CITATION:	*The Queen v Rolfe (No. 4)* [2021] NTSC 58
PARTIES:	THE QUEEN v ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21942050
DELIVERED:	13 August 2021
HEARING DATES:	19, 20, 21 and 22 July 2021
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

EVIDENCE – Admissibility of expert evidence – Opinion rule – Exception – Opinion as to whether or not use of force by the Accused was justified – Objection on the grounds of relevance – Meaning of 'specialised knowledge' – Whether expert opinion goes to the ultimate issue which the jury must consider – *Held:* Expert opinion does not go to whether the Accused's use of force was justified at law (i.e. the ultimate issue), but rather, to whether the Accused's conduct was compliant with the General Order, and is therefore admissible – *Also held:* Police training, experience, and general orders may be relevant to the Accused's state of mind at the time of the alleged offence, and therefore to the objective reasonableness of the Accused's conduct.

CRIMINAL LAW – Charge of murder – Alternative charge of manslaughter – Further alternative charge of violent act causing death – Police powers – Use of force – Compliance with general orders – Defence of self-defence – Defence of another – Jury questions – Whether the Accused's conduct was reasonable in the circumstances as he perceived them – Alternatively, whether the Accused was acting in good faith vide s 148B of the *Police*

Administration Act 1978 – Whether expert evidence is relevant and admissible.

Criminal Code Act 1983 (NT) ss 43BD(2), 156, 160, 121A(1), 208E
Evidence (National Uniform Legislation) Act 2011 (NT) ss 76(1), 79(1), 80, 135, 138(1)
Police Administration Act 1978 (NT) s 148B

Adler & Anor v ASIC [2003] NSWCA 131; *ASIC v Vines* (2003) 48 ACSR 291; *Burkhart v Bradley* (2013) 33 NTLR 79; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Doney v The Queen* 171 CLR 207; *Forge v ASIC* (2004) 213 ALR 574; *Heiss v The Queen* (1992) 2 NTLR 150; *Honeysett v The Queen* (2014) 253 CLR 122; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *R v Castanenda (No.3)* [2015] NSWSC 1104; *R v Gehan* [2019] NTSC 91; *R v Sayson* [2016] NTSC 60; *Rabelais Pty Ltd v Cameron* [1993] ANZ Conv R 457, referred to

REPRESENTATION:

Counsel:

Crown:	P. Strickland SC and S. Callan SC
Accused:	D. Edwardson QC and A. Allen QC

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Tindall Gask Bentley

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

The Queen v Rolfe (No. 4) [2021] NTSC 58
No. 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 13 August 2021)

Introduction

[1] The Accused, Zachary Rolfe, is charged on indictment with one count of murder in relation to the shooting of Charles Arnold ("Kumanjayi") Walker (the Deceased) at Yuendumu on 9 November 2019, contrary to s 156 of the *Criminal Code 1983* (NT) (the Code). The Accused is also charged in the alternative (count 2) with having engaged in conduct that caused the death of the Deceased, being reckless or negligent as to causing the death of the Deceased contrary to s 160 of the Code, and in the further alternative (count 3), with engaging in conduct involving a violent act to the Deceased, namely discharging a firearm causing the death of the Deceased contrary to s 161A(1) of the Code.

[2] At the trial, the Crown intends to call evidence from Detective Senior Sergeant Andrew Barram (Barram) as an expert witness. Barram has provided a number of statements setting out the evidence he intends to give. Only four of those statements are now sought to be relied upon:

- Statutory declaration sworn 13 March 2020 (hereinafter referred to as the first statement).
- Statutory declaration sworn 1 April 2020 (hereinafter referred to as the second statement).
- Statutory declaration sworn 11 June 2020 (hereinafter referred to as the third statement).
- Statutory declaration sworn 21 August 2020 (hereinafter referred to as the fourth statement).

[3] The opinions expressed by Barram rely to some extent on certain facts which are objected to by counsel for the Accused on the grounds of relevance. It will be necessary to consider those objections in the course of dealing with the question of the admissibility of the evidence that is proposed to be given by Barram.

The Defence case

[4] Counsel for the Accused intends to raise the defence of self-defence and defence of another person under s 43BD(2) of the Code. Counsel for the

Accused also intends to rely on the defence provided by s 208E of the Code,[1] and to rely on a defence under s 148B of the *Police Administration Act 1978* (NT) (the PAA). The question of whether or not the last possible defence is available in this case has been referred by me to the Full Court for decision. The Full Court has decided that it is available.

[5] In those circumstances, the issues for the jury are whether or not the Crown is able to prove beyond reasonable doubt either that the Accused was not acting in defence of himself or Constable Eberl at the relevant time, or that if he was so acting, his conduct was not a reasonable response in the circumstances as he perceived them. So far as s 43BD(2) of the Code is concerned, it is well established that the second limb of the defence involves a subjective as well as an objective element. The reasonableness of the response has to be judged objectively to the circumstances as the Accused perceived them to be. The Accused's perception is to be judged subjectively and his perception does not have to be reasonable: see *Burkhart v Bradley*.[2] In the present case, the Accused has not made a statement as to his belief at the relevant time. In order for the Crown to prove at least a prima facie case that it has negatived the second limb, the Crown will need to establish facts which, if accepted by the jury, would enable the jury to infer the nature of

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1 In the submissions before me prior to the Reference to the Full Court, Counsel for the Defence stated that the Accused no longer intended to rely on s 208E of the Code. When the matter was argued in the Full Court, the Accused maintained that he did intend to rely on this defence at trial. I have considered the questions of admissibility on the basis that s 208E will be raised at trial as a separate defence.

2 [2013] NTCA 5; (2013) 33 NTLR 79 at para [27]; and see *R v Hutchinson & Wilkinson* [2018] NSWSC 1759 at [309] per Hamill J; *Doran and Brunton v DPP* [2019] NSWSC 1191 at [42], [49]-[50].

the Accused's actual perception at the relevant time. So far as the defence under s 208E of the Code is concerned, the Crown would need to show that the Accused was not at the time acting in the course of his duty as a police officer, or that his conduct was not objectively reasonable at the time. So far as the defence under s 148B is concerned, the Crown would need to show that at the time the Accused fired the second and third shots into the Deceased's body, he was not acting in good faith in the exercise of a power or function under the PAA.

The Crown case

[6] The Crown intends to lead the following evidence at the trial:

1. The Accused is police officer Zachary Brian ROLFE. The Accused joined the Northern Territory Police Force on 30 May 2016, completing 6 1/2 months of training at the Northern Territory Police Fire and Emergency Services College (NTPFES) and graduating on 7 December 2016. Following his graduation the Accused was posted to Alice Springs Police Station where he has served in General Duties since this time. The Accused has undertaken additional training whilst in Alice Springs as part of the Immediate Response Team (IRT) which is a command asset within Alice Springs, comprising duties members who have undertaken additional skills enhancement and perform these duties in addition to their primary policing role. This role is undertaken as required on a necessity basis.

2. The alleged victim (now deceased) in this matter was a 19 year old male (Charles Arnold WALKER) who resided in Yuendumu Community. On 26 June 2019 the Deceased was sentenced to 16 months imprisonment (Case 21911252 refers), backdated to 22 February 2019, in relation to an aggravated assault, assault police and other offences. The Deceased was released after serving 8 months imprisonment with the balance suspended for 12 months from his date of release. After his release from prison on 14 October 2019 the Deceased signed an agreement with Community Corrections to abide by a curfew (7.00pm to 7.00am) and other conditions including wearing an Electronic Monitoring Device (EMD) and remaining at a nominated residence — Central Australian Aboriginal Alcohol Programs Unit (CAAPU) in Alice Springs.
3. On Tuesday 29 October 2019 at 12:41am, Community Corrections reported to police that the Deceased had removed his EMD at CAAPU and could not be located on site.
4. At about 6:30am that same date, Alice Springs Police attended residences known to be linked to the Deceased in an attempt to locate him, including House 6, Warlpiri Camp. The Deceased was not located.
5. On Wednesday 30 October at about 8:00am, Alice Springs police re-attended House 6 Warlpiri Camp in an attempt to locate the Deceased. He was not located.

6. On Tuesday 5 November 2019 a warrant was issued for the arrest of the Deceased with regard to a breach of order suspending sentence.

7. On Wednesday 6 November 2019, Yuendumu Police members, Senior Constable First Class Christopher HAND and Senior Constable Lanyon SMITH attended House 577 Yuendumu Community in an attempt to arrest the Deceased in relation to his breach. This attempt resulted in the officers being threatened by the Deceased who had armed himself with a small axe, before decamping the residence and fleeing from pursuing members. Sergeant Julie FROST, the officer in charge of Yuendumu Police Station sought to negotiate with the Deceased's family to have the Deceased hand himself in after a local funeral had concluded.

8. On Thursday 7 November 2019 at about 3:00pm, Sergeant Evan KELLY briefed his patrol group about the Deceased and informed them that he was an arrest target. The patrol group comprised a number of police officers, including Constable James KIRSTENFELDT and the Accused. At 3:16pm, the Accused accessed the Body Worn Video (BWV) of the axe incident on 6 November 2019. The Accused, KIRSTENFELDT and other members of Sgt KELLY'S patrol group viewed the footage of the incident. The Accused also accessed the Deceased's PROMIS records.

9. During this shift, the Accused and his partner Constable Mitchell HANSEN conducted enquiries to locate the Deceased in Alice Springs.

Their enquiries identified Warlpiri Camp, House 6 as a location of interest.

10. A short time before 6:30pm, the Accused briefed other members of his patrol group, including KIRSTENFELDT, in the carpark of the Bunnings store, nearby to Warlpiri Camp. House 6 Warlpiri Camp was identified on a map and members of the patrol group were allocated positions to form a cordon around the house. A plan was devised whereby it was identified that as there was a risk of the Deceased being armed, police would try to get the Deceased to leave the house.

11. At about 6:36pm, the Accused, KIRSTENFELDT and other police entered Warlpiri Camp and attended House 6. There was no response to the door knocks and it was determined by Sgt KELLY that police did not have sufficient grounds to force an entry into the house. As a result the cordon was dispersed and police left the location.

12. Later that evening at 8:11pm, Constable HANSEN and the Accused again viewed the BWV of the axe incident on 6 November 2019. The Accused and Constable HANSEN discussed the incident and what they might have done in that situation.

13. On Saturday 9 November 2019 four police members from the IRT were called on duty, being the Accused, Constable First Class Anthony HAWKINGS, Constable First Class Adam EBERL and Constable James KIRSTENFELDT, along with one dog handler Senior Constable First Class Adam DONALDSON.

14. At about 2:30pm at the Alice Springs Police Station, the Accused and other IRT members received a briefing from Acting Sergeant Shane MCCORMACK. The Accused and other IRT members also viewed the BWV of the axe incident on 6 November 2019. The members were instructed to attend Yuendumu in order to provide relief for the local police and arrest the Deceased the following morning.

15. At about 4:00pm, the Accused and KIRSTENFELDT departed Alice Springs in one police vehicle with EBERL and HAWKINGS together in a second vehicle. DONALDSON had departed Alice Springs earlier and arrived at Yuendumu at about 5:42pm and was conducting patrols.

16. At 4.59pm, Sgt FROST sent an email to Sgt MCCORMACK and the four IRT members setting out details of the IRT deployment, including most relevantly the situation in relation to the Deceased and the operational plan for the arrest of the Deceased at 5:00am on Sunday 10 November 2019.

17. The Accused and KIRSTENFELDT arrived at the Yuendumu Police Station at about 6:33pm, and at about 7:00pm, Sgt FROST briefed the Accused and KIRSTENFELDT. FROST instructed them to obtain intelligence as to the whereabouts of the Deceased, to conduct high visibility patrols of the community and respond to incidents throughout the night. The operational plan for the arrest of the Accused was that the following morning at 5:00am, the IRT along with a local police

officer (ALEFAIO) would attend the Deceased's known local address and arrest him.

18. By the conclusion of the briefing by Sgt FROST, Constables EBERL and HAWKINGS had arrived at the police station. The Accused provided the IRT members with a briefing during which they devised a plan to gather information and intelligence as to the whereabouts of the Deceased.

19. The IRT officers all had body-worn cameras activated, the footage from which includes the shooting of the Deceased, from which the following is largely drawn.

20. The IRT then left the police station at 7:06pm and arrived at House 577 at 7:11pm and took up a cordon position. The Accused spoke with witness Ethan ROBERTSON in the yard and stated "We are here to grab Arnold up OK". The Accused was advised by ROBERTSON that the Deceased was not present at the house. The Accused then requested permission to enter the house to search for the Deceased and then using his mobile phone, asked ROBERTSON to show him on a map of Yuendumu where the Deceased may be.

21. The Accused then advised ROBERTSON that he was going to search the house. Just prior to entering the house, the Accused was advised by KIRSTENFELDT that the Deceased was residing at that house, had left three minutes ago and that he would be returning there to stay for the night. The Accused then entered the house with KIRSTENFELDT

following. As the Accused passed through the kitchen area and entered the main living area, he placed his right hand on his pistol, depressed the hood button and rotated the hood closure forward, thereby disengaging two of the three holster retention devices to enable a fast deployment of his firearm. The Accused maintained this grip on his firearm as he conducted a search of the house. At the conclusion of the search, the Accused returned the hood closure on his holster to the secure position and removed his hand from his pistol. The Accused and KIRSTENFELDT then left the house.

22. Upon leaving the house, the Accused again approached ROBERTSON who indicated that the Deceased's mother resided in an area on the other side of the oval, in either House 511 or House 518. The Accused and the other IRT members then left this house at 7:14pm.

23. At 7:18pm, the Accused and KIRSTENFELDT arrived outside House 518, along with the other IRT members. DONALDSON parked near House 512 and remained there.

24. Witnesses Leanne OLDFIELD and Nathan COULTHARD saw the Deceased enter House 511 just as police arrived.

25. The Accused directed KIRSTENFELDT to check House 518 and then stated that he would check the house that he was walking to, being House 511. Constable EBERL also walked into the yard of house 511.

26. The Accused jumped over the fence into the yard of House 511 and approached the boundary fence with House 518 and spoke with witness

Rachel LEWIS at 7:19pm. The Accused asked LEWIS to come over to the fence and the Accused told her "We're here to grab up Arnold hey" and asked where the Deceased and the Deceased's girlfriend Rekeisha ROBERTSON were. The Accused showed LEWIS a picture of the Deceased on his personal mobile phone and she stated she did not know the Deceased.

27. The Accused was then approached by EBERL who asked which house they were looking at. ROLFE stated "It could be either of them but I think 511". The Accused and EBERL then walked along the front yard of House 511 at 7:20pm and EBERL stated to ROLFE "Someone just went in the back" and pointed to House 511.

28. The Accused spoke with witnesses Leanne OLDFIELD and Elizabeth SNAPE who were in the front yard of House 511 and asked where the Deceased and Rekeisha ROBERTSON were. They stated they did not know. The Accused asked whose house he was at and OLDFIELD stated "Margaret's but they still in um...". The Accused asked if he could check inside and OLDFIELD stated "Go, go (inaudible)". The Accused asked "Go check inside?" and then proceeded to walk behind EBERL to the entrance door of House 511. The Accused stated on police radio "Me and Adam are just gonna clear this red house".

29. At 7:20pm EBERL was in front of the Accused as they entered the front door, EBERL produced his torch and illuminated the Deceased who was standing at the opposite end of the room. The Accused and EBERL

asked the Deceased what his name was. The Deceased replied "Vernon DIXON" and repeated this name several times as he walked forward.

30. EBERL stopped the Deceased from walking forward and told him to stop walking. The Accused told the Deceased "Just come over here for a sec" and guided the Deceased to a position where he stood with his back against the wall and held the Deceased there with his right hand.

31. The Accused told the Deceased to be calm and advised him that he was going to put a phone next to his face, before removing the Deceased's cap from his head with his right hand. The Deceased took hold of his cap and returned it to his head.

32. The Accused placed his hand on the Deceased's chest and told the Deceased "I need this hat off' and again removed the Deceased's cap from his head and dropped it to the ground. The Deceased bent over to pick up his cap, retrieved it from the ground and placed it back on his head, whilst EBERL told him to leave his hat off and not to put it on.

33. The Accused again held his right hand against the Deceased's chest and placed his mobile phone next' to the Deceased's head to attempt to identify the Deceased, and told him to look straight ahead. The Deceased stated "That's not me" and "My name is Vernon DIXON".

34. At 7:21pm, as the Accused removed his mobile phone from next to the head of the Deceased, the Accused stated "Easy mate, easy, just put your hands behind your back" and after putting his phone away, used his left hand to push on the right wrist of the Deceased.

35. The Deceased pushed the Accused's left arm away and a struggle ensued as EBERL and the Accused attempted to restrain the Deceased. During the struggle, the Deceased produced a pair of small medical scissors from his right side and, using his right hand, stabbed the Accused once to the Accused's left shoulder which subsequently required medical attention.

36. The Accused stepped back, drew his firearm and, as EBERL and the Deceased continued to struggle, the Accused fired one shot, at 7:22:01pm which struck the Deceased to the middle right region of his back.

37. EBERL took the Deceased to the ground on top of a mattress on the opposite side of the bedroom. As the Deceased lay on his right side with his right arm holding the scissors beneath him, EBERL was partially on top of him. EBERL had pinned the Deceased's left leg and had his right arm around the Deceased's neck to control the Deceased.

38. The Accused moved forward towards EBERL and the Deceased and using his left hand, placed it upon EBERL'S back as EBERL remained on top of the Deceased. The Accused then fired a second shot fired 2.6 seconds after the first shot, followed by a third shot fired 0.53 seconds after the second shot. Both of these shots were at point blank range entering the Deceased's left chest area. One of these shots was the fatal shot. This was witnessed by Constable HAWKINGS who was standing at the front door of house 511.

39. The Accused then holstered his firearm and assisted EBERL in attempting to handcuff the Deceased, who was still struggling. The Accused stated "It's all good. He was stabbing me, he was stabbing me. It's all good. He's got scissors in his hand, he was stabbing me, he was stabbing you".
40. The Accused and EBERL had to force the right arm of the Deceased out from beneath him to place it behind his back for handcuffing. The Deceased's right hand still held the scissors during this process.
41. The Deceased was restrained with handcuffs and immediately removed from the location by the Accused and EBERL to a police vehicle outside House 511. As they left the house, KIRSTENFELDT asked "What have we got. Are we going to the station". The Accused replied, stating "Three gunshot wounds".
42. From there, the Deceased was transported to the Yuendumu Police Station where first aid was administered by police members. Due to evacuation of medical staff from the community earlier in the afternoon, no clinic staff were available to assist. Medical staff were dispatched from Yuelamu Community to assist.
43. The Deceased was declared deceased at 9.28pm by Heather ZANKER RN.
44. On Tuesday 12 November the Accused was spoken to by investigating-members (Detective Sergeant Kieran WELLS and Senior Constable

First Class Daniel RALPH) and formally declined to participate in an electronic record of interview.

45. On Wednesday 13 November 2019 at 5.10pm the Accused was arrested in Darwin and a s 140 PAA conversation took place during which the Accused further declined an opportunity to participate in an EROI. He was transported to the Darwin Watch-house and subsequently charged with murder. Police bail was refused however he was granted conditional bail upon review by John BIRCH LCJ.

46. On Tuesday 12 November 2019 a Post Mortem examination was conducted by Pathologist Doctor Marianne TIEMENSMA. Pathological findings showed that the Deceased had suffered one gunshot entrance wound close to the right infero-medial thoracic area of the back (no vital organs were injured), and two gunshot entrance wounds to the left infero-lateral aspect of the chest, in very close proximity to each other (one was fatal, no vital organs were injured by the other). The cause of death was stated as a gunshot injury to the chest and abdomen.

47. The conduct by the Accused, in shooting the deceased, caused the Deceased's death. By shooting the Deceased, the Accused intended to cause serious harm to the Deceased.

48. The Crown case is that the Accused ignored the operation plan as communicated by Sgt FROST, thereby increasing the likelihood of needing to use lethal force.

49. The Crown case is that the Accused and other IRT officers did not discuss (before entering either House 577 or 511) any plan if they found the Deceased at either house or what they would do if the Deceased had a weapon or any discussion about deploying options other than lethal force.

50. The Crown case is that the Accused did not have belief on reasonable grounds to lawfully enter House 577. Furthermore, the actions of the Accused in entering House 577 in silence, releasing two retention devices from his holster and gripping his police firearm were inconsistent with the NT Police use of force philosophy, relevant safety principles and defensive tactics training. The Accused did this in total disregard of critical information that he knew about the Deceased and the level of risk the Deceased posed to police if confronted. These actions demonstrated that in spite of having a range of alternative less than lethal tactical options available to him, the Accused intended to use his firearm as his first option if confronted by the Deceased.

51. The Crown Case is that the Accused did not have belief on reasonable grounds to lawfully enter House 511.

52. Furthermore, that doing so was contrary to the operational plan, and given the Deceased's immediate prior history, placed the Accused and Constable EBERL in a potentially very dangerous situation. The Accused's approach to the Deceased to compare the Deceased's face to a photo on his phone, without obtaining any sort of control over the

Deceased, was contrary to his training and put himself in a potential position of danger.

53. At the time of the first shot, the Accused intended to use his firearm as his first option if confronted by the Deceased.

54. At the time that shots 2 and 3 were fired by the Accused, the Deceased was laying on the ground and controlled by Constable EBERL. The Deceased's right hand holding the scissors was trapped beneath the Deceased. The Deceased did not have the intent, ability, means or opportunity to assault the Accused or Constable EBERL.

55. The Crown case is that, against the background set out above, shots 2 and 3 were unjustified as they were unreasonable, unnecessary and disproportionate to the circumstances and in spite of having a range of alternative less than lethal tactical options available to him. In particular, the Crown contends that if the Accused was intending to defend Constable Eberl, there is at least a prima facie case that he must have realized that, because of his training, his actions were not a reasonable response in the circumstances as he believed them to be (s 43BD(2)(b) of the Code). Further, that there is a prima facie case that the Accused was not then acting in the course of his duty, or if he was, his conduct was not objectively reasonable (s 208E). Furthermore, when the Accused fired shots 2 and 3 there is a prima facie case that he was not doing so in the exercise of any power or function under the PAA.

Expert evidence of Barram

[7] The admissibility or otherwise of expert evidence depends upon the provisions of the *Evidence (National Uniform Legislation) Act 2011* (NT) (ENULA). Section 76(1) provides that "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed" (the "opinion rule"). Section 79(1) provides for an exception to the opinion rule:

> If a person has specialised knowledge based on the person's training study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

[8] There is no definition in ENULA as to what is meant by "specialised knowledge". In *Honeysett v The Queen*,[3] the High Court said:

> Section 79(1) states two conditions of admissibility: first, the witness must have "specialised knowledge based on the person's training, study or experience" and, secondly, the opinion must be "wholly or substantially based on that knowledge". The first condition directs attention to the existence of an area of "specialised knowledge". "Specialised knowledge" is to be distinguished from matters of "common knowledge". Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience. However, the person's training, study or experience must result in the acquisition of *knowledge*. The *Macquarie Dictionary* defines "knowledge" as "acquaintance with *facts, truths, or principles* as from study or investigation (emphasis added) and it is in this sense that it is used in s 79(1). The concept is captured in Blackmun J's formulation in *Daubert v Merrell Dow Pharmaceuticals Inc*: "the word 'knowledge' connotes more than subjective belief or unsupported speculation … [It]

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3 [2014] HCA 29; (2014) 253 CLR 122 at 131 [23].

applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds".

The second condition of admissibility under s 79(1) allows that it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends "observations and knowledge of everyday affairs and events". It is sufficient that the opinion is *substantially* based on specialised knowledge based on training, study or experience. It must be presented in a way that makes it possible for a court to determine that it is so based.

(footnotes and citations omitted)

[9] Barram's expertise is set out at some length in his first report. In short, he has been a member of the Northern Territory Police Force since 1997, and is currently posted to the Professional Standards Command (since 26 August 2019). For seven years prior to that he was Officer in Charge of the Operational Safety Section (OSS), which is the in-service training authority for the Northern Territory Police Force with responsibility for all Northern Territory Police Operational Safety Tactics and Training (OSTT), other than specialist tactical training carried out by the Territory Response Group (TRG). The main disciplines the OSS is responsible for are Defensive Tactics, firearms, other Police weapons, incident management, Police Use of Force, tactical Communications and Emergency Care Management Program First Aid Training. His duties included oversight of all aspects of OSS training, and writing and reviewing training packages. He is also a qualified instructor in all OSS disciplines. He has delivered education and training in relation to the practical and theoretical applications of use-of-force options available to police in operational policing situations including in the lethal use-of-force, training in the use of Northern Territory Police issued firearms, and less than lethal use-of-force options (TASERS, handcuffs, baton skills, OC spray, empty hand tactics, tactical communication skills, cordon and containment. He also has professional qualifications in various police disciplines including as an instructor in the use of capsicum spray, Defensive Tactics, Firearms Instructor, Incident Management Instructor, and

Tactical Communications Instructor. He has represented the Northern Territory Police in various national forums on police use of force and related issues and is a member of the International Association of Law Enforcement Firearms Instructors. He has in his various roles reviewed many incidents that involved force used by and/or against members of the Northern Territory Police Force. He has previously given evidence on police use-of-force in the Northern Territory's Supreme Court, Local Court and Civil and Administrative Tribunal. He also has qualifications in various martial arts disciplines. No objection was raised as to his qualifications to express his opinions on most of the matters contained in his reports, although there is an objection to such of his opinions as intrude into the functions of the jury because the jury is capable of reaching its own conclusions without the need for opinion evidence, and also to expressions of opinion which it is submitted go to the ultimate issues to be decided by the jury.

The opinion of Detective Senior Sergeant Andrew Barram

[10] Barram's opinion is substantially contained in the first statement. It is based upon various statements, photographs, body worn footage and medical and training records. He has familiarised himself with the records specifically relating to the training of the Accused in the use of force. He has also had regard to a General Order titled *General Order and Instruction: Operational Safety and the Use of Force*, which states:

> Members should only use force that is reasonable, necessary, proportionate and appropriate in the circumstances. Members should use the minimum amount of force required for the safe and effective performance of their duties.

[11] Barram also refers to guidelines and models provided to police to support decision making regarding the use-of-force by police. These are covered early in Police Recruit training and are constantly reiterated through their

months of training in the Police College. They are further reiterated as part of mandatory annual requalification training. Barram states that there are ten operational safety principles which relate to everything an officer does operationally, which are set out in a document referred to as the Facilitator Guide Defensive Tactics Session 1- *Defensive Tactics Model No NTP/100 Trainee Constable*. He also refers to a model for a planned response taught to police called the ICENCIRE Plan. In relation to the Defensive Tactics model, he refers to a chapter on Edged and Blunt Weapon awareness and states that under the model, scissors are an edged weapon. He refers to a number of drills in defensive tactics and firearms training involving responding to edged and other weapon attacks, including practicing versions of a police training exercise called the "Tueller Drill" to prepare officers for what to expect in a short-range edged weapon attack when the officer still has his or her firearm holstered. He then refers to what police are taught regarding the theory and proper handling of firearms, and the four safety rules which are reinforced by firearms instructors.

[12] Barram further states that it is a requirement for police to maintain qualification in OSS disciplines annually. He referred to records maintained by the Police of the Accused's most recent firearm requalification and also to the exams completed by the Accused during his recruit training which Barram states indicate that the Accused achieved very high to perfect results showing a thorough understanding of all of the above concepts and procedures.

[13] Barram then reviewed the facts leading up to the shooting of the Deceased. He notes that the Accused was compliant with the General Order relating to the minimum accoutrement carriage requirements and in particular that the Accused was equipped with a Glock pistol, spare magazine, handcuffs and a TASER. Barram also notes that the Accused was a member of a part-time "Immediate Response Team" (IRT), which is made up of General Duties and

other members of the Police Force who have received some additional tactical training which is carried out by the Territory Response Group (TRG), but there was no record available to him for this training.

[14] Barram notes that:[4]

> Rolfe has not provided what his apprehensions and beliefs were at the time of firing the shots, and has exercised his right to silence. Therefore I am unable to consider these mental elements in coming to an opinion about the necessity and proportionality of the force used in this situation.

[15] In the context of self-defence or defence of another, I take it that Barram acknowledges that he does not know what the circumstances were as the Accused perceived them when he fired his pistol: see s 43BD(2)(b) of the Code.

[16] The ultimate conclusions of Barram are that "there is a scenario open in which the firing of [s]hot 1 was justified because in that moment it could have been perceived as reasonable, necessary, proportionate and appropriate in the circumstances. However, the subsequent firing of [s]hots 2 and 3 in rapid succession was not justified because it was not reasonable, necessary, proportionate and appropriate in the circumstances".[5] The opinions thus expressed are clearly referenced to the General Order set out in paragraph [10] above. I note that irrespective of whether or not Barram was entitled to express an opinion relating to the first shot, the Crown is not suggesting that the first shot was unlawful.

[17] In coming to his conclusions, Barram referred to and relied upon what he called the DIAMO+P model.[6] He stated that although this acronym is no longer used, the wording of the model remains as an example taught to

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4 First statement, para 19.

5 First statement, para 20.

6 Ibid, paras 130-159.

recruits as a model for assessing the use of force in a potentially lethal situation, and that the structure of the model remains intact in the *Operational Safety-Session 2 – Incident Management Facilitator Guide*, which is taught to all police.[7] He explains that this model sums up the elements in considering whether the use of lethal force is justified and means:

> **D** – Defence of life/serious harm – Are Police in a position of defending life or at risk of serious harm?
>
> Does the threat presented have the:
>
> **I –** Intent to carry out their action (a threat made or implied)?
>
> **A –** Ability to carry out their intent?
>
> **M –** Means to carry out their action/threat?
>
> **O –** Opportunity to carry out the action/threat?
>
> **P –** Preclusion of all other options – Is there no other option available to police to resolve the incident less forcefully?

[18] In relation to shot 1, Barram's opinion is that each of the questions D to O should be answered 'Yes', and that the answer to question P was that there was no such option available. Barram based his opinion on the assumption that the Accused was acting in defence of Constable Eberl. However, in relation to shots 2 and 3, his opinion was that not all of the elements of the DIAMO+P model had been met because he concluded that the elements of ability, means, opportunity and preclusion had not been fully satisfied. His reasoning is that:

1. When these shots were fired, Constable Eberl was not at immediate risk of serious harm or death because at that time the Deceased was already on the ground with Constable Eberl partially on top of the Deceased,

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7 Fourth statement, paras 9-12.

with the Deceased in a headlock. The Deceased's right arm was pinned underneath him. He had the scissors still in his right hand.[8]

2. The Accused did not use any "dynamic verbal commands" or call on the Deceased to drop the weapon or surrender or give any warning that he was about to shoot. He did not say anything but fired two shots in rapid succession.[9]

3. Although police are trained to fire two shots in rapid succession into the body of a target, there was no need for it by this time as the circumstances had changed since shot 1 had been fired.[10]

4. The Accused had time to consider other options.[11] The Accused could have changed his position to obtain a better view and to make a better tactical assessment of what other options were available.[12] He could have moved into the Deceased's field of vision and called on him to drop the weapon and surrender.[13] He could have used his TASER.[14] He could have holstered his weapon without firing it and assisted Eberl to ground stabilise and handcuff the Deceased.[15]

Other matters of opinion expressed by Barram

[19] In addition to the above matters, Barram commented upon other events and circumstances which he did not rely upon in forming the opinions set out in paragraph [18] above. These were mostly objected to on the grounds of relevance. These comments and opinions included:

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8 First statement, paras 140, 145-147, 149 and 151-153.
9 Ibid, para 141.
10 Ibid, paras 142-144.
11 Ibid, para 148.
12 Ibid, para 155.
13 Ibid, para 156.
14 Ibid, para 157.
15 Ibid, para 158.

1. Police are trained when using a firearm not to fire warning shots and to aim at the "centre of seen mass" of the target, i.e. the centre of the torso as the aiming point.[16] This is not objected to.

2. Following information that the Deceased may be at Warlpiri Camp in Alice Springs on Thursday, 7 November 2019, and after the Accused had seen the body worn video worn by police officers Hand and Smith who were involved in an incident at Yuendumu where the Deceased had produced a hatchet on 6 November, a briefing was conducted and a plan formulated to identify the house at the Camp in Alice Springs where it was believed that the Deceased would be located. The plan involved cordoning off the house then knocking on the door to facilitate the Deceased's arrest by calling him out of the house. The Accused took part in this operation. When the plan was actioned, there was no response to the door knocks. Following that, it was decided that the police did not have sufficient grounds to force entry inside the house and the cordon was disbanded. This was significant because the Accused was involved in this operation which was a good example of the ICENCIRE plan and the 10 Operational Safety Principles, and did not contradict the use of force philosophy, in contrast with what occurred at Yuendumu where the ICENCIRE plan was poorly applied, the 10 Operational Safety Principles were ignored, entry was made without a lawful basis and someone was shot and died shortly thereafter. This contradicts the use of force philosophy.[17] No specific objection was taken to this opinion in relation to the operation at Alice Springs, although objection is taken to a plan later alleged to have been formulated by Sergeant Julie Frost (Frost).

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16 Ibid, paras 30-37, 39.

17 Ibid, paras 58-63.

3. On Saturday, 9 November 2019, after arriving in Yuendumu, Frost conducted a briefing at about 7pm, at which the Accused and Eberl were present and where a plan was discussed. The plan was that the IRT members would conduct high visibility patrols during the evening, obtain intelligence relating to the Deceased's whereabouts and attempt to arrest him around 5am the next morning. Frost also said words to the effect that "of course, if you come across Walker then arrest him". No plan was developed to cover this scenario, which was a probable outcome in a community the size of Yuendumu.[18]

4. That evening, the Accused and Constable Kirstenfeld (another IRT member present at the earlier briefing and at the Warlpiri Camp operation) decided to conduct a "forced entry search" of House 577, which was contrary to the 10 Operational Safety Principles.[19] During the search, the Accused had his hand on his firearm and the holster had been disengaged with two out of the three retention mechanisms disengaged and ready for a fast deployment. The forced entry was not reasonable or necessary and a departure from police training and practice. The Accused having his hand on his firearm with the holster disengaged was a disproportionate use of force and not appropriate to the circumstances given that it was known that there were young children in the house.[20]

5. Subsequently, at about 7:20pm, following information as to the Deceased's possible whereabouts, the Accused and Eberl entered House 511 in order to clear it. In doing so, they put themselves in danger which they should have realized. They conducted a "forced entry search" which should only be used as a last resort, and this was not a last resort. This precipitated the confrontation with the Deceased

18 Ibid, para 68.
19 Ibid, paras 71 and 74.
20 Ibid, paras 72-74.

which could have been avoided if they had followed standard police procedure of "cordon and contain". Little or no regard was paid to the requirement of "safety first". Little, if any, assessment was made of the risk of entering precipitating a confrontation.[21] This evidence is objected to on the grounds of relevance. Some of this evidence is no longer being pressed by the Crown viz paragraphs 86 and 88.

6. There was poor communication between the members to ensure that other members would be in a position to form an effective cordon. It is unclear who was in charge of the IRT members, and there appears to have been no effective command and control being exercised by any of them.[22]

7. The IRT members departed significantly from the plan developed by Frost to arrest the Deceased at 5:00am the next morning following patrols to locate his whereabouts, because the IRT members began searching for the Deceased immediately after leaving the police station.[23]

8. There was no plan or discussion undertaken prior to entering House 511, contrary to their training. If they had properly considered their approach, they should have realised that if they entered House 511, they did not have many options open to them which may have informed their decision to enter the house.[24]

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21 Ibid, paras 83–94.
22 Ibid, para 95.
23 Ibid, para 96.
24 Ibid, paras 97-99.

9. This was not an emergency situation that required immediate search and entry, and there were no circumstances which made it impractical to adopt a 'cordon and contain' approach to the situation.[25]

10. No steps were taken to avoid a confrontation, and the decision to enter House 511 precipitated the confrontation.[26] This is objected to on the ground of relevance.

11. There were also other criticisms of the Accused's conduct, such as not calling for other resources, including deploying a General Purpose Dog which was available, or utilising someone as a negotiator. The Accused and Eberl were chasing a quick result rather than utilising more time to arrange a planned response.[27] Entering the house was not a reasonable tactic at the time because they could have knocked on the door and asked the person they saw to come and talk to them, and if he refused, closed the door and contained him inside, and then employed the ICENCIRE plan to attempt to negotiate a peaceful resolution.[28]

12. Neither the Accused nor Eberl noticed that the Deceased had his right hand in his pants pocket, possibly holding a weapon. Usual practice would be to ask the person to take his hands out of his pockets before closing the distance with the person.[29]

13. Once the police had identified the Deceased, no effort was made to relay this information to other police, which is poor practice and contrary to training.[30]

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25 Ibid, para 100.
26 Ibid, para 101.
27 Ibid, para 105.
28 Ibid, paras 106 and 115.
29 Ibid, paras 107, 110 and 111.
30 Ibid, para 109.

14. Neither Eberl nor the Accused told the Deceased that he was under arrest, contrary to normal police practice.[31]

15. The Accused did not ensure that he had effective control of the Deceased. Had the Accused and Eberl followed their training they should have closed in rapidly and firmly, and taken control of one arm each so that an arrest could be made without further incident.[32]

16. The Accused and Eberl could have used another tactical option, such as baton, OC spray or TASER.[33]

17. Once the Accused had been stabbed, he should have yelled "Knife, knife knife!" which would most probably have prompted Eberl to disengage from the wrestle with Walker, thus removing the immediate danger.[34]

18. No warning was given to the Deceased that the Accused was about to shoot, and there was no call on the Deceased to surrender before the first shot was fired. It is uncertain whether the Deceased would have complied even if this had happened, given his previous behaviour.[35]

The Defence Objections

[20] The starting point is to consider whether any, and if so what, opinions expressed by Barram are relevant. In considering relevance, it is important to identify what the issue or issues are that the opinion evidence proves or

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31 Ibid, para 112.
32 Ibid, paras 113-114.
33 Ibid, para 116 and 121.
34 Ibid, para 121.
35 Ibid, para 127.

assists in proving.[36] In this respect it is to be observed that Barram himself states:[37]

> I have been asked … to review the police tactics and provide an opinion on the force used in an incident that occurred in the Yuendumu Community, Northern Territory on Saturday 9 November 2019, which resulted in Constable Zachary ROLFE shooting Mr Arnold WALKER, and WALKER'S subsequent death due to injuries received. I have also been asked to review some of the events that led up to this incident from an incident management perspective, with reference to NT Police policy and training relating to use of force, operational safety and tactics.

In this respect there is much in Barram's proposed evidence that is not relevant to the opinion that he ultimately gives as to whether or not the use of force by the Accused in firing the second and third shots was justified, for the simple reason that he does not rely upon it in coming to his conclusions about the second and third shots. I refer, in particular, to the matters that are referred to in paragraph [19] above, with the exception of items 1, 14, 15, 16, 17 and 18.

[21] The second point is that Barram expressed no opinion on whether or not the second and third shots were justified in law. His opinion on that subject matter is limited to whether or not those shots complied with Police General Orders and the Accused's training as a Constable in the Northern Territory Police Force. In that respect, his opinion does not go to the ultimate issue which the jury will have to consider in terms of s 43BD of the Code. The question is whether the opinions that he expresses assist in proving that the Accused was not acting in defence of Eberl in circumstances where his conduct was not a reasonable response in the circumstances as the Accused perceived them. I use the words "assist in proving" because, as I have already mentioned, Barram does not purport to directly answer that question.

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36 *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 at [31]; *Honeysett v The Queen* [2014] HCA 29; 253 CLR 122 at [25].

37 First statement, para 13.

Alternatively, the evidence needs to be considered as to whether it is relevant to proving that the Accused's response was not an objectively reasonable one. Also, his evidence needs to be considered as to whether it is relevant to whether or not the Accused was acting in accordance with his powers and functions under the PAA.

[22] So far as Barram's opinion goes as to whether or not the second and third shots complied with Police General Orders and his training as a Constable are concerned, objection is taken to certain paragraphs in the first statement. The objections taken are that the opinions expressed are "an inadmissible attempt to resolve the ultimate issue to be considered by the jury"; that the opinions are irrelevant, and that they are not wholly or substantially based on the expert's specialised knowledge. So far as the objection relates to the "ultimate issue", the opinions do not go to the ultimate issue for the reasons expressed above. If they go to the ultimate conclusions reached by Barram on the question he has sought to answer, the question then is whether they are relevant. Section 80 of ENULA provides that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue or a matter of common knowledge. If the fact in issue is whether or not his conduct was not justified because he did not comply with the General Orders or his training, that is a different question which raises other considerations.

[23] I will now deal with the various paragraphs in the first statement which are objected to. These are dealt with seriatim below.

[24] **Paragraph 13:** This is referred to in paragraph [20] above. It is not inadmissible. It shows what his opinions are intended to be about.

[25] **Paragraph 20:** This is a summary of his opinions relating to shots 1, 2 and 3. I am concerned that the opinion relating to shots 2 and 3 is potentially misleading because it is expressed in terms using the words "not justified because it was not reasonable, necessary, proportionate and appropriate in

the circumstances", which harks back to the words in bold below in the General Order relating to the Operational Safety and Use of Force, (Annexure A to the Barram report of 13 March 2021), the text of which is not directly referred to in the report. Annexure A refers to the following:

> **The following principles underpin this General Order:**
>
> - The authority to use force is derived from the law. Individual members are accountable and responsible for their use of force and must be able to justify their actions at law.
> - **Members should only use force that is reasonable, necessary, proportionate and appropriate to the circumstances.** Members should use the minimum amount of force required for the safe and effective performance of their duties.
> - Force should only be employed in a manner consistent with the provision of the *Criminal Code Act* or any other legislation empowering members to use force.
> - Improper use of force undermines the legitimacy of police, erodes public confidence and respect for police.
> - Governance structures be maintained to report, record, monitor and evaluate the use of force to improve public and police safety.
> - The success of an operation will be primarily judged to the extent to which use of force is avoided or minimized.

[26] The words in bold reflect earlier iterations of the defence of self-defence or defence of another which no longer represent the law. For example, the original *Criminal Code,* as passed in 1983, provided that force that will or is likely to kill or cause grievous harm is justified provided that it is not unnecessary force where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result.[38] The opinion, expressed in this way, is apt to

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38 *Criminal Code Act 1983* (NT) s 28(f). See also the common law as then expressed in *Viro v The Queen* (1977) 141 CLR 88 (subsequently overruled in *Zecevic v The DPP* (1987) 162 CLR 645).

mislead, because it is not clear from Barram's report that he is referring to this general principle, and in any event, the wording of the general principle does not reflect the present law. Although I consider that Barram has the expertise to make the opinion expressed in these terms, and although they do not go to the ultimate issue, even if they do go to a fact in issue, they should be excluded in the exercise of my discretion under s 135 of ENULA because they are misleading, and I doubt if any instruction to the jury would be effective. However, I consider that Barram should be permitted to give evidence that the conduct was not in accordance with the Accused's training and not in accordance with the *Operational Safety-Session 2 Incident Management Facilitator Safety Guide* or DIAMO+P model. He should also be able to give evidence that the firing of the second and third shots was not necessary and unreasonable in his opinion. Although this expresses an ultimate conclusion about whether or not the Accused's conduct was objectively reasonable, s 80 of ENULA does not make that opinion inadmissible only because of that.

[27] **Paragraph 74:** This paragraph refers to the decision to enter and search House 577 and the use he made of his pistol holster in partially disengaging it, and is not relevant to his ultimate conclusion. However, the Crown wishes to rely upon it for another purpose. Subject to whether it is admissible for another purpose, this paragraph is irrelevant.

[28] **Paragraph 83:** This refers to the decision to enter and clear House 511, in which Barram discusses the risks associated with that decision. That paragraph is not relevant to his ultimate conclusion. However, the Crown wishes to rely upon it for another purpose. Subject to whether it is admissible for another purpose, this paragraph is irrelevant.

[29] **Paragraphs 84-90:** These paragraphs relate to whether or not the Accused had entered House 511 lawfully. Paragraph 84 is not relevant to his opinion and is not admissible. It is further inadmissible in expressing an opinion on

a matter of law which is not relevant and for which Barram is not an expert. Paragraphs 86 and 88 are no longer pressed by the Crown. Paragraph 87 also is an opinion on the law and not within Barram's expertise, and is irrelevant to his ultimate conclusion. Paragraphs 89 to 90 are also irrelevant and inadmissible for the same reasons. They are not admissible for another purpose.

[30] **Paragraphs 92-114:** Paragraphs 92 to 105 are not relied upon by Barram to reach his ultimate conclusions and are irrelevant, except for paragraph 108. The Crown seeks to rely upon each of these paragraphs, which relate to the 10 Operational Safety Principles, for another purpose. Paragraph 106 relates to the reasonableness of entering House 511. Paragraph 107 relates to the failure to notice that the Deceased had his hands in his pockets when they entered the House. Paragraph 108 relates to the facts relating to Eberl establishing the Deceased's identity and is relevant. Paragraph 109 relates to the lack of communication and coordination between team members, the lack of effective leadership or a plan of action. Paragraph 110 relates to closing the distance between the Accused and the Deceased without obtaining any kind of subject control. Paragraph 111 is a summary of some of the previous matters of poor practice not reflective of police training. Paragraph 112 relates to a failure to tell the Deceased that he was under arrest. Paragraphs 113-114 relate to what is called the RISC Principle for the application of Defensive Tactics and criticises the Accused and Eberl for not closing in on the Deceased rapidly and taking effective control of one arm each. The Crown intends to rely on these paragraphs for another purpose.

[31] **Paragraph 115**, which relates to "Tactical Disengagement" was not relied upon by Barram and is irrelevant. The Crown seeks to rely on this paragraph for another purpose.

[32] **Paragraph 116** relates to other tactical options available once the Deceased resisted arrest, and is relevant.

[33] **Paragraphs 117-120** are relevant to Barram's opinion and are admissible.

[34] **Paragraph 121** relates to a failure to call "Knife, knife, knife!", which is not relied upon by Barram in reaching his opinion. The Crown seeks to rely upon it for another purpose.

[35] **Paragraph 122** refers to the facts immediately before the Accused drew his firearm, and is relevant.

[36] **Paragraph 123** asserts that the Accused had other options open to him instead of firing his weapon, and is relevant.

[37] **Paragraphs 124 and 125** set out facts which are relevant.

[38] **Paragraphs 126 and 127** relate to the Accused's failure to use any dynamic verbal commands or warnings, and are not relevant to Barram's ultimate opinion. The Crown contends that they are relevant for another purpose.

[39] Counsel for the Accused has withdrawn his objection to **paragraphs 128 to 137**, although he submitted that the opinion was not admissible because it was not relevant. These paragraphs relate to Barram's opinion that the firing of the first shot complied fully with the DIAMO+P Model and was therefore justified. In my opinion these paragraphs are relevant because, although the Crown case is that firing the first shot was not unlawful, the circumstances of the first shot need to be considered in contrasting the circumstances of that shot with the second and third shots.

[40] **Paragraph 138** recites some facts which followed immediately after the first shot was fired, which are clearly relevant.

[41] **Paragraph 139**, which deals with "ground stabilisation" is no longer objected to and is clearly relevant.

[42] **Paragraphs 140 and 141** relate to facts relied upon by Barram to reach his conclusions. They are relevant.

[43] **Paragraphs 142 and 143** relate to the practice of "double tapping" and the need to keep firing until a threat has ceased. They are no longer objected to and are clearly relevant.

[44] **Paragraphs 144-160** are a combination of facts relied upon to form Barram's ultimate opinion and the reasons for that opinion. They are clearly relevant.

[45] **Paragraph 161** is a summary of the conclusions that Barram has reached. The first dot point is not relevant because it deals with the entry and search of House 577, and is not relevant to his conclusion about whether the second and third shots were reasonable. The second dot point deals with the entry and search of House 511 and is similarly irrelevant to his conclusions about the firing of the second and third shots. The third dot point summarises his conclusions about the first shot and is relevant for the reasons already discussed. For the reasons given previously in paragraph 26 above, the way this conclusion is expressed is misleading and will not be admitted in that form. However, Barram is entitled to express the opinion that the firing of the first shot was in accordance with police training and with the DIAMO+P Model, and that the firing of this shot was not unreasonable and unnecessary. The fourth dot point is relevant subject to what I have said in paragraph 26 above. I will deal further as to its relevance later.

[46] Barram's second statement deals with the Accused's TASER and whether it was in working order on 9 November 2021. It is not objected to and is clearly relevant.

[47] Objection is taken to the proposed evidence from Barram in his third statement. The purpose of this evidence is to show that the Accused had disengaged two of the three levels of retention security features on the holster which made the firearm less secure when he moved through House 577. His opinion is that this is an indication that the Accused was anticipating and preparing to draw the firearm; a departure from police practice, training and procedure. This evidence is not relevant to Barram's opinion as to whether or not the Accused had complied with the DIAMO+P model at the time of firing the second and third shots and is not admissible on that ground. The Crown intends to rely on this evidence for another purpose, which I will deal with later.

[48] No objection is taken to Barram's fourth statement, which expands upon the DIAMO+P model which he used to analyse the conclusions he reached about whether or not the Accused followed his training, etc. The evidence will be admitted.

Alternative basis of admissibility

[49] There is no doubt in my opinion that the Accused's police training and experience is admissible and relevant in this case to the Accused's state of mind both leading up to and at the time of firing the second and third shots and the reasonableness of the Accused's response. Hiley J reached a similar opinion in *R v Sayson*[39] concerning the admissibility of Barram's evidence in that case. Although, the facts and circumstances of that case are very different, and precisely what Barram's opinion in fact was is not entirely evident from a reading of that judgment, it is illustrative of the relevance of that kind of evidence and how it may be used. Counsel for the Crown referred me to *R v Castanenda (No.3)*,[40] but that case was concerned with the history of a relationship between the Accused and the victim, and also with

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39 [2016] NTSC 60, especially at [26]-[27] and [29].

40 [2015] NSWSC 1104 at [28]-[36].

the admissibility of that history as tendency evidence, which has no bearing on this case. I agree, however, that the objective component in s 48BD and the second limb of s 208E of the Code will involve the jury's assessment of the response of the Accused to the circumstances of the Deceased resisting arrest with an edged weapon, and it is open to the jury to consider his conduct generally in deciding upon the reasonableness of his response when he fired the second and third shots. It would be relevant also to consider that the Accused's conduct up to the time of entry into House 511 was not criticised by any of the other officers involved who conducted themselves in the same way as the Accused did. Were these officers, including the Accused, deliberately ignoring their training, and if so, why? Did this not show a reckless or a negligent disregard for the safety of the Deceased, as well as for their own safety? Is it not open to infer, on one view of the evidence, that there is a prima facie case that the Accused had decided to fire his weapon if the Deceased threatened him or Eberl with a weapon as his *only* response, even if another response was reasonably open to him? Is not the history of the Deceased's use of the axe when Constables Hand and Smith attempted to arrest the Deceased on 6 November 2019, his knowledge of those circumstances and his criticisms of their response, indicative of his state of mind to throw caution and his training to the winds should he find the Deceased and attempt to arrest him? Counsel for the Crown submitted that inferences can be drawn from this evidence in the same way as inferences are usually drawn from circumstantial evidence. Counsel for the Accused submitted that this was nonsense and mere speculation. I do not agree. I think the submission of counsel for the Crown is correct. The evidence which comes from Barram's statements as to the Accused's conduct that day, and whether or not he complied with his training before and at the time of the firing of the second and third shots, is relied upon as circumstantial evidence to draw the inference that the Accused's state of mind was such that the circumstances as he actually perceived them did not warrant the response of firing the second and third shots because that was an

unreasonable response in those circumstances. For there to be a prima facie case, all that is needed is some evidence, no matter how weak or tenuous or vague, upon which a jury could convict.[41] No submission was made that the evidence was relevant to the question of whether or not the Accused was acting in good faith when he fired the second and third shots, but the reasonableness of his conduct would be relevant to an assessment of whether or not he was so acting, if that became an issue.

[50] Counsel for the Crown referred to some authorities which dealt with expert opinion on, inter alia, the ultimate issue. First, I was referred to *Adler & Anor v ASIC*.[42] In that case, ASIC brought proceedings for a civil penalty against Mr Adler and his company. An expert was called to give opinion evidence which went "fairly directly" to the contraventions of the Act in question in relation to the transactions. As an example, one question was: "Would a reasonably careful and diligent director of officer of HIH or HIHC in the position of Mr Adler have caused or procured the payment on 15 June 2000 of $10 million by HIHC to PEE?" The Court of Appeal did not regard the evidence of the opinion in that case to be inadmissible. That case also turned on whether the expert's opinion was wholly or substantially based on his specialised knowledge based on his training, study or experience. In this case, I have no doubt that the opinions Barram has expressed were based on his specialised knowledge, and moreover, that he demonstrated the reasoning process which led to his opinions, which are based substantially on that knowledge.[43] *Forge v ASIC*[44] is a similar case. Barram's opinion evidence is relevant to the objective reasonableness of the Accused's conduct, and is therefore directly relevant to the defence in s 208E of the

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41 *Doney v The Queen* [1990] HCA 51; 171 CLR 207 at [17].

42 [2003] NSWCA 131.

43 See *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85]; *Dasreef Pty Limited v Hawchar* [2011] CLR 21; (2011) 243 CLR 588, at [31], [37].

44 [2004] NSWCA 448; (2004) 213 ALR 574 at [269]-[276]. See also *ASIC v Vines* [2003] NSWSC 1095; (2003) 48 ACSR 291, at [27].

Code and is relevant to the defence of another for the reasons I have expressed in paragraph 49 above.

[51] Another matter that was raised by the Crown is that Barram's opinion that the Accused had failed to comply with General Orders was relevant as setting the minimum standard of behaviour which the community expected police officers to observe, and that the reasonableness of the Accused's conduct could be measured against that standard, and hence Barram's opinion was admissible on that basis also. In *Heiss v The Queen*,[45] the Court of Criminal Appeal said:

> The General Orders make good sense and ought to be carefully observed, but they do not have the force of law and are for guidance only. They can not effect (sic) the lawfulness of an arrest.

[52] Counsel for the Crown referred me to *Rabelais Pty Ltd v Cameron*,[46] which dealt with an action for negligence against a solicitor, in which Hodgson J admitted opinion evidence given by four solicitors as to what a reasonably competent and careful solicitor would or should do in precisely specified circumstances, based on the standards laid down by a Code of Practice approved by the Law Society of New South Wales. Although the opinion was received into evidence, Hodgson said that "it was still open to the Court to say that these standards are too low or (perhaps less probably) more exacting than reasonable care and skill require",[47] and "whether or not the court accepts this opinion, or whether or not it regards this as the appropriate measure of the duty, will be a matter for the Court".[48]

[53] There are cases where "minimum standards" have been considered in deciding whether or not to reject evidence obtained by police under s 138(1)

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45 (1992) 2 NTLR 150, at 162.
46 [1993] ANZ Conv R 457; BC9302077, at 38-41 (Supreme Court of NSW).
47 Supra at 38.
48 Supra at 40.

of ENULA.[49] Those cases are not about the admissibility of evidence to determine what those standards may be, or ought to be found to be, whether based on general orders, or not.

[54] To the extent that Counsel submitted that the measure of reasonableness in cases of defence of another, or in cases where the defence provided by s 208E of the Code is concerned, was to be determined according to standards laid down in General Orders, so that a higher standard was expected of police officers than everyone else, no authority was cited for that proposition, and I do not think that it represents the law. Nevertheless I accept that General Orders may be relevant to the Accused's state of mind and to the objective reasonableness of his response, in the same way as the Accused's training and experience is relevant: see *R v Sayson*.[50]

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49 *R v Gehan* [2019] NTSC 91 [8]-[9] citing *Ridgeway v The Queen* [1994] HCA 66; (1995) 184 CLR 19, at 36; and *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546, at [23].

50 [2016] NTSC 60 at [27].