Rose v Huddle [2015] NTSC 14

PARTIES:	**ROSE, Alfred Jungarayi**
	v
	HUDDLE, Gregory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21337099 (JA 38 of 2014)
HEARING DATES:	19 SEPTEMBER 2014
DELIVERED:	10 MARCH 2015
APPEAL FROM:	COURT OF SUMMARY JURISDICTION
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Assault Police in the execution of duty – meaning of the execution of duty – Duty should be interpreted broadly –Police officers should have wide discretion to act swiftly and decisively – Exercise of discretion subject to scrutiny due to potential adverse impacts on a person's rights – *Criminal Code*, s 189A.

JUSTICES APPEAL – Extempore decisions of the magistrate should not be considered in an overly critical manner – No identification of the source of the evidence for the physical contact found to constitute the assaults – Appeal allowed.

Australian Federal Police Act (Cth), s 64
Criminal Code, s 189A
Liquor Act, s 75(b)
Summary Offences Act, s 47(a)

Fox v Percy (2003) 214 CLR 118; *Gipp v The Queen* (1998) 194 CLR 106; *Jones v The Queen* (1997) 191 CLR 439*; M v The Queen* (1994) 184 CLR 87; *Peach v Bird* (2006) 17 NTLR 230; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, applied.

Carr v The Queen (1990) 165 CLR 314; *Innes v Weate* [1984] Tas R 14; *Launder v McGarvie* (unreported) 5 April 2006, NTSC; *Libke v The Queen* (2007) 230 CLR 559; *Osadebay v The Queen* [2014] NTCCA 6; *Re K* (1993) 46 FCR 336, referred to.

REPRESENTATION:

Counsel:

Appellant:	G. O'Brien-Hartcher
Respondent:	S. Ledek

Solicitors:

Appellant:	NAAJA
Respondent:	ODPP

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

Rose v Huddle [2015] NTSC 14
No. 21337099

BETWEEN:

ALFRED JUNGARAYI ROSE
Plaintiff

AND:

GREGORY HUDDLE
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 10 March 2015)

Introduction

[1] After a contested hearing conducted in the Court of Summary Jurisdiction, Lajamanu on 14 January 2014 and 20 May 2014, the appellant was found guilty of two counts of unlawfully assaulting a police officer in the execution of duty, contrary to s 189A of the *Criminal Code*.

[2] In relation to a charge of resist police in the execution of duty, the appellant was found not guilty. He also pleaded guilty to two charges, one of using obscene language within the hearing of a person in a

public place contrary to s 47(a) of the *Summary Offences Act* and one of possess liquor in a restricted area contrary to s 75(1)(b) of the *Liquor Act*.

[3] The offending was alleged to have occurred at Kalkarindji in August 2013. Kalkarindji is a restricted area under the *Liquor Act*.

[4] The grounds of appeal are as follows:

> 1. The learned magistrate erred in finding that the appellant unlawfully assaulted two police officers in the execution of their duty; and
>
> 2. On all of the evidence the decision of the learned magistrate was unsafe and unsatisfactory.

[5] The appellant sought orders quashing the findings of guilt and that verdicts of not guilty be entered in respect of both counts.

[6] Both grounds require a full review of the evidence. In relation to ground one, the particular focus is whether it was correct for the learned Magistrate to find, beyond a reasonable doubt, that police were "in the execution of their duty" at the time the conduct constituting the assaults was engaged in.

[7] In terms of ground two, the question the Court must ask itself is whether upon the whole of the evidence it was open to the trier of fact, in this instance the learned magistrate, to be satisfied beyond

reasonable doubt that the appellant was guilty.[1] If upon the whole of the evidence, the trier of fact, acting reasonably was bound to have a reasonable doubt, then the findings of guilt must be set aside.

[8] In answering that question, the process and test to be applied is similar to that taken by an appellate court when reviewing a decision after a jury verdict. This Court must keep in mind that the magistrate as the trier of fact is entrusted with the primary responsibility of determining guilt or innocence and enjoys the benefit of having seen and heard witnesses.[2] An appellate court's function in respect of a ground such as ground 2 has been explained as follows:

> "An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make".[3]

> "The appellate court's function is to make its own assessment of the evidence not for the purpose of concluding whether that court entertains a doubt about the guilt of the person convicted but for the purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused".[4]

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[1] *Gipp v The Queen* (1998) 194 CLR 106 per McHugh and Hayne JJ [49] reaffirming the test laid down in *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at [7] and affirmed in *Jones v The Queen* (1997) 191 CLR 439.
[2] *M v The Queen* (1994) 191 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at [7].
[3] *Carr v The Queen* (1990) 165 CLR 314 per Brennan at 330 – 334, applied by Gaudron J in *Gipp v The Queen* at [18]; *Libke v The Queen* (2007) 230 CLR 559, 596-597; *Osadebay v The Queen* [2014] NTCCA 6.
[4] *M v The Queen* (1994) 181 CLR 487per Brennan J at [3].

[9] It has also been said that doubts experienced by an appellate court will be a doubt which a jury ought also to have experienced.[5] Where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by an appellate court is a doubt which a reasonable jury ought to have experienced. Findings that are substantially dependent upon the assessment of credibility of witnesses are not however immune from appellate challenge.[6] If after reviewing the evidence there is a significant possibility that an innocent person has been convicted, then an appellate court is bound to act and set aside a verdict based upon that evidence.[7] With appropriate modifications (bearing in mind this appeal is from a judicial officer rather than a jury) this is essentially the approach taken in respect of ground two. Unlike an appeal from a jury verdict, an appeal from a decision of a judicial officer has the benefit of reasons.

Review of the Evidence before the Court of Summary Jurisdiction

[10] As is often the case in summary hearings, there were no opening addresses.

[5] *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at [494].
[6] *Fox v Percy* (2003) 214 CLR 118.
[7] *M v The Queen* (1994) 181 CLR 487at [494].

Glenda Edwards

[11] Glenda Edwards was the first of two civilian witnesses to give evidence on 14 January 2014. Ms Edwards said that she was at her home in Kalkarindji on 23 August 2013 when "the two police came around".[8] Alfred Rose (the appellant) was visiting her house (House 37) at that time. She said police officers came for the appellant. The appellant was swearing but "didn't hit them or anything". Ms Edwards said "they came for Alfred..... they tried to arrest him but Alfred didn't want to go. Then – he was swearing, but they didn't do anything. But Alfred didn't hit them or anything".[9] Ms Edwards identified the two police officers who came to her residence as "Greg and Angus" (Brevet Sergeant Gregory Huddle and Constable Angus Smith). She said they arrived in a police car, which they parked outside of her yard.

[12] Ms Edwards told the court the police officers entered the premises from her front yard. Sergeant Huddle then picked up a bottle of Bundaberg Rum in the yard, emptied it, walked out to the rubbish bin located outside the fence of the yard and put the empty bottle in the bin. She said the appellant remained inside the yard. After placing the bottle in the bin outside the yard, Sergeant Huddle walked back into the yard. She said that "trouble" between the appellant, Sergeant

[8] Transcript, 14 January 2014, 5.
[9] Ibid.

Huddle and Constable Smith took place inside the fenced area of the yard.

[13] Ms Edwards said Sergeant Huddle walked towards the appellant; the appellant remained standing inside the yard and did not approach Sergeant Huddle; that Sergeant Huddle walked close enough to the appellant to touch him; that the appellant was swearing but he did not hit either Sergeant Huddle or Constable Smith. She said Sergeant Huddle pushed the appellant in the chest with his hands. The push caused the appellant to fall over. Ms Edwards said she noticed the appellant was bleeding after falling over, but did not know how it happened. She said police asked the appellant to "settle himself down" and they returned to the police car without arresting him. Asked whether the appellant was invited to her house or whether he was just allowed to be there because he was her friend, Ms Edwards said "he's my brother-in-law". She agreed with the suggestion that he was allowed in her house because he is her brother-in-law.

Anthony Jurra

[14] Mr Jurra told the Court he was present at his house (House 37). He said he went outside and saw two police bashing Alfred (the appellant). When he turned around he saw the appellant was bleeding from the forehead. He knew the police officers as "Greg and Angus". Police kept on holding the appellant, they put him on the ground and

Constable Smith put his knee on top of the appellant. He said when he came out of his house the first thing he saw was two police "wrestling" with the appellant. He said he "probably" told Greg and Angus to try and let him go; then they "just let him loose".[10] He stated he saw Sergeant Huddle walk to the yard, pick up a bottle of Bundaberg Rum, empty the bottle, and walk to the rubbish bin outside the yard and place a bottle in the bin. He said the appellant remained in the yard the entire time and it was Sergeant Huddle who approached the appellant. He said the appellant was "probably sitting" in the yard. He said the appellant did not hit either of the police officers. He stated he did not know if the appellant was swearing or not.

[15] When first asked if Sergeant Huddle pushed the appellant, he answered "yeah probably… They was holding him".[11] He said police put the appellant on the ground and Constable Smith placed his knee in the back of the appellant.[12] Mr Jurra stated that he "probably told Greg and Angus to try let him go"; they then "just let him loose".[13] The appellant was still in the yard at this point. He said that all the trouble took place inside the fence. When asked if he saw Sergeant Huddle push the appellant, he answered "yeah".[14]

[10] Ibid, 10.
[11] Ibid, 12.
[12] Ibid, 9.
[13] Ibid, 10.
[14] Ibid, 12.

Sergeant Greg Huddle

[16] Sergeant Huddle's evidence was that he was on duty on 23 August 2013 and in full uniform. He had been told that people were drinking at the house. He was driving the police car from the Gurindji Festival to the local school. Constable Smith was a passenger. They drove past the house on the way to the school, saw people, but there was no evidence of drinking.

[17] On the return journey they drove past the house again and Constable Smith said that he saw the appellant throw a bottle. Sergeant Huddle stopped the car and walked towards the location of the bottle. He said the appellant approached him but he (Sergeant Huddle) walked around the appellant to the bottle. Sergeant Huddle said he picked up a bottle of Bundaberg Rum and noticed it had about 4 centimetres of rum left in it. He tipped the rum out. At that time the appellant's demeanour rapidly changed. He became very angry towards both police. Sergeant Huddle said he noticed Constable Smith also tipped something out.

[18] Sergeant Huddle said he walked with Constable Smith back to the police car, which was parked outside of the front gate and the appellant followed behind. The appellant got close to Sergeant Huddle and the appellant had his fists clenched. Sergeant Huddle said he was thinking of his own safety and pushed the appellant to the chest to move him

away. Sergeant Huddle said he continually told the appellant to settle down.

[19] He said that once pushed, the appellant began to flail around and threw off his shirt or singlet. Sergeant Huddle and Constable Smith then attempted to grab the appellant's arms, they put him on the ground, continually telling him to settle down. He said the appellant continued to flail his legs. Sergeant Huddle said the appellant's legs brushed against his a few times but "didn't connect anything serious".[15] The appellant was yelling at both officers. Sergeant Huddle said he saw spittle leave the appellant's mouth while the appellant was yelling and it landed on Constable Smith's face and that Constable Smith told the appellant to stop spitting. At that time, the appellant then spat into Sergeant Huddle's face, hitting him on the face and on the neck. Sergeant Huddle said the appellant turned around and spat into Constable Smith's face.[16]

[20] Sergeant Huddle said Anthony Jurra then came over and told them to let the appellant go as he was bleeding. Through the scuffle, he said the appellant could have scratched his head on something when they put him on the ground. He said the appellant "tired out" and they let go of his arms. Both officers then walked back to the police car and Sergeant Huddle got into the driver's seat. The appellant approached

[15] Ibid, 15.
[16] Ibid.

the driver's side window and Sergeant Huddle told the appellant to back away before they drove back to the police station.

[21] Sergeant Huddle explained that he deemed it was not the most appropriate time to arrest the appellant as the Gurindji Festival was on – the appellant was arrested the next day when other police officers arrived at the station. He was then asked: "At any stage did you give him permission to spit in your face"? He answered "No I did not".

[22] In cross-examination, Sergeant Huddle said the reason he entered the yard was to seize the alcohol and tip it out. He said he did not turn around and approach the appellant. He could not recall if the rubbish bin was inside or outside of the fence. He said that when the appellant was close to him, prior to pushing him, both he and the appellant were inside the yard. He said he did not push the appellant while trying to affect an arrest or place him into protective custody.

[23] He agreed in cross-examination that when he was close to the appellant, both of them were inside the yard; that the appellant did not make any physical contact with him at that point and that he pushed the appellant in the chest; that the appellant did not give him permission to push him in the chest but he did that because "he was in my space, I was worried about my safety". He agreed he had already finished dealing with the bottle of rum and that the appellant was not between himself and his car. He was asked if the appellant fell over when he

pushed him and he said “no he did not”. He agreed that later the appellant was taken to the ground and at that point the appellant got a cut on his head and it was bleeding. It was put to him the appellant got the cut because his head hit the fence and he said he was not sure.[17]

[24] It was suggested to him that when he pushed the appellant in the chest, it was not any part of what he was doing as a police officer. He said he pushed the appellant in the chest due to him having clenched fists, he was intoxicated, he was within his space “as in front on”.[18] He considered him to be a threat to his safety, so he was pushed away. He agreed he did not like the appellant standing that close to him. Sergeant Huddle agreed that by then, the issue with the bottle of alcohol had all finished. He also agreed that when he pushed the appellant to the chest it had nothing to do with what he was doing in the yard. It was suggested to him that his duty was to seize the alcohol and he said “that’s what we did, yes”.[19]

Constable Angus Smith

[25] The case was adjourned on 14 January 2014 after Sergeant Huddle’s evidence was completed as Constable Smith was not available on that date to give evidence. Constable Smith gave evidence on the 20 May 2014.

[17] Ibid, 17.
[18] Ibid, 18.
[19] Ibid, 19.

[26] Constable Smith told the Court he was informed that people were drinking at Ms Edwards' house. On the way back from returning some goods to the local school, Constable Smith saw the appellant throw a bottle. He informed Sergeant Huddle who was driving, that a bottle had been thrown. They pulled up. Constable Smith said when he saw the appellant he noted he was "extremely intoxicated".[20] Sergeant Palmer (sic) (it may be assumed he meant Sergeant Huddle) walked to the side of the house and picked up a bottle of rum and tipped it out. Constable Smith said he also picked up a bottle of Coke that smelt of rum and tipped that out.

[27] It was at that time that the appellant became aggressive and started swearing at police. He said police began to walk away; Sergeant Huddle placed an emptied bottle in the bin. The appellant then approached Sergeant Huddle, he got very close, to within 10 cm from him; the appellant's chest was pumped out and his fists were clenched; he was "very very aggressive". Constable Smith stated that Sergeant Huddle pushed him away and the appellant struck out at him with his arm, and then he took the appellant to the ground with the assistance of Sergeant Huddle. During that process, Constable Smith said he thought the appellant received a cut across the face.

[28] Constable Smith said the appellant started yelling and swearing, saying "look what police are doing to me", calling for people nearby to fight

[20] Transcript, 20 May 2014, 2.

them. Constable Smith said they did not have their belts on, due to having been at the Gurindji Festival. The appellant was yelling out to family members, and a large male was saying "that 'they don't have their belts on get (inaudible)' - that kind of thing or saying 'we can kill because they don't have their belts on".[21] They got off of the appellant and he started getting back up again and again they had to take him to the ground. He said at the same time the other male was coming up and pushing him back. Eventually the appellant began to tire and settle down a bit.

[29] In terms of an assault, the prosecutor asked Constable Smith "did anything happen to you"? Constable Smith answered "I got – just got kicked during the process, nothing – or not to the face, but just trying to restrain him".[22] Constable Smith also gave evidence about the appellant going to the driver's side of the car. He said when he had the appellant restrained they were just directing him to stop resisting and stop trying to strike them and then he settled down. He said the appellant was swearing, saying "fucking mothers" and other swear words.[23] He also recalled other people gathering around to see what was going on and Alfred calling them to join in.

[30] In cross-examination Constable Smith confirmed that he walked inside the fenced area of the yard. He said he thought he might have been

[21] Ibid, 3.
[22] Ibid.
[23] Ibid.

inside of the yard when he tipped out the contents of the Coke bottle. He said after Sergeant Huddle had emptied the bottle of rum he walked back from the yard, they were out to the side of the house and they walked back towards it. He agreed Sergeant Huddle put the empty bottle in the rubbish bin. When asked whether the rubbish bin was outside the yard he said he thought it was. He said he put the Coke bottle in the rubbish bin as well. He was asked about the position of the rubbish, and whether it was outside the yard. Constable Smith said "yeah, it was either there or just outside there, I think it was there Sir".[24]

[31] When asked if the confrontation between Sergeant Huddle and the appellant occurred after the bottles had been disposed of, Constable Smith said that the appellant followed them all the way, as they walked with the bottle. He followed them and shouted at them and was "carrying on". His mannerisms were very aggressive.[25] He said the appellant came right up close and he thought this was right near the driveway but was not sure if it was inside or outside. He said where they took him down was actually inside the yard. It was like a wrestle. He said it must have been close to inside. Asked even if it had been outside, he would have had to move him back inside, Constable Smith said "not necessarily I would have had to push him back in, it could

[24] Ibid, 5.
[25] Ibid.

have been he struggled, and in the struggle we got back inside".[26] He agreed that when the appellant was swearing he did not actually hit Sergeant Huddle. Constable Smith said he was concerned for Sergeant Huddle's safety because the appellant was so close. He said he was not sure if he touched him or not. He agreed Sergeant Huddle then pushed the appellant. He said it was on the chest. He was not sure if it was one hand or two hands. He said he was the person that put the appellant on the ground, and he thinks Sergeant Huddle did as well.[27]

[32] He agreed he was not personally arresting the appellant. The appellant was not being taken into protective custody. Constable Smith said he thought they would have arrested the appellant but they did not because they did not have their belts and equipment on and there was a large number of people gathering around. He agreed that when he and Sergeant Huddle emptied the bottles, they went to the rubbish bin and put the bottles in the bin. It was put to him that at the point he put the bottles in the bin the appellant was not standing between him and the car. He said the appellant was in between Sergeant Huddle and the vehicle and he (Smith) - was closer to the vehicle. He did not think the appellant was between himself personally and the car. He thought he was in front of where Sergeant Huddle was facing.

[33] The appellant did not give evidence.

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[26] Ibid, 5.
[27] Ibid, 6.

Submissions before the Learned Magistrate

[34] The prosecutor submitted the appellant was aggrieved at the alcohol being tipped out by police and that the appellant was within Sergeant Huddle's comfort zone. It was pointed out that Sergeant Huddle, who was frank about this, applied force to the appellant's chest and pushed him back. Constable Smith then determined the appellant should be put in a "face down" position and was assisted by Sergeant Huddle. It was submitted there was resistance. Other persons arrived and police determined not to effect arrests. In relation to the assaults, it was emphasized that Sergeant Huddle recalled having force applied to him and spit fly up in his face. The prosecutor submitted Sergeant Huddle's evidence should be preferred over Constable Smith who did not raise issues of force being applied. The prosecutor said police were lawfully on the premises, in the execution of their duties to ensure alcohol was not in the community.

[35] On behalf of the appellant, it was submitted police were not acting in the execution of their duties at the time of the alleged assaults (and resisting) as the task of dealing with the alcohol was complete before the events giving rise to the charges took place. Further, that Sergeant Huddle's "assault" on the appellant was outside the ambit of his duty. The evidence was clear that the bin was outside of the yard and Sergeant Huddle came back into the yard and confronted the appellant; that the evidence was that the appellant did not touch Sergeant Huddle,

but rather, it was the reverse. It was submitted there was nothing preventing police from leaving the house after they completed their duty, emptying the bottles.

Reasons of the Learned Magistrate

[36] The learned magistrate gave brief reasons for making the findings of guilt in respect of the assault police charges and for dismissing the charge of resist arrest.

[37] The learned magistrate found that on the evidence, the police officers were exercising their duty when they entered the property to remove the alcohol from the property and from the appellant. The appellant was clearly unhappy about that removal. The appellant was very drunk and aggressive. Reference was made to the appellant's actions in approaching Sergeant Huddle and being so close, as described by Ms Edwards "close enough to touch" and according to Sergeant Huddle and Constable Smith, the appellant was "very close". The learned magistrate found that the appellant was placing himself in a position where he was making it difficult for police to execute their duty.[28] In relation to where the incident giving rise to the charges occurred the learned magistrate said:

> "The defence have made much of the fact that the incident where there was an alleged assault happened inside on the yard having Sergeant Huddle having walked outside to dispose of the

[28] Ibid, 12.

bottle. I think that argument is an argument which is (inaudible) however, it is clear that the incident happened only just inside (inaudible) and there was not much movement in my view, of the evidence of Sergeant Huddle and Mr Rose.

Once Mr Rose approached Sergeant Huddle, he was removing the bottle. There is no doubt that the police officers were exercising their duty – execution of their duty when removing alcohol. That is clearly their duty to do so in these restricted alcohol areas. Mr Rose, in his actions hindered that exercise of the duty. However, I cannot be satisfied that he resisted the exercise of that duty.

He, for example did not have the bottle in his hand. It was not removed from his hand and he pulled back on that. The bottle was in fact outside his physical possession. He was merely scorned in having lost the alcohol and its being removed. While his personal presence certainly hindered the police, it did not resist them in the exercise of that duty.

Therefore I must find him not guilty in relation to count three. In relation to the assault of police, Mr Rose placed himself aggressively in very close proximity to Mr Huddle whilst he, in my view, was exercising his duty and he by doing that, caused Sergeant Huddle to be fearful of his safety and his own personal safety.

But his actions were corroborated by Constable Smith who was also fearful of Sergeant Huddle's safety and Sergeant Huddle, in my view, took what we call a pre-emptive strike by pushing Mr Rose away from him. It was not, in my view, an assault by Sergeant Huddle. In my view, it was an application of force and he was justified in applying that force given that he was in fear of his safety and the situation that was arising about him.

It therefore follows that the application of force by Constable Smith was Brevet Sergeant Huddle and there was a wrong result. The actions of Mr Rose, (inaudible) where he struck Sergeant Huddle and Constable Smith was an assault on the

police officers arising out of his own personal actions towards the Sergeant who was at that time executing his duty".[29]

Consideration of the Grounds of Appeal

[38] I fully appreciate the learned magistrate was hearing the matter in difficult circumstances, during the course of busy 'bush court' lists, split across two hearing dates, four months apart. The extempore reasons are brief and it is not appropriate that there be forensic dissection of each piece of evidence within the reasons. The reasons should not be considered in an overly critical manner.[30]

[39] There are three areas that after some consideration, I think are of concern in relation to the sufficiency of the reasons. First, there was no assessment made of the evidence of the lay witnesses, and whether they were correct in suggesting the position of the bins where the officers disposed of the alcohol. Related to that is the question of whether their evidence was taken into account in relation to the alleged assaults. Secondly, and related to the first issue, is the question of whether the police officers were engaged in the execution of their duties after disposing of the alcohol and if so, what were the nature of those duties at the time of the alleged assaults. Thirdly, there is no identification of the source of the evidence for the finding of "striking" police officers in circumstances that would constitute an assault on

[29] Ibid, 12-13.
[30] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259; *Peach v Bird* (2006) 17 NTLR 230.

each officer. It is apparent that the alleged spitting, about which only one officer gave evidence, was not the basis of the finding that the appellant assaulted the police officers, but rather that the appellant had "struck" both officers.

[40] Ultimately in respect of the reasons, the respondent contended there was nothing unsafe or unsatisfactory about the ultimate conclusion that an assault had been committed by the appellant against the officers, although it was acknowledged by counsel for the respondent that a "more fulsome elaboration on the state of the evidence and the weight given to each witness' testimony should have been provided".[31]

[41] In order to determine whether the officers were acting in the execution of their duty necessarily required at least some findings to be made on the evidence. The preponderance of the evidence must lead to the conclusion that the bin the officers used to dispose of the bottles was outside of the fenced yard of the house. Even if the learned magistrate discounted or did not accept certain parts of Ms Edwards' evidence, which was not dealt with in the reasons, there would seem to be no reason not to accept that part of her evidence. Even if, as counsel for the respondent submitted, Ms Edwards, being a relative of the appellant meant her evidence could have been discounted, on this point, all witnesses gave evidence to the same effect, save that Sergeant Huddle could not recall where the bin was.

[31] Respondents Outline of Submissions, [23].

[42] It is clear the officers, at least initially, were acting within the execution of their duties. They knew alcohol was on the premises and when they disposed of it, they were clearly acting in the execution of their duty; but that is not when the offences were committed.

[43] The learned magistrate specifically found there was no resisting on the part of the appellant when police were engaged in disposing of the alcohol. It is clear from the evidence that police were acting in due execution of their duty when disposing of the alcohol, however, after disposing of the alcohol outside of the premises the position is not clear. Little or no evidence was given about what duties police were engaged in after disposing of the alcohol when they re-entered the yard.

[44] I accept what has been submitted on behalf of both the appellant and the respondent in respect of the authorities and the meaning given to: "acting in the course of duty". In *Innes v Weate*, Cosgrove J stated:[32]

> It refers to the duty of constables generally – the duty to prevent and detect crime, to apprehend wrongdoers, to keep the peace, and to protect life and properly, (that is, to protect persons from injury and property from damage).
>
> In *Rice v Connelly* [1966] 2 QB 414 at 419, Lord Parker CJ said: "It is also in my judgement clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and

[32] [1984] Tas R 14 at 20-21.

> obligations of the police, but they are at least those, and they would further included the duty to detect crime and to bring an offender to justice".

[45] In *Launder v McGarvie,*[33] Angel J dealt with an appeal against conviction for assault a police officer in the execution of his duty. The case involved a charge arising from events after inquiries were undertaken by a police officer under implied licence at the rear door of the premises of the alleged offender. After making initial inquiries, and then being told to "Fuck off, cunt", the police officer said he wanted to speak about some trouble that happened. The offender/appellant reacted using a spear. Based on the premise that in technical terms the police officer became a trespasser once he had been told to leave, it was held he was no longer acting in the execution of his duty. The Crown there had argued the police officer was still acting in the course of his duty. Angel J held that if the officer had "turned on his heel" and demonstrated that he was not going to persist with his inquiries, it may well be the assault would never have happened. Further, his Honour stated that it is really speculation as to what might have happened, but at the time of the assault, he was not acting within his duty.

[46] It is accepted here that an officer should have a wide discretion to act swiftly and decisively; however, the exercise of that discretion is properly subject to scrutiny given the potential adverse impacts on a

[33] 5 April 2006, NTSC, Angel J.

person's rights and vulnerability to being charged with serious offences should they interfere in a range of ways, with a police officer who is in the execution of their duty.

[47] In *Re K*,[34] the Federal Court adopted a broad approach with respect to the definition of "in the execution of his duty" for the purpose of s 64 of the *Australian Federal Police Act* (Cth). Section 64 makes it an offence to "assault, resist, obstruct or hinder, or aid, incite or assist any other person to assault, resist, obstruct or hinder, a member in the execution of his duty". When interpreting this section it was held:[35]

> "Section 64 should not be construed in any narrow or restricted sense, but should be given a broad operation to protect the performance of all police duties, and not just some. The section is general: "in the execution of his duty". That means that the section applies whenever the police officer is doing something which can fairly and reasonably be regarded, given the existing circumstances, as a carrying out of his duty".

[48] I agree with is approach. The duties should be capable of identification, but in a broad way.

[49] The police officers here initially were clearly acting in the execution of their duty. They found the alcohol and disposed of it. They decided not to arrest the appellant. On behalf of the respondent it was argued, that after emptying the bottles and returning into the yard, police continued to act in the execution of their duties. Those duties may have included to keep the peace, or perhaps to check that there was no

[34] (1993) 46 FCR 336.
[35] *Re K* (1993) 46 FCR 336, 341.

more alcohol on the premises, or indeed incidental with their duty to keep the peace, to check the appellant was not continuing with disorderly conduct of some kind. They may well have been acting in the execution of any number of duties; or their presence at the house may be seen as acting in accordance with matters incidental to the execution of their duties under the *Liquor Act*. The problem is, however, that there was no evidence about why they returned to or re-entered the yard. I think however, it is safe to infer that police had no other reason to return to the yard, but for reasons of their duty generally and ensuring there was no other offending taking place; perhaps that there was no more alcohol. As I mentioned, there was no evidence given of any suspicions held in relation to other alcohol or offending, however, I am prepared to infer that when they re-entered the yard, the officers did so in accordance with general duties to ensure there were no further breaches of the law.

[50] None of the duties or powers that I would be prepared to infer that police were executing go so far in this particular instance, as exercising a power of arrest or restraint over the appellant. Such a duty or power was specifically eschewed in the evidence given by the police officers. In executing the range of potential police duties, taking the appellant to the ground, after a push by one officer when he was not to be arrested ought not, in these particular circumstances, be fairly and reasonably regarded as carrying out their duties. I am not suggesting Sergeant

Huddle did not have reasons to push the appellant in the manner he described if he was about to engage in or was engaging in, further duties. The learned magistrate found, the push was a "pre-emptive strike", however, beyond that point, the evidence does not in my view allow the drawing of an inference beyond reasonable doubt that placing the appellant on the ground was done in the execution of police duties. The officers, no doubt for good reason, had determined not to arrest the appellant. Neither officer said that they were arresting the appellant. The learned magistrate determined the appellant had not earlier resisted police in their duties being carried out in respect of the *Liquor Act*.

[51] There should have been a reasonable doubt entertained about whether, in the execution of other generalised duties after the disposal of the alcohol, after pushing the appellant, police officers were required to engage further physically with the appellant. The prosecution bore the onus to persuade the court of the element that police were acting in execution of their duties. If it is accepted that the push by Sergeant Huddle was necessary (and I am not to be taken as suggesting from his perspective that it was not) in the overall circumstances, it is not at all clear how the later actions by the officers in bringing the appellant to the ground was in the execution of their duty. To conclude the officers were still engaged in their duties in these particular circumstances requires speculation. There is an absence of evidence on that point and what evidence there was, was conflicting. Constable Smith said the

appellant struck out after being pushed, whereas Sergeant Huddle said he was flailing around. Even though Constable Smith gave evidence that he thought he may need to assist Sergeant Huddle, there is still a lack of evidence as to how taking the appellant down was in furtherance of the execution of generalised, non-specified duties following the completion of their primary duty at the premises. The push may have been incidental to the execution of other duties, but beyond that, without further evidence it is in my view speculation to suggest police were still acting in execution of their duty. Sergeant Huddle did not say the appellant struck him. The lay witnesses say he did not. Constable Smith's physical engagement with the appellant cannot fairly be said to be in the execution of his duty. As a matter of law, the reasons in the court below are insufficient on this point, however, taking the reasons with the evidence reviewed, indicates there should have been a doubt experienced on whether it had been proven that police at the relevant time were acting in the due execution of their duty.

[52] Although I would allow the appeal on the first ground, I appreciate reasonable minds may differ on assessments of this nature, given the conclusions require inferences to be drawn from fairly sketchy evidence. If I am in error, in relation to ground one, in my view in any event, the second ground is made out.

[53] The finding below was that the assaults were constituted when the appellant “struck” the officers.

[54] The evidence of either officers being “struck” can barely be extracted from the evidence. The evidence of the police officers, as can be seen from the summary above, conflicted about the nature of any assault and whether there was an assault. I appreciate that this may well occur as a result of the different perceptions and attention that may be given by two persons present at an event that is unfolding quickly. Sergeant Huddle however, said both officers were spat on (although perhaps not initially deliberately). When on the ground, Sergeant Huddle said spittle from the appellant hit him in the face and neck and hit Constable Smith in the face.

[55] Constable Smith gave no evidence at all of the appellant spitting on either himself or Sergeant Huddle. It is possible the learned magistrate preferred the evidence of Sergeant Huddle, however this is not dealt with in the reasons. It is a significant difference in the evidence. It might be expected Constable Smith would have given evidence of being spat on in the face, if he had been.

[56] The lay witnesses do not give evidence of the appellant spitting or striking police. Aside perhaps discounting Ms Edwards’ evidence to some degree because she is related to the appellant, there would not seem to be a reason to reject her account. It is quite possible however,

that Ms Edwards did not see the whole event. None of this is dealt with in the reasons, perhaps because the evidence on this subject was scant. The learned magistrate did not indicate rejection of the lay evidence or that it would be given lesser weight. Mr Jurra's evidence was vague generally and not of great assistance overall, but neither of the lay witnesses gave evidence of the appellant spitting at police. In any event, the finding was assault by being struck. Nothing was found in relation to an assault constituted by spitting.

[57] Constable Smith gave evidence that he "just got kicked in the process, nothing – oh not to the face, but just trying to restrain him". In the circumstances of a struggle of this kind, this falls short of proof beyond reasonable doubt of an intentional or foreseeable application of force. There is no detail in the evidence about how or where Constable Smith was kicked. Constable Smith does not appear to be describing an assault. Perhaps it was just understatement, but there is no detail that would permit a finding beyond reasonable doubt that this constituted an assault by striking. No finding was made about mental elements.

[58] In a similar manner, Sergeant Huddle's evidence was that the appellant's legs brushed against his a few times, "but didn't connect anything serious….. Just brushing". It is the case, as argued by counsel for the respondent, that an offence of assault can be made out, even if it is not regarded as serious by the victim, and it may be

constituted by a direct or indirect application of force. I do not regard that evidence as capable of proving an assault beyond a reasonable doubt in the circumstances. Sergeant Huddle did not appear to be describing an assault. There is no evidence to suggest any such "brushing" was intentional or foreseen. No finding was made in relation to any mental state.

[59] There remains the issue of Sergeant Huddle's evidence of the appellant spitting at him. There would not seem to be any reason to reject that evidence; however, that was not the basis of the finding of guilt. As already noted, it is doubtful that at the time of the spitting the element "in execution of duty" was proven.

[60] The other potential source of evidence was that of the appellant "flailing" and "not settling", or, after being pushed away, "striking out", but that evidence does not describe an assault, save that perhaps "striking out" might be regarded as a threatened application of force. The evidence was not given in a way that describes a threatened application of force. It was not the subject of a finding of guilt.

[61] This is not a case that readily turns on credit or demeanour. In any event, in many but not all respects, Sergeant Huddle's evidence coincides with the evidence given by Glenda Edwards and Anthony Jurra. Constable Smith's evidence stands alone in many respects and cannot be given the same weight as the evidence it diverges from.

Constable Smith for example, unless he had been mistaken on names, gave evidence of other police being present. He was the only witness to suggest the appellant "struck out" or attempted to hit Sergeant Huddle. He is the only witness who spoke of another man being at the scene and pushing the appellant.

[62] In all of the circumstances, reviewing the evidence and findings, in my opinion the Court of Summary Jurisdiction should have entertained a reasonable doubt.

[63] There will be orders that the appeal be allowed and the findings of guilt and convictions imposed 20 May 2014 be quashed.

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