Sinclair v Burgoyne [2007] NTSC 6

PARTIES:	DAVID HAROLD SINCLAIR
	v
	ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 43 of 2005 (20428334)
DELIVERED:	8 February 2007
HEARING DATES:	7 February 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Appeal – Justices Appeal – appeal against conviction – summary offences – assault of police officer - whether lawful apprehension under Mental Health and Related Services Act s 163 – no reasonable grounds for apprehension – appeal against conviction allowed

Hortin v Rowbottom (1993) 68 A Crim R 381; *R v Lavery* (1978) 19 SASR 515; *R v O'Donohoe* (1988) 34 A Crim R 397; *Smith v The Queen* (1957) 97 CLR 100; *Van Der Meer and Others v R* (1988) 62 ALJR 656 - applied

Mental Health and Related Services Act

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	R Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Sinclair v Burgoyne [2007] NTSC 6
No JA 43 of 2005 (20428334)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

DAVID HAROLD SINCLAIR
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 8 February 2007)

Introduction

[1] On 14 October 2005 the appellant was found guilty by the Court of Summary Jurisdiction in Alice Springs following a summary hearing of three offences including the following two offences. First, on 10 December 2004 at Alice Springs the appellant unlawfully assaulted Theo Karamanidis, a police officer, in the execution of his duty with circumstances of aggravation that Theo Karamanidis suffered bodily harm, contrary to s 189(1) and (2)(a) of the Criminal Code. Secondly, on 10 December 2004

at Alice Springs the appellant unlawfully assaulted Sherry Baxter, a police officer, in the execution of her duty with circumstances of aggravation that Sherry Baxter suffered bodily harm, contrary to s 189(1) and (2)(a) of the Criminal Code. The appellant appeals against both these convictions under s 163 of the Justices Act.

[2] On 8 November 2005 the appellant was sentenced by the Court of Summary Jurisdiction to a total period of three months imprisonment to be suspended after he had served one day of imprisonment. The appellant does not appeal against sentence.

The issue

[3] The principle issue in the appeal is did the learned magistrate err in finding that the two police officers were acting in the execution of their duty at the time that they were assaulted by the appellant? More specifically was it a reasonable possibility that the appellant was unlawfully apprehended under the provisions of the Mental Health and Related Services Act and assaulted by police on 10 December 2004?

[4] In my opinion the appeal should be allowed. It could not be excluded as a reasonable possibility that the officers were not acting in the execution of their duty as they unlawfully apprehended the appellant.

The facts

[5] Before dealing with the appellant's arguments it is convenient to state the facts which gave rise to the appellant's two convictions by the Court of Summary Jurisdiction.

[6] On 10 December 2004 police Constables Theo Karamanidis and Sherry Baxter were performing general duties on the 7.00 pm to 5.00 am shift in Alice Springs. They were both in uniform. At about 8.54 pm they were tasked to investigate a complaint that someone was "hooning around doing burn outs" in a Holden station wagon in the industrial area near the Shell Truckstop in Alice Springs. They drove to the area in a paddy wagon, which is a marked police vehicle with a cage on the back, and conducted a mobile patrol. While on patrol they saw a blue Holden station wagon that was of a similar description to the motor vehicle that was the subject of the complaint that they were tasked to investigate. The Holden station wagon was parked in the yard of a business premises. The yard of the business premises was private property.

[7] The police officers drove into the yard of the business premises where they saw the appellant. He was moving from the Holden station wagon to the building and he was carrying some sort of a box. While still seated in the driver's seat of the police vehicle Constable Karamanidis spoke to the appellant. He was about 20 to 25 metres away from the appellant when he did so. Constable Karamanidis said, "Good day! How are you?" The appellant replied in an aggressive tone, "Fuck off mate! What the fuck do

you want?" Constable Karamanidis then got out of the police vehicle and said, "Calm down. What is your name?" The appellant put the box down and walked towards Constable Karamanidis in an aggressive manner waving his arms and asked, "What the fuck for? What's your fucking name?" Constable Karamanidis then told the appellant his name and the appellant said that his name was Dave "Skits" or something similar.

[8] While the appellant was approaching Constable Karamanidis he saw the appellant put both his hands in his pockets and he became concerned that the appellant may have a weapon in his pockets. Constable Karamanidis grabbed one of the appellant's arms, put it behind the appellant's back and then placed the appellant face down on the bonnet of the police vehicle where the appellant was searched. Constable Baxter assisted Constable Karamanidis restrain and search the appellant. The appellant did not have a weapon. While the appellant was still restrained on the bonnet of the police vehicle Constable Karamanidis again asked the appellant to calm down. He told the appellant that they just wanted to talk to him. The appellant calmed down and he was then released.

[9] After the appellant was released Senior Constable Muir arrived at the yard of the business premises in a police car. By this time the appellant was not struggling. He had lowered his voice and he was not behaving in a loud or aggressive manner. Constable Karamanidis asked the appellant what had been happening. The appellant told him that he did not have any money. He had been ripped off. He had nowhere to go and his boss had said that he

could stay at the business premises as the caretaker. The appellant then appeared to become emotionally upset. He began to cry and he appeared to be in a fluctuating mood going from a teary state to an aggressive state. Constable Karamanidis then asked the appellant if he was on any medication. The appellant said that he had been on medication for schizophrenia. He had been taking double the amount of his medication but he had then gone off it. He needed something stronger. Constable Karamanidis then asked the appellant if he would like to see a doctor. The appellant said, "Yeah" and he calmed down. Constable Karamanidis again asked the appellant his name. The appellant started to yell loudly again. He said his name was "Dave Stitches" or something similar.

[10] While Constable Karamanidis was talking to the appellant another police paddy wagon arrived. In the paddy wagon were Constables Barrett and Smith. Ultimately there were two paddy wagons and an unmarked police car at the yard of the business premises and five police officers in attendance.

[11] As a result of his observations Constable Karamanidis formed the opinion that the appellant was suffering from some sort of mental disorder. He decided to get the appellant to a doctor to have a chat to somebody or counselling or something like that to see if they could help the appellant. Constable Karamanidis continued to talk to the appellant. He wanted the appellant to voluntarily go and see a doctor. However, he was beginning to form the opinion that if the appellant did not go voluntarily then he may have to take the appellant to see a doctor regardless. If the appellant had

broken away he would have chased him and restrained him. Constable Karamanidis gave evidence that he would have acted under the authority of the Mental Health and Related Services Act.

[12] While Constable Karamanidis was talking to the defendant Constable Baxter made an enquiry with the police radio base about the appellant's Holden station wagon and she was told that there was a medical alert because of the appellant's mental health. She told Constable Karamanidis what she had learned. Constable Karamanidis relied on this information as part of his overall assessment that the appellant was suffering from a mental disorder.

[13] Constable Karamanidis said to the appellant, "Come on, let's go and speak to a doctor, let's go and see a doctor." The appellant again became aggressive. He replied, "Where? In the fucking gaol?" Constable Karamanidis responded, "No, to the hospital." The appellant said, "What, at fucking Alice Springs Hospital? Yeah, right, you want to take me to fucking gaol." Constable Karamanidis said, "Look, calm down, I just want to help you. Let me take you to a doctor." After Constable Karamanidis said this the appellant appeared to calm down again. The appellant said, "Yeah, okay."

[14] After the appellant said that it was okay to go to the hospital to see a doctor Constable Karamanidis put his hand upon the appellant's shoulder to guide him to a police paddy wagon. He did not suggest the appellant get into the back seat of the police car so that he could be taken to the hospital.

Constable Baxter accompanied them. However, at no time was she holding the appellant. It was Constable Baxter's opinion that the appellant was going to be taken to hospital because of his distressed condition. She believed that the appellant may have been a danger to himself and to the community. They walked with the appellant some three to four metres towards a police paddy wagon and then without warning the appellant swung around and began punching Constable Karamanidis to the head. He also hit and kicked Constable Baxter. After Constable Karamanidis was hit by the appellant he retaliated by punching the appellant in the head. The other police joined in to help restrain the appellant. The appellant was then ground stabilised and handcuffed. It was Constable Karamanidis' evidence that the appellant was struggling when he was picked up and that he yelled out a number of words to the police officers. Constable Karamanidis said that the appellant did not say anything to him before the appellant struck him. The appellant was told that he was now under arrest for assaulting police and he was put in the cage on the back of Constable Barrett's and Smith's paddy wagon. He was then taken to the police watch house behind the police station in Alice Springs.

[15] Constable Karamanidis had intended to convey the appellant to the hospital by placing the appellant in the cage on the back of a paddy wagon. He gave evidence that in the past he had taken people to the hospital in the back of a paddy wagon and that they had been quite happy to get into the cage. Once

in the cage the appellant would not have been able to open the door of the cage.

[16] At no stage did any of the police officers contact the Alice Springs hospital and speak to anybody in the psychiatric ward to get some assistance.

The findings of the Court of Summary Jurisdiction

[17] Having reviewed the evidence of the various police witnesses the learned magistrate found that:

> The situation, [so far as their evidence is concerned, is that after Constable Karamanidis had asked you to come with him to the hospital, it was not on his mind that you had committed any offence]. It was not on his mind that you were likely to commit an offence or a breach of the peace. [He was concerned about your state of mind and your rather irrational behaviour in the circumstances]. The fact that you had told him that you suffered from schizophrenia and that you had been on medication … enlivened him to the possibility that you were a person who needed some medical attention.
>
> At the point when you both turned [and walked towards the police vehicle] you were agreeing with him to go to the hospital. You were not under arrest for any offence. Likewise he had not apprehended you for a [medical] assessment pursuant to the Mental Health and Related Services [Act].
>
> The question so far as counts one and two are concerned is, having regard to those findings of fact, were Constables Karamanidis and Baxter acting in the execution of their duty? [It is Mr Goldflam's primary submission that they were not acting in the execution of their duty because the impression that was conveyed to you by the officer placing his hand on you and guiding you towards the police vehicle was that you were under some form of restraint and you were not free to leave the police officer's presence]. If you intended to do so the only reasonable inference on the evidence was that you would have been prevented from doing so.
>
> I have [considered what was said by the court in] *DPP v Grimble* as well as the other authorities [to which I have been referred]. So far

> as I am concerned, the police officers did not have you under arrest or apprehension at the time that you turned and started to walk towards the police vehicle.
>
> …
>
> The [police] officer had an opportunity … to make an observation of you and your demeanour and state of mind at the time. He had [to weigh up his observations and consider what was best to deal with the situation]. Constable Barrett thought that the best resolution for what was taking place at that particular yard was for you to go off to the hospital and get some assistance from a medical practitioner. That would no doubt have occurred had you not swung around and commenced to punch the police officers.
>
> It is my view, having regard to the varied duties that police officers are required to undertake by way of taking people into protective custody and generally, that it was more than a proper assessment of the situation to decide to take you to the hospital for some treatment by a doctor rather than pursuing it in any other way. In my opinion, when the police officers pulled up at your yard … they were looking for the car that had been hooning around. It is quite clear … that they did not intend to arrest you or detain you in relation to that particular incident. Their attention to the [original] investigation changed as a result of your conduct at that particular time.
>
> I am satisfied in all of the circumstances that you were not under arrest or apprehension pursuant to the Mental Health and Related Services Act. You had acquiesced with the [police] officer to attend the hospital to get some medical treatment. I am satisfied in all of the circumstances that the police officer's discretion was appropriately exercised. He was acting in the execution of his duty as was Constable Baxter.

The appellant's argument

[18] The appellant argues that the learned magistrate erred in finding that the two police officers were acting in the execution of their duty because on the evidence presented to the Court of Summary Jurisdiction the learned magistrate could not have excluded as a reasonable possibility a conclusion that the police officers unlawfully apprehended the appellant in Alice

Springs on 10 December 2004. Although the police did not intend to arrest the appellant because they did not have a reasonable belief that he had committed an offence, their words and actions conveyed the impression to the appellant that he was not free to go. Any such apprehension of the appellant was in excess of the police officers' powers under s 163 of the Mental Health and Related Services Act or otherwise and therefore the police officers were not acting in the execution of their duty at the time that the appellant assaulted the two police officers.

[19] Further, the laying of the police officer's hands on the appellant when they guided him to the police vehicle amounted to an assault which also meant that the police officers were not acting in the course of their duty at the time that the appellant assaulted the two police officers.

[20] The appellant says that particular regard should be had to the following passages of the evidence of the police officers. As to the issue of apprehension Constable Karamanidis said the following in evidence:

> So what did you do in relation to that? I started having – continued the conversation with him and trying to keep him calm and get him to voluntarily come with us so we could take him to the hospital to have a chat to a doctor.
>
> So your intention was to get him to voluntarily come. Now can I ask you this? If he was not going to voluntarily come had you determined a course of action? Yes, I had.
>
> And what was that course of action if he had not voluntarily come? He was going to go, regardless.
>
> So were you guiding him to a particular vehicle? Yes, I was.

Now you were guiding him towards a police vehicle that is the paddy wagon? That's right.

And it was your intention to manoeuvre him to the back of that paddy wagon? To guide him.

Yes, okay, to guide him to the back of that paddy wagon. And it was your intention when you got to the back of the paddy wagon to get him to enter the rear of the paddy wagon? That's right.

And then you were going to lock the door? I'm going to close the door, yes.

And lock it? Close it. What do you mean by lock?

Well don't paddy wagons when they're driving around with people in the back of them have little padlocks? I wasn't - I had no intention to padlock it.

I don't – explain to me what the mechanism is for closing the back door of a paddy wagon? Yep, it's a mechanism similar to what you see on containers. Have you seen the – it's got two locks at the top attached with a bar which you can turn around, it hooks into hooks and it closes and you flip a little latch over it to keep it in place. And there is a hole in there which you can put a lock through, however I had no intention of putting a lock through it at that stage.

And normally when you're driving around with people who are in custody in the back of a paddy wagon do you use a padlock or do you just – is it sufficient to close it in the way you've just described, that's enough to keep a person securely in there? If you were taking somebody – it is sufficient to keep it locked like that, however we will lock it, depending on the person we have in the rear of the cage.

If I were inside the paddy wagon and it was closed in the way that you've described I wouldn't be able to get out of that paddy wagon - - - ? No, you wouldn't.

- - - unless I was very, very, very determined and shook the thing to a point where the latch bounced open, is that right? You would not be able to open it.

Now I think, as I understand your evidence, you're saying that if Mr Sinclair had broken away as you were guiding him you would have chased him and restrained him? Yes.

And do you agree with me that at the time you commenced to guide him towards the police vehicle it was not your belief that he had committed a criminal offence? At that stage I believed he may have been involved in that criminal offence that we were initially asked to go there for. However that wasn't a concern at that stage. I was purely there trying to help him.

Well you didn't have an actual belief that he had committed an offence, did you? I had a belief that he had committed an offence, yes.

So were you arresting him, using the powers under the Police Administration Act? No, I wasn't. As I said I was trying to help him.

[21] As to the issue of apprehension Constable Baxter said the following in evidence:

Well what was your understanding that Constable Karamanidis was going to do? The fact that Mr Sinclair agreed quite happily to be conveyed by us to the Alice Springs Hospital that that's what we were doing. The – we certainly didn't want to leave Mr Sinclair there. We were concerned for his welfare and believe if he hadn't have been conveyed by us he could have been a danger to himself or other people in the area.

And that was the conclusion that you yourself had come to? Yes, sir.

The – when you decided to guide Mr Sinclair over to the paddy wagon you at that time did not consider that you were arresting him for committing any offence, did you? No.

And at that time you were acting out of concern for his welfare? Yes.

And at that time you were under the belief, at least for a little while, that he was going voluntarily? Yes.

You weren't, at that time, placing him – in your mind you weren't placing him under some sort of custody or apprehension? We were hoping to avoid that issue.

Well you can only speak for yourself. You hadn't talked about it with your partner, had you? No. We were hoping – my belief was that if Mr Sinclair came with us at that stage voluntarily, as he had stated, then we were avoiding any further escalation of the situation.

Yes. And so at that time when you commenced to guide him towards the police vehicle you were not, in your mind, apprehending anybody? No.

Now the vehicle you were guiding him towards was a paddy wagon? Yes.

And it was your intention to somehow or other get him peacefully to hop in the back of that paddy wagon? Yes.

And then you would have – it was up to you, you or your partner would have closed and shut the door in a way that it would mean that he wouldn't be able to open that door? Yes.

[22] Senior Constable Muir did not give evidence on the issue of apprehension.

[23] Constable Barrett said the following:

And in view – in your view, based on your previous experience, if this man had declined to go to a doctor what would you think was the appropriate action? If he declined to go to a doctor under the provisions of the Mental Health Act I probably would have suggested the apprehension of him for the purposes of a medical examination by a mental health doctor, a qualified practitioner.

Well I'm suggesting to you that it's only in the lead up to the hearing of this court case that you've started to think about the application of the Mental Health Act to - - -? No, because Constable Karamanidis was speaking to him and his intention, from the conversation that was been having with Mr Sinclair was to apprehend him for the purpose of a medical assessment at the hospital.

So are you saying that you heard Constable Karamanidis disclose an intention to apprehend Mr Sinclair - - -? The conversation between the two – obviously I couldn't hear a lot of conversation, but the conversation was directed to try and get him into the van to get him up to mental health to the hospital.

Yes? That's where my van was taking him initially.

Yes, I understand that? I don't know – like I say, I don't know the full context of the conversation. Constable Karamanidis was dealing with Mr Sinclair and basically I was back a bit distance away while the conversation was taking place, but that was the, I believe, the specific intention of Karamanidis and Baxter.

So my question is did you hear Karamanidis at any point say that he was going to apprehend Mr Sinclair? I heard him speaking to Mr Sinclair inviting – trying to convince him to get into the van to go to the hospital for some treatment with a doctor.

Yes? That's the conversation basically.

Did you hear any discussion about apprehension? No, not as – well apprehension is a – you apprehend somebody if a person believes they're in custody of police (inaudible) they're actually under arrest, they're actually in custody. So even if he came along voluntarily he'll still be apprehended by us, if that's what – you know what I mean, like. If a person believes he can no longer leave (inaudible) police he's actually in custody.

Yes? And that includes a traffic offender or whatever, if we're speaking to somebody and we're making a determination about a particular inquiries into a job or a task that person feels he's not free to leave he's actually in apprehension. He's going to be – he's actually in custody.

[24] As to the issue about the apprehension of the appellant Constable White said the following:

> [Karamanidis] said to Sinclair that he thought that he may be able to take him to the hospital for a medical assessment. I then heard Sinclair say that that was probably a good idea as he had – as he was

on medication but he hadn't taken it for a couple of days and when he'd last taken it that it was a double dose.

[25] Based on the whole of the evidence and in particular the evidence referred to above the appellant submitted that the learned Magistrate erred in not finding that it was a reasonable possibility that the circumstances conveyed to the appellant were that he was under restraint and had no real choice. Those circumstances included the following: five police officers were present; two of the police officers had, a short time before, suddenly, but it is conceded lawfully, assaulted the appellant when they searched him; two of the police officers were leading the appellant towards a police paddy wagon and not towards the police car; they intended to place the appellant in the cage on the back of a police paddy wagon and to close the door; the police officers had already formed the intention to apprehend the appellant if he did not acquiesce with their request to take him to the hospital; according to Constable White's uncontradicted evidence Constable Karamanidis had told the appellant that he may have to take him to hospital for a medical assessment; Constable Karamanidis placed his hand on the appellant's body to guide him, without seeking or obtaining his consent to touch him, to a police paddy wagon; police did not tell the appellant that he had a choice or that he was free to go if he did not wish to go to the hospital; and the police officers were aware that the appellant was in an agitated and mistrustful state, and that in particular he had expressed a suspicion that they intended to apprehend him when they initially asked him to see a doctor.

Arrest

[26] In *R v Lavery* (1978) 19 SASR 515 at 516 to 517 King CJ said:

> A suspect may, voluntarily and without constraint, accede to a police officer's request to accompany him and, if he does so, there is of course no interference with his liberty. This is so even if he goes reluctantly out of respect for authority or fear that a refusal will be construed as an indication of guilt or some other similar motive. The suspect's liberty is not under restraint simply because the police officer would or might arrest him if he were to exercise his right to depart or to refuse to accompany the police officer. If, however, the circumstances are such as to convey, notwithstanding the use of words of invitation or request, that the suspect has no real choice, his freedom is under restraint and he cannot be regarded as accompanying the police officer voluntarily. If such a situation comes into existence, and the police officer does not wish to make an arrest, it is incumbent upon him to make it clear by words or actions that the suspect is free to refuse the invitation and is free to depart. I am satisfied in this case that the words of request were a mere formality and were understood as such, and that the accused had no real choice. In my view, he was under restraint from the time Conway placed his hand on his shoulder.

[27] The above statement of King CJ was approved in *Van Der Meer and Others v R* (1988) 62 ALJR 656 at 670 (Deane J) and *R v O'Donohoe* (1988) 34 A Crim R 397 at 401. It is consistent with the following passage of the Judgment of Williams J in *Smith v The Queen* (1957) 97 CLR 100 at 129:

> The term "in custody" in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody. This was decided in England in Reg. v. Bass and in Scotland in Chalmers v. H.M. Advocate.

[28] These cases show that at the very least it was a reasonable possibility, which could not be excluded by the evidence, that the appellant was apprehended by police before he assaulted them in the yard of the business premises. I accept the appellant's submissions in this regard.

[29] From the outset the appellant was concerned that he was going to be arrested by police. There were five police officers in attendance at the yard of the business premises. Constable Karamanidis placed his hand on the appellant's person to guide the appellant to the cage on the back of a police paddy wagon and he was being escorted towards the paddy wagon by two or three police officers. Constable Karamanidis did not make it clear by his words or actions that the appellant could refuse the invitation to assist him to go to the hospital and he was free to depart. Indeed, Constable Karamanidis had decided that if the appellant did not voluntarily accompany the police to the hospital, he was going to take the appellant regardless.

Was the apprehension of the appellant lawful?

[30] If the apprehension was unlawful the appellant could not be guilty of the two counts which are the subject of this appeal: *Hortin v Rowbottom* (1993) 68 A Crim R 381 at 390.

[31] I accept the appellant's submission that the relevant power or authority for the police officers to apprehend the appellant was that contained in s 163 of the Mental Health and Related Services Act. There was no finding by the magistrate that the police officers believed that the appellant had committed

any offence or that the appellant was likely to commit an offence or that there was likely to be a breach of the peace. The police officers stated in their evidence in the Court of Summary Jurisdiction that they had not arrested the appellant for the commission of any offence before the appellant assaulted the police officers.

[32] Section 163 of the Mental Health and Related Services Act provides as follows:

> (1) A member of the Police Force may apprehend a person and take the person to a medical practitioner, an authorised psychiatric practitioner or designated mental health practitioner for an assessment under section 33 if the member believes, on reasonable grounds, that –
>
> (a) the person may be mentally ill or mentally disturbed;
>
> (b) the person –
>
> (i) has, within the immediately preceding 48 hours, attempted to commit suicide or to harm himself or herself or another person; or
>
> (ii) is about to attempt to commit suicide or to harm himself or herself or another person; and
>
> (c) it is –
>
> (i) necessary to immediately apprehend the person; or
>
> (ii) not practicable to seek the assistance of a medical practitioner, an authorised psychiatric practitioner or designated mental health practitioner.
>
> (2) For the purposes of subsection (1), a member of the Police Force may enter private premises or any other private place.

(3) A member of the Police Force is not required to exercise any clinical judgment as to whether a person is mentally ill or mentally disturbed but may exercise his or her powers under subsection (1) if, having regard to the behaviour and appearance of the person, the person appears to the member to be mentally ill or mentally disturbed.

(4) A member of the Police Force may use reasonable force in the exercise of his or her powers under subsection (1).

(5) A member of the Police Force must give details of –

(a) his or her reasons for apprehending a person; and

(b) any restraint or other type of force used to apprehend and detain the person,

to the medical practitioner, authorised psychiatric practitioner or designated mental health practitioner to whom he or she takes the person under this section.

[33] For a person to be lawfully apprehended by a police officer under s 163 of the Mental Health and Related Services Act the purpose of the apprehension must be to take the person to a medical practitioner, an authorised psychiatric practitioner or designated mental health practitioner for an assessment under s 33 of the Act and the police officer must believe on reasonable grounds that the person may be mentally ill or mentally disturbed and that the person has, within the immediately preceding 48 hours, attempted to commit suicide or to harm himself or another person or that the person is about to attempt to commit suicide or to harm himself or another person and it is necessary to immediately apprehend the person or that it is not practicable to seek the assistance of a medical practitioner, an authorised psychiatric practitioner or designated mental health practitioner.

[34] A police officer cannot lawfully apprehend a person under s 163 of the Mental Health and Related Services Act if he merely believes on reasonable grounds that the person is mentally disturbed and it is not practical to seek the assistance of a medical practitioner.

[35] The above interpretation of s 163 the Mental Health and Related Services Act is consistent with the grammatical structure of the section and with the objects of the Act. The provisions of the section are not disjunctive other than to the extent to which they are expressed to be disjunctive. The objects of the Act relevantly include an object to provide for the care, treatment and protection of people with mental illness while at the same time protecting their civil rights: s 3.

[36] Further s 8(b) and (c) of the Mental Health and Related Services Act provide that the Act is to be interpreted so that any restriction on the liberty of the person and any interference with their rights, dignity, privacy and self respect is kept to the minimum necessary in the circumstances and the objective of treatment is directed towards the purpose of preserving and enhancing personal autonomy.

[37] As the evidence presented to the Court of Summary Jurisdiction does not establish the requisite standard of proof anything other than that the police officers had reason to believe that the appellant was mentally ill or mentally disturbed and was distressed and annoyed by their attendance in the

circumstances in which he found himself, they did not have authority to apprehend him under s 163 of the Mental Health and Related Services Act.

[38] If the apprehension of the appellant was unlawful, the appellant did not assault either police officer in the execution of his order her duty. Consequently the two charges against the appellant which are the subject of this appeal have not been proven beyond reasonable doubt.

Orders

[39] I make the following orders:

1. The appellant's conviction in respect of count 1 of the Information for an indictable offence dated 13 December 2004 is quashed.

2. The appellant's conviction in respect of count 2 of the Information for an indictable offence dated 13 December 2004 is quashed.

3. The appellant is acquitted of count 1 of the Information for an indictable offence dated 13 December 2004

4. The appellant is acquitted of count 2 of the Information for an indictable offence dated 13 December 2004

[40] I will hear the parties as to costs.