CITATION:	*Hall v Rigby* [2018] NTCA 12
PARTIES:	HALL, Conrad
	v
	RIGBY, Kerry
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 12 of 2017 (21711434)
DELIVERED:	23 November 2018
HEARING DATE:	13 April 2018
JUDGMENT OF:	Southwood, Blokland and Barr JJ

CATCHWORDS:

CRIMINAL LAW – Police powers – Protective custody – Statutory power of apprehension without arrest – Lawfulness of apprehension – Whether there was objectively reasonable grounds for a belief that a place was a "public place" – "Public place" within the meaning of s 128(1)(b) of the *Police Administration Act* (NT) – "Public place" describes the factual conditions surrounding the nature or use of a particular area or location – Private property may be a "public place" – Appeal dismissed

STATUTORY INTERPRETATION – Principle of legality – Whether broad interpretation precluded because of abrogation of fundamental right to personal liberty – Whether principle engaged where deprivation confined to a protective or preventative purpose – Statement by legislature of extent to which personal freedom is abrogated and reason for doing sufficiently clear

Criminal Code (NT) s 189A
Police Administration Act (NT) s 120A, s 128, s 132

Schubert v Lee (1946) 71 CLR 589, distinguished

Benbrika v R (2010) 29 VR 593; *Douglass v The Queen* (2012) 290 ALR 699; 86 ALJR 1086; *Karui v Malogorski* [2011] NTSC 17; *Libke v The Queen* (2007) 230 CLR 559; *M v The Queen* (1994) 181 CLR 487; *Momcilovic v The Queen* (2011) 245 CLR 1; *Prior v Mole* (2017) 261 CLR 265; *Ward v Marsh* [1959] VR 26, referred to

REPRESENTATION:

Counsel:

Appellant:	R Pettit and P Coleridge
Respondent:	S Brownhill SC and T Moses

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hall v Rigby [2018] NTCA 12
No. AP 12 of 2017 (21711434)

BETWEEN:

CONRAD HALL
Appellant

AND:

KERRY RIGBY
Respondent

CORAM: SOUTHWOOD, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 23 November 2018)

THE COURT:

Introduction

[1] On 5 May 2017 following a summary trial the appellant was found guilty by the Local Court of Counts 2 and 3 on an Information dated 3 March 2017. Count 2 charged that contrary to s 189A of the *Criminal Code* on 2 March 2017 at Darwin the appellant unlawfully assaulted Senior Constable Aden Reeves while in the execution of his duty and he suffered harm. Count 3 charged that contrary to s 189A of the *Criminal Code* on the same date the appellant unlawfully assaulted Constable Mehtap Ozdemir while in the execution of her duty and she suffered harm.

[2] The appellant appealed to the Supreme Court against his convictions. On 30 November 2017 his appeal was dismissed. The appellant now appeals to this Court on the following grounds.

1. The presiding Judge erred in concluding that the findings of the Local Court Judge were not unsafe and unsatisfactory.
2. The presiding judge erred in concluding that it was open to the Local Court Judge to find, to the criminal standard, that Constable Reeves had reasonable grounds for his belief that the appellant was in a public place.

[3] Ground 2 of the appeal is, in effect, a particular of Ground 1.

[4] The ground of appeal that a guilty verdict is unsafe and unsatisfactory was considered by the High Court in *M v The Queen*.[1] The principles enunciated in that case have been applied by appellate courts on appeal from courts of summary jurisdiction[2] and to cases of trial by judge alone, even if the appeal provisions did not expressly provide such a ground of appeal.[3]

[5] The legal principles which govern the consideration of such a ground of appeal are well established. The question which must be determined is one of fact, to be resolved by the appellate court making its *own independent assessment of the evidence*.[4] Notwithstanding that there is evidence upon which a trial Judge might have convicted the appellant, the appellate court must nevertheless determine whether it would be dangerous in all the

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1 [1994] HCA 63; 181 CLR 487.

2 *Karui v Malogorski* [2011] NTSC 17.

3 *Douglass v The Queen* [2012] HCA 34; 290 ALR 699; 86 ALJR 1086.

4 *M v The Queen* [1994] HCA 63; 181 CLR 487.

circumstances to allow the verdict to stand. The High Court has stated the question for consideration by the Court of appeal is:[5]

> […]whether it was *open* to the [trial Judge] to be satisfied of guilt beyond reasonable doubt, which is to say whether the [trial Judge] *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the [trial Judge] to be sufficient to preclude satisfaction of guilt to the requisite standard. (Footnotes omitted)

[6] The relevant principles were fully explained by the Victorian Court of Appeal in *Benbrika v R*[6] as follows.

> The approach required of appellate courts in considering a ground which contends that a verdict is "unsafe and unsatisfactory" involves the following steps:
>
> 1. the court of criminal appeal must ask itself whether, upon the whole of the evidence, it was open to the [trial Judge] to be satisfied beyond reasonable doubt that the accused was guilty;
> 2. in considering that question, the appeal court must bear in mind that the [trial Judge] has the primary responsibility of determining guilt or innocence and has had the benefit of seeing and hearing the witnesses;
> 3. in most cases a doubt experienced by an appellate court will be a doubt which a [trial Judge] ought also to have experienced; and
> 4. it is only where a [trial Judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice has occurred.
>
> A guilty verdict can only be said to not have been reasonably open to the [trial Judge] if there was no aspect of the evidence which obliged – as distinct from entitled – the [trial Judge] to come to a different conclusion. In *Libke v R*, Hayne J (with whom Gleeson CJ and Heydon J agreed) said in relation to the "unsafe and unsatisfactory" ground:

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5 *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at 596–7 [113] per Hayne J (with whom Gleeson CJ and Heydon J agreed).

6 (2010) 29 VR 593 at 694–5 [476]–[478].

> But the question for an appellate court is whether it was *open* to the [trial Judge] to be satisfied of guilt beyond reasonable doubt, which is to say whether the [trial Judge] *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the [trial Judge] to be sufficient to preclude satisfaction of guilt to the requisite standard.
>
> In other words, the question posed in *M v R*, namely, "whether … upon the whole of the evidence it was open to the [trial Judge] to be satisfied beyond reasonable doubt that the accused was guilty", requires a court of criminal appeal to decide "whether the state of the evidence was such as to preclude a [trial Judge] acting reasonably from being satisfied of guilt to the requisite standard". The question is whether there was a "solid obstacle to reaching a conclusion beyond reasonable doubt" or whether, instead, "the path to a conviction [was] open". (Footnotes omitted)

The prosecution case at trial

[7] The prosecution case at trial was as follows.

[8] At 10:30 pm on 2 March 2017 Senior Constable First Class (Senior Constable) Aden Reeves and Constable Mehtap Ozdemir were on duty when they received a call to attend the Malabar Lodge in Smith Street Darwin. They were informed there had been a domestic disturbance. Ms Eileen Barra had made a complaint about the appellant's behaviour. He was her partner. She said he was highly intoxicated and threatening her. Both Ms Barra and the appellant were known to Senior Constable Reeves. He had had previous dealings with them.

[9] Upon arrival the police officers got out of their vehicle and they heard the appellant creating a disturbance. He was with a group of people at the front of Malabar Lodge. The police officers approached the appellant. As they

did, they could hear him yelling. The appellant and a group of about six people were sitting in the grounds of the Malabar Lodge just inside a wire fence near a carpark. The fence separated the group from the carpark which was adjacent to Smith Street. Senior Constable Reeves spoke to the appellant. He noticed that the appellant was slurring his speech. The appellant's eyes were bloodshot and Senior Constable Reeves could smell the strong odour of alcohol on him. Senior Constable Reeves formed the opinion that the appellant was intoxicated. He had had dealings with him on prior occasions when he was intoxicated. The appellant has a problem with the misuse of alcohol. He gets drunk a lot. There are numerous prior occasions when police have taken him into protective custody. The appellant has a high tendency to commit offences when intoxicated.

[10] Having considered his options, Senior Constable Reeves made a decision to apprehend the appellant under s 128 of the *Police Administration Act*. Under that section of the Act, in certain circumstances, police may take members of the public into protective custody.

[11] When the appellant was apprehended he was inside the fence of the Malabar Lodge. As the police officers began walking him to the cage at the back of the police vehicle he was unsteady on his feet, tripping over, and it was necessary for the police officers to support him. The appellant refused to get into the cage. He began yelling at Senior Constable Reeves and Constable Ozdemir. As they were assisting him into the cage, the appellant took hold of Senior Constable Reeves around his neck and punched him with a

clenched fist multiple times to the face causing Senior Constable Reeves to feel pain and his nose to start bleeding. Senior Constable Reeves pulled the appellant from the cage and on to the ground outside the police vehicle. The appellant continued to struggle.

[12] Constable Ozdemir then directed a burst of capsicum spray at the appellant's face which allowed Senior Constable Reeves and her to handcuff him. Once he was secured, the police officers again attempted to place him into the cage. He continued to resist. As Senior Constable Reeves and Constable Ozdemir lifted the appellant into the cage a second time, he kicked Constable Ozdemir in the left and right legs causing her pain. The appellant was eventually placed into the cage and the door was shut and secured. The appellant was taken to the Darwin watch house.

The defence case

[13] Section 189A(1) of the *Criminal Code* states any person who assaults a police officer in the execution of the officer's duty is guilty of an offence. An element of the offence is that the police officer is in the execution of the officer's duty at the time of the assault. The defence case at trial was that the prosecution failed to prove beyond reasonable doubt that the police officers were in the execution of their duty. There was a reasonable possibility they were acting unlawfully because the apprehension of the appellant did not comply with the requirements of s 128 of the *Police Administration Act*. Subsection 128(1)(b) of the *Police Administration Act*

states that a police officer may, without warrant, apprehend a person and take the person into custody if the police officer has reasonable grounds for believing the person is intoxicated and the person is in a public place or trespassing on private property. The appellant was not in a public place when he was apprehended. He was in the grounds of the Malabar Lodge, which is private property. There were no reasonable grounds on which Senior Constable Reeves could have formed a belief that the appellant was in a public place because he knew the Malabar Lodge was owned by a private person.

The evidence about the apprehension of the appellant

[14] Senior Constable Reeves's evidence about the place where the appellant was apprehended under s 128 of the *Police Administration Act* may be summarised as follows.

[15] The appellant was with a group of people at the front of the Malabar Lodge. He was sitting just inside the fence of the Malabar Lodge, near a car park which was on the other side of the fence. He was inside the fence line. However, the property contains a unit complex. The area where the appellant was sitting was a common area. It was part of a thoroughfare used by other members of the public, and people who reside in that building to access their rooms. It was a thoroughfare to the private units.

[16] Senior Constable Reeves knew the landlord of the building. The building comprised of a set of units which were occupied by different people. The

premises may be described as a private boarding house. Each private room or unit in the building was rented to different people who were members of the public.

[17] The fence of the Malabar Lodge was set back 15 to 20 metres from the road in front of Malabar Lodge. There was an opening in the fence.

[18] It was Senior Constable Reeves's understanding that private buildings are not public places. Senior Constable Reeves knew that the Malabar Lodge was a private building which was owned and rented out by a landlord.

[19] Senior Constable Reeves was asked by counsel for the defence if it was his understanding that the lawns of a private building which is enclosed by a fence are also private property. His answer was that, in his opinion, it was a shared unit complex. His understanding was that the area where the appellant was apprehended was part of a thoroughfare used by other members of the public to get to their privately rented units or residences. It was his understanding of s 128 of the *Police Administration Act* that if a place is a thoroughfare, it did not matter if the thoroughfare was formed on private property. In other words, his understanding was that common areas appurtenant to a block of units on private property may constitute a public place. His understanding was that any lawn area allowing access to any private building that contained more than one residence was a public place.

[20] Senior Constable Reeves's belief is similar to what is stated in subparagraph (c) of the definition of 'public place' in s 120A of the *Police*

Administration Act – "public place includes the following: […] (c) every road, street, footway, court, alley or thoroughfare that the public are allowed to use, even if the road, street, footway, court, alley or thoroughfare is on private property".

Section 128 of the Police Administration Act

[21] Subsections 128(1) and (2) of the *Police Administration Act* state:

> (1) A member may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:
>
> (a) the person is intoxicated; and
>
> (b) the person is in a public place or trespassing on private property; and
>
> (c) because of the persons intoxication, the person:
>
> (i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or
>
> (ii) may cause harm to himself or herself or someone else; or
>
> (iii) may intimidate, alarm or cause substantial annoyance to people; or
>
> (iv) is likely to commit an offence.
>
> (2) For the purposes of carrying out his duties under subsection (1), a member may, without warrant, enter upon private property.

[22] The first issue arising in this appeal is: what is the meaning of 'public place' in s 128 of the Act? In this regard it is important to note that despite the words 'public place' being used in a number of different sections in a number of different parts of the Act, the words are not defined in s 4, which is the interpretation section, and are only partially defined in s 120A of the Act. Section 120A is found in Division 2A of Part VII (Police Powers) of

the Act. Division 2A is headed 'Special provisions about dangerous drugs'.

Section 120A is the definition section for Division 2A.

[23] The definition of 'public place' in s 120A of the Act is:

> Public place includes the following:
>
> (a) every place to which free access is permitted to the public with the express or tacit consent of the owner or occupier of the place;
>
> (b) every place to which the public are admitted on payment of money, the test of the admittance being the payment of the money only;
>
> (c) every road, street, footway, court alley or thoroughfare that the public are allowed to use, even if the road, street, footway, court, alley or thoroughfare is on private property;
>
> (d) every school, college, university or similar institution providing or offering to provide courses of instruction.

[24] In *Ward v Marsh*,[7] a decision of the Full Court of the Supreme Court of Victoria about the meaning of 'public place', which is often cited in cases such as this, Sholl J stated:

> … the argument before us drew attention to the fact that the expression "public place" occurs in many parts of the *Police Offences Act* [Vic], which is made up of provisions originating in many different enactments and at many different times.
>
> [….]
>
> … according to accepted principles of statutory construction, the ordinary English meaning of the words, subject to any interpretation of them as such which may authoritatively have been put upon them by judicial decision – i.e., what I may call the common law meaning – but subject also to any restriction of that meaning which it may be proper to infer in any particular case from the collocation of other words or expressions with the phrase "public place".
>
> … where it is necessary to consider the applicability of the common law meaning of the phrase, that meaning itself may possibly be found to vary in content, so to speak, according to the nature and subject matter

7 [1959] VR 26 at 29–30.

of the particular enactment [or division or part of the Act] in which the phrase is used

[25] In other words, when interpreting the words ‘public place’ in the *Police Administration Act*, context is a most important consideration. It is necessary to give consideration to the collocation of other words or expressions with the phrase “public place” in the relevant section, the subject matter of the section, the part of the Act in which the section appears, and the whole of the Act.

[26] Section 128 appears in Division 4 of Part VII (Police Powers) of the *Police Administration Act* which deals with apprehension without arrest. The division is primarily aimed at regulating public drunkenness and ensuring that a person who is drunk does not remain in public if they are not able to adequately care for themselves, or may cause harm to themselves or someone else, or may intimidate, alarm or cause substantial annoyance to people, or if they are likely to commit an offence. It is, in many respects, a protective provision aimed at maintaining public order and safety in circumstances that are specifically concerned with public drunkenness. A police officer is authorised to remove a person from the public place and either take them to a place of safety, for example a sobering up shelter, or place them in police custody for so long as it reasonably appears to the member of the police force, in whose custody the person is held, that the person remains intoxicated. Section 132 of the Act anticipates that a person who is in protective custody should sober up within six hours. Otherwise, it

will be necessary for the police officers who have custody of the drunken person to obtain permission from a police officer of or above the rank of Superintendent to keep the person in custody for a longer period.

[27] As to the collocation of words with the phrase ‘public place’, it is necessary to give consideration to the words ‘or trespassing on private property’. At the same time it is useful to compare the text of s 128(1)(b) of the *Police Administration Act* with the definition of ‘public place’ in s 120A of the Act. First, it is important to note that the phrase used is ‘public place’ not ‘public property’. The words ‘private property’ are concerned with the nature of the estate in the property, and how it is held; and mean property owned by individuals, as opposed to property owned by the state. Whereas, subject to context, the phrase ‘public place’ is not concerned with the nature of the estate or who holds the property. The phrase has been held to have a wider meaning than ‘public property’. It is not unusual for the phrase ‘public place’, without any words of inclusion, to be interpreted as broadly as subparagraphs (a) to (c) of the definition of ‘public place’ in s 120A of the Act. That is, ‘private property’, in certain circumstances, and from time to time, may be a ‘public place’.

[28] In our opinion, the use of the two phrases in s 128(1)(b) of the *Police Administration Act*, ‘public place’ and ‘private property’, does not establish two mutually exclusive categories. ‘Private property’ may become a ‘public place’ depending on how the property is used and accessed. The purpose of the words ‘or trespassing on private property’ is to extend the use of police

powers of apprehension beyond public place, not to confine or restrict the meaning of public place. For example, the power enables police to deal with the common situation where uninvited drunken guests go to a private back yard party, become further intoxicated, and cause alarm or substantial annoyance. Rather than arrest such persons, and charge them, the police are given power to take them into protective custody which often leads to a sensible resolution of all potential problems that may arise.

[29] 'Public place' describes the factual conditions surrounding the nature or use of a particular area or location. The matters to be taken into account in considering if a place is a public place include (i) the place being actually open to the public who have occasion or social purpose to be at that place; and (ii) a real use of the place by the public, as opposed to only casual or occasional use, so that there is a real need for regulation of the place. The access and use must be permitted or allowed, either expressly or implicitly by the person or persons to whom the property belongs or tolerated by the proprietor. All that is required is that members of the public may go to that place if they choose.

[30] In this case a significant number of people had congregated at the location. Not all of the people resided at Malabar Lodge. Members of the public were permitted to congregate there and consume alcohol. Access to the lawn was free and open. People could go there if they chose. The place was adjacent to a carpark on a main road. Any disturbance at the location was visible to

members of the public. The place is the kind of place at which the regulation of drunken behaviour is required under the *Police Administration Act.*

[31] When regard is had to what we have stated at [29] and [30] above and to the evidence of Senior Constable Reeves at [14]–[20] above it is readily apparent that there were objectively reasonable grounds for his belief that the place was a public place.[8] The grounds that have been identified by the Court point sufficiently to the subject matter of that belief. As Nettle J stated in *Prior v Mole*:[9]

> Granted, the test of reasonable grounds for a belief is objective. But, depending on the circumstances, belief may leave "something to surmise or conjecture". And, as was stated in *George v Rocket*, while the objective circumstances necessary to found reasonable grounds to believe must point sufficiently to the subject matter of that belief, they need not be established on the balance of probabilities. (Footnotes omitted).

In the circumstances there was no obstacle to his Honour the trial Judge concluding beyond reasonable doubt that Senior Constable Reeves had reasonable grounds for his belief that the appellant was in a public place.

The principle of legality

[32] During the course of the appeal counsel for the appellant submitted that the principle of legality precluded the Court from interpreting the phrase "public place" as broadly as the Court has done. In his written submissions, counsel for the appellant submitted that the principle of legality precluded

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8 *Prior v Mole* [2017] HCA 10; 261 CLR 265 at 270 [4] per Kiefel and Bell JJ.

9 [2017] HCA 10; 261 CLR 265 at 292 [73].

such a broad interpretation of the phrase because to do so would abrogate impermissibly from a fundamental right or privilege namely, personal liberty.

[33] Counsel for the appellant submitted, at its most basic, the principle of legality amounts to:

> […] a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes to be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.[10]

[34] It was stated on behalf of the appellant that there is no clear and unequivocal language in s 128(1)(b) of the Act so as to enable the phrase "public place" to be interpreted in the manner the Court has interpreted above; nor is such language to be found in the provisions immediate statutory context. If Parliament intended the phrase "public place" to be interpreted in the above manner it could have easily inserted a definitional provision that clearly stated so and unmistakably expressed its intention to broaden the scope of the expression. The effect of the application of the principle of legality in a case such as this is that the Court should not depart from what is characterised as the common law or common English usage of the word 'public' namely, 'public qua public'. Since *Schubert v Lee*[11] a public place is a place that must be open to, or used by, the public as the

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10 *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at 46 [43] per French CJ.

11 [1946] HCA 28; 71 CLR 589 at 592 per Latham CJ, Rich and Dixon JJ.

public. The police officer's evidence in this case was that he believed the place to be a public place because a limited class of persons who are non-intimate's of the appellant's made use of the premises.

[35] On behalf of the respondent, the Solicitor-General submitted that the appellant's submission was put without comprehension of the real function of s 128 of the Act. Protective custody, as the name implies, contains both protective and preventative aspects. It protects the intoxicated person from themselves and prevents the intoxicated person from engaging in certain kinds of antisocial behaviour. It is not punitive. It strikes a balance between the inconsistent rights of the intoxicated person to determine their own choices and to be protected from the consequences of their deleterious choices. Recourse to personal liberty does not advance the proper construction of the phrase.

[36] There is long-standing recognition by the courts that in cases of public nature type offences, drunkenness, and indecent behaviour the term "public place" can have a broad meaning even in the common law, because of the mischief to which those provisions are addressed. The appellant sought to distinguish s 128 of the Act from those kinds of provisions because the section does not involve any offence. The respondent's submission is that with its protective nature as well as its public offence tackling provisions the section actually supports an even broader definition of "public place" because the policy is to protect intoxicated people, and the broader community, from the harm caused by the misuse of alcohol. Section 128 is

not an arrest provision. While there is an involvement of deprivation of liberty, or an infringement of the right of liberty, it occurs for a different purpose. The respondent does not submit that the principle of legality is utterly irrelevant to this deprivation of personal liberty. What the respondent submits is that it is not appropriately engaged in the sphere of operation of this particular provision in which the deprivation of the right is confined to a preventative or protective purpose and lasts only as long as the person remains intoxicated to the degree specified by s 128(1)(c) of the Act.

[37] We accept the submissions of the Solicitor-General. There is in our opinion a sufficiently clear and unequivocal statement by the legislature of the extent to which personal freedom is to be abrogated and the reason for doing so.

Conclusion

[38] The appeal is dismissed.
