaintiff's knee, and under the Plaintiff's skirt. She had rotated her forearm so that her palm must have faced upward. PA Shepherd does not pat down the Plaintiff's thigh, instead her hand moves quickly up towards the Plaintiff's groin area.
> 40. The Plaintiff immediately exclaimed "*ow don't do that!*" and moved away from PA Shepherd and at the same (time) turned around to face her. The Plaintiff then put her head down on the counter and started to cry and said "*no need to stick your finger up my private parts*".
> 41. For the next few minutes the Plaintiff appeared to be angry and upset which was markedly different from her demeanour just a moment earlier.
> 42. The Plaintiff's affidavit described the events as follows:
>
> > 15. *I felt the female officer's hand between my legs moving up towards my vagina and then felt her push a finger or more*

than one finger into my vagina in a fast upward motion. The motion was fast, rough and very painful. This was done without any warning, verbal or otherwise.

16. *I was wearing a G-string at the time of the arrest and it was very thin. Because of how I was standing with my legs spread apart, my G-String did not stop the female officer's finger or fingers from going into my vagina.*

17. *The penetration of my vagina hurt and I was shocked. I remember thinking that she must have put 2 fingers into my vagina because of the pain it caused.*

43. PA Shepherd's affidavit stated:

43 *whilst I was leaned down to start the pat down search at knee height with my right hand. Ms Kellie's skirt bunched up between her legs as my right hand moved up. Ms Kellie bottom was not exposed at any time during the search as her skirt had bunched up between her legs. Rather than being bunched up on the outside of her body.*

44. *Ms Kellie reacted to the pat down search as my right hand reached the groove of her groin and thigh area. I recall that Ms Kellie's skirt had bunched up between my hand and the groove of her groin. Ms Kellie threw her body forward and backwards before turning around and said words to the effect 'don't do that'.*

48. *I absolutely did not insert one or more fingers into Ms Kellie's vagina. I do not believe it is physically possible to have inserted one or more fingers into Ms Kellie's vagina as her skirt had bunched up between her legs as my hand went up her leg. It was between my gloved hand and her vagina.*

49. *I do not recall any touching of Ms Kellie's vagina. I was wearing gloves throughout the search.*

44. Both the Plaintiff and PA Shepherd were cross-examined on the above, but both were not moved from their affidavit evidence.

45. There was further evidence to assist the fact finding, but the findings I do make on the above video is that PA Shepherd's hand went under the skirt with her palm facing upwards, and the skirt did not "bunch up".

[36] His Honour noted that the respondent was clearly distressed and PA Shepherd moved away and removed her gloves which she placed in a bin. A

short time later she put on fresh gloves and stood near the respondent. It was put to PA Shepherd that she changed her gloves because she knew she had just inserted her fingers into the respondent's vagina. This was denied by the officer who said that she called an end to the search because the respondent was upset and she therefore took her gloves off. She put on fresh gloves not to continue the search but because the respondent remained agitated and the officer thought that she might have to get "hands-on". His Honour did not accept this evidence noting that there was limited time for PA Shepherd to form the impression that she may have to get "hands-on" and that the body language of the police officers present did not suggest to his Honour that they thought the respondent was about to get violent. We are not here concerned with whether the explanation provided by his Honour was right or wrong but rather whether adequate reasons were given to explain how his Honour reached the conclusion.

[37] Immediately following these events, there was a conversation in which PA Shepherd said "I don't think she's got underwear on" and then stated that she did not think that the respondent was "concealing". His Honour found that this conclusion was based on what the officer had touched when her hand was under the skirt and was because her gloved fingers went past the G string worn by the respondent and made contact with the respondent's vagina. His Honour found that the officer thought that the respondent was not concealing anything because she inserted one or more fingers into the vagina of the respondent.

[38] Shortly thereafter, there was also recorded a conversation in the watch-house between PA Shepherd and a fellow police officer in which she referred to "that sneaky finger slip" and the two officers laughed. In her evidence, PA Shepherd explained the reference as an inappropriate joke and she was upset by the false accusations made by the respondent. In this regard, his Honour concluded:

> 60. I don't accept PA Shepherd's explanation. I agree with PO McGill's opinion that she was having a laugh and I find she did not look upset by the accusation. It was not the case that others were joking around her, and that she was quietly upset—rather it was PA Shepherd who was the first to use the "finger slip" line. She did not look like she was using humour to mask hurt feelings. She looked like a person willingly joking about inserting a finger to search the vagina of a suspect.

[39] In reaching his conclusions the Local Court Judge referred to the behaviour of the respondent as "erratic at times" and said this was taken into account. The findings of his Honour were in the following terms:

> 64. The police had a reasonable belief to suspect that the Plaintiff may have been concealing jewellery and drugs in her vagina. PA Shepherd knew that her colleagues had this suspicion.
> 65. Although I have serious doubts generally as to the Plaintiff's credibility, the surrounding evidence is more than sufficient to overcome that doubt, and cause me to find in favour of the Plaintiff.
> 66. The video evidence of PA Shepherd's actions, and the Plaintiff's reaction, is consistent with the Plaintiff's allegation. The skirt did not bunch up to prevent PA Shepherd from reaching the Plaintiff's vagina. PA Shepherd thought that the Plaintiff was not wearing underwear because she went past the G-string and touched and penetrated the Plaintiff's vagina.
> 67. Although, PA Shepherd thought that the Plaintiff was not concealing jewellery because the wand didn't beep, she thought

she was not concealing any drugs because she intentionally inserted one or more fingers into the vagina of the Plaintiff.

68. The police officers' disturbing offensive remark about the "sneaky finger slip" was made because a finger did (intentionally) slip into the Plaintiff's vagina.

69. The Defendant argued that a finding in favour of the Plaintiff requires the Court to find that PA Shepperd (sic) is a liar. That PA Shepherd lied is the most likely consequence of the above findings, but it is possible, that with the assault being so quick, so long ago, and so wrong, that PA Shepherd has convinced herself that it did not happen.

[40] The respondent was later charged and pleaded guilty to a range of offences. She was dealt with in the Supreme Court on 7 December 2021 for offences of causing damage, unlawful entry of a dwelling house, robbery in company, and possessing methamphetamine. She was sentenced to imprisonment for a period of three years with a non-parole period of two years.

Ground 1– inadequate reasons

[41] The first ground of appeal asserts that the Local Court Judge gave inadequate reasons for relying on the respondent's evidence and her recorded demeanour during the incident.

[42] The appellant pointed to the delay in the Local Court delivering judgment and made reference to the observations made by the Court of Appeal in *Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd*[13] where various principles relevant to a consideration of delay were set out as follows:

13 [2020] NTCA 4 at [26].

a) where the interests of justice require it, a court may properly pronounce judgment and give reasons for it later – the gap may be appreciable;

b) delay between the taking of evidence and the making of a decision is not, of itself, a ground of appeal, unless the judge could no longer produce a proper judgment or the parties are unable to obtain from the decision the benefit which they should;

c) delay, of itself, does not indicate that a trial has miscarried or that a verdict is in any manner unsafe – appellate intervention flows from the error, or infirmity of the decision, not the delay itself;

d) where there is significant delay in giving judgment, it is incumbent upon an appellate court to look with special care at any finding of fact challenged on appeal;

e) the fact of long delay weakens a trial judge's advantage in having seen the oral and documentary evidence unfold in a coherent manner;

f) after a significant delay a more comprehensive statement of the relevant evidence than would normally be required should be provided by the trial judge in order to make manifest, to the parties and the public, that the delay has not affected the decision;

g) where there is significant delay it cannot be favourably assumed that evidence not referred to has not been overlooked and it is incumbent upon the trial judge to make clear why the evidence of a particular witness has been rejected; and

h) on an appeal consideration must be given to the prospect that the delay of the decision will have placed the judge under great pressure to complete and publish the judgment.

[43] It was submitted on behalf of the respondent that the time between the evidence concluding and the delivery of the judgment, some 14 months, should not be regarded as "significant delay" because of the busy nature of the Local Court and other demands on the Local Court Judge. However, the issue of delay is not concerned with whether there are good reasons for the delay but rather with the possibility of the delay affecting the judgment. The reasons for the delay in this matter were not known but I consider it was

a significant delay as that term is understood in the discussion in *Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd*.[14]

[44] However, it should also be noted that his Honour had available a transcript of the proceedings and, importantly, the CCTV recording of what had taken place. It is not apparent that the significant delay itself led to error or infirmity of the decision.

[45] The appellant submitted that, in the present circumstances, where credit is a vital issue a more comprehensive statement of the relevant evidence was required. There needed to be careful analysis of the evidence and it was necessary for the trial judge to make clear why the evidence of PA Shepherd was not accepted and that of the respondent was accepted in light of the material before the Court.

[46] As noted above at [29], his Honour specifically found that the respondent had a history of dishonesty offences, that at the time of the search she was probably intoxicated by alcohol and amphetamines, and that she told a number of lies. In those circumstances, his Honour regarded her as having very little credibility. Notwithstanding that finding, the Judge referred to the video recording of the search and also the video of the respondent's later conduct in the holding cells which was described as being "erratic at times", and concluded that "the video evidence of PA Shepherd's actions, and the

14 Ibid.

plaintiff's reaction, is consistent with the plaintiff's allegation". His Honour went on to make the findings set out at [39] above.

[47] The appellant submits that, in so doing, no explanation was provided as to how or why the complaint of the conduct differed from earlier complaints and claims made by the respondent which his Honour accepted as lies. There was no attempt to explain why the spontaneous and elaborate claims of assault made by the respondent in the hours preceding the alleged assault, which were shown to be false, either by the video evidence or by her own admission, should not have been taken into account when deciding whether the allegation of assault she made against PA Shepherd was also false.

[48] The appellant submitted that reference to the Supreme Court sentencing remarks relating to the respondent, the body worn camera recordings of the arrest, the video recordings of the events in the watch-house and the evidence given by the respondent at the Local Court hearing revealed a range of claims by the respondent of assault upon her, of mistreatment of her, of outlandish claims against others made by her and a range of statements made by her which were later shown to be, and sometimes admitted by her to be, lies. The lies were not mere untruths but elaborate, sophisticated lies accompanied by supportive changes in demeanour.

[49] The appellant submitted to the Local Court (and again to this Court) that reliance could not be placed upon the demeanour of the respondent and the dramatic changes in that demeanour during the course of the search in

support of her claim, because of the demeanour displayed by her in the course of events leading up to the search. It was submitted that she told persecutory lies, she falsely reported abuses of her and she did so on multiple occasions. She did so to distract and manipulate others and, it was submitted, the allegation against PA Shepherd was a lie introduced to manipulate PA Shepherd into searching the respondent's groin less thoroughly. It was submitted that this was the very kind of lie she had told repeatedly. Her demeanour changed to support the truth of her lies and consequently any shift in demeanour or emotional outburst in relation to the core issue was equally consistent with lying or telling an untruth. The dramatic shift in demeanour did not support truthfulness or reliability or distinguish honesty from dishonesty. The lies were sophisticated and based around a partial truth or verifiable fact.

[50] Those claims and physical displays having been shown to be lies and unreliable, it was submitted, the same should apply to the complaint the subject of the proceedings or, at least, the reasons why they did not should have been addressed and exposed. His Honour failed to engage with this issue.

[51] In the reasons for decision, the Local Court Judge did recount some of the lies of the respondent including:

(a) that she had been looking for a laundry and that the stolen property she had in some bags was hers;

(b) that she repeatedly accused the arresting police officers of assault whilst being extremely abusive;

(c) that the occupants of the unit which she had unlawfully entered had "flogged" her;

(d) that occupants of the relevant unit were having sex with her partner who, it turned out, was in fact in jail; and

(e) that she told her own lawyer that at the relevant time she was at a friend's place "doing our laundry and two Asian people just came out of nowhere and started attacking us".

[52] Having referred to some of the identified lies told by the respondent leading up to the alleged assault and thereafter, his Honour concluded that the respondent "told a number of lies on the day of her arrest and search" and went on to find that she had "very little credibility".

[53] Notwithstanding that finding, his Honour accepted the evidence of the respondent in relation to the core issue being the allegation of assault. It was incumbent upon the Judge to expose at least in broad terms why that was so and to engage with the issues concerning the reliability of the respondent canvassed in the hearing.

[54] The respondent submitted that there was evidence to support the findings including, particularly, the CCTV footage which recorded the respondent's physical and verbal reaction when PA Shepherd's hand moved towards her groin. That footage showed the respondent in a calm and cooperative state

whilst being searched by PA Shepherd. His Honour noted that the "respondent had remained emotionally stable and was answering the questions of the officer standing to her right… She is also calmly speaking to the nurse on her right".[15] Further, his Honour noted that when requested the respondent complied and separated her feet and upon doing so "remained compliant and continued to talk calmly to the officer and nurse on her right". When the hand of PA Shepherd moved in the manner described there was a sharp reaction from the respondent. It was a flinching movement away. The respondent moved away from PA Shepherd, turned around to face her and then put her head down on the counter and started to cry.

[55] Reference to the CCTV and transcript confirms that, as his Honour described, immediately before the flinching movement the respondent was in a calm conversation with PO Pizanias in which she indicated she wished to talk about other things including her story. She went on to say, "There's nothing" and then dramatically changed direction mid-sentence to say "Ow, don't do that…" and accused PA Shepherd of penetrating her vagina.

[56] The trial Judge paid attention to that video evidence and the conversations that were recorded. His Honour also proceeded to consider other issues raised in the proceedings.

[57] His Honour concluded that PA Shepherd knew that her colleagues suspected that the respondent was hiding something in her vagina and wished to

15 Reasons at [34]-[38].

conduct an internal examination but a decision in that regard was to be made after the standard search. His Honour provided a detailed description of the search and noted that PA Shepherd did not, as she had claimed in her affidavit, conduct a regular search of the respondent. Having determined not to accept the evidence of PA Shepherd in this regard the trial Judge did not refer to the matter again in relation to the issue of liability. Reference was made to the issue in assessing damages where it was said that this was "an intentional breach of the law – perhaps to avoid the effort of finding another female police officer to conduct a strip search, and avoid calling the Watch Commander to obtain a Court order". The use of the word "perhaps" clearly indicates that this was not a finding but rather, simply, identifying one possibility. What use, if any, was made of these observations in making the ultimate findings was not disclosed.

[58] His Honour also discussed the evidence regarding PA Shepherd removing her gloves and then replacing her gloves and concluded that he did not accept the explanation provided by PA Shepherd in this regard. The reasons for so concluding were set out. However, having reached that conclusion his Honour did not discuss or seek to identify any other explanation for the conduct of PA Shepherd in removing and then replacing her gloves. The Judge did not address whether, and if so how, any of the information relating to the gloves was used in making the ultimate findings.

[59] Further, the Judge referred to PA Shepherd having expressed the opinion that the respondent was not wearing underwear and was not "concealing".

His Honour found that the opinion was formed because PA Shepherd had touched the respondent under the skirt and her fingers went past the G string and made contact with the respondent's vagina. His Honour went on to say:

> 53. The lack of beeping indicated there was probably no concealed metal jewellery, but the officers had earlier discussed the possibility of jewellery or drugs being concealed in the plaintiff's vagina. I find that the above exchange shows PA Shepherd concluded that the plaintiff was not concealing drugs or jewellery.
>
> 54. I find that PA Shepherd thought that the plaintiff was not concealing anything because she inserted one or more fingers into the vagina of the plaintiff.

[60] Having held that PA Shepherd had "concluded" that the respondent was not concealing drugs or jewellery, his Honour did not then elaborate upon, or explain how, this led to a finding that the reason was because one or more fingers had been inserted by PA Shepherd into the vagina of the respondent. PA Shepherd had given evidence that she did not think the respondent was "concealing" because of the lack of response from the wand. PA Shepherd provided a further, innocent, reason for her suspicion (not "conclusion") that underwear was not being worn because, she said, of her experience of females as suspects reacting strongly to such searches where the suspect was not wearing underwear. His Honour did not refer to or in any way engage with those reasons but simply made the findings set out above without further explanation.

[61] His Honour then addressed the conversation regarding the so-called "finger slip" between PO McGill and PA Shepherd. By reference to what could be seen on the CCTV footage, his Honour rejected the claim by PA Shepherd

that she was embarrassed and upset by the accusation made by the respondent and used humour to mask her hurt feelings but, rather, concluded that she was "willingly joking about inserting a finger to search the vagina of a suspect". The evidentiary basis for that finding, being the CCTV footage, was identified.

[62] However, his Honour did not go on to explain how the telling of that inappropriate joke led to a finding that PA Shepherd did insert a finger or fingers into the vagina of the respondent. Accepting his Honour's finding regarding the telling of the off-colour joke, that does not necessarily lead to a conclusion that the offending conduct occurred. The joke may have resulted equally from that conduct in fact taking place or from a false complaint that the conduct took place. His Honour did not engage with this issue.

[63] The appellant submitted that CCTV footage of the behaviour of the respondent in the cells after the search demonstrated her behaviour was inconsistent with a person who had been digitally penetrated. His Honour concluded that her behaviour was "erratic at times" and said that he had "taken this into account". Unfortunately, his Honour did not disclose how he had taken the information into account. It is not clear whether his Honour accepted or rejected the submission of the appellant as to inconsistency. It is not clear what part the conduct played in the findings of his Honour.

[64] In finding the appellant liable for damages his Honour again noted his serious doubts regarding the credibility of the respondent but observed that "the surrounding evidence is more than sufficient to overcome that doubt and cause me to find in favour of the plaintiff". This was plainly, principally, by reference to the video evidence to which his Honour referred.

[65] What was not addressed in the reasons is the detailed submission placed before the Local Court[16] regarding the prior dishonest and dramatic conduct of the respondent and the impact of that conduct upon the assessment of the honesty and reliability of the respondent in relation to the crucial element of the case. Although the reasons do address the change in demeanour of the respondent at the relevant time there is no attempt by his Honour to compare or contrast that with the earlier conduct of the respondent. This was a vital consideration in determining the outcome of the proceedings and was not addressed at all. His Honour failed to engage with the detailed submissions of the respondent or with the issue at all.

[66] It is to be borne in mind that this Court is not concerned with whether or not his Honour was wrong in his conclusions or whether his findings were perverse, or against the evidence or the weight of the evidence but only with the question of whether the Judge's reasons adequately disclose why his Honour found in favour of the respondent.[17]

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16 Appeal Book Tab 8; Respondent's Written Closing at [1]-[59].

17 *Fennell v Kentz (Australia) Pty Ltd* [2023] NTSC 42 at [91].

[67] In my opinion, the reasons for decision were inadequate. These were prepared reasons delivered months after the hearing. They do not adequately expose the Judge's path of reasoning to the ultimate conclusion. Significant issues raised on that path were either not resolved or, if findings were made, any use made of those findings in making the final determination was not disclosed. Further, a crucial part of the case for the appellant, being the submission that the conduct of the respondent in making the complaint in the manner she did was consistent with similar conduct on that day, was not addressed.

[68] The appeal is allowed on this ground. In light of that conclusion, it is both unnecessary and unhelpful to deal with the remaining grounds of appeal and I refrain from so doing.

[69] The appeal is allowed, the judgment of the Local Court set aside and the matter remitted to the Local Court differently constituted for a rehearing.
