CITATION:	*Pikos v O'Neill* [2024] NTSC 6
PARTIES:	PIKOS, Anastasios
	v
	O'NEILL, Julie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	LCA 34 of 21 (22035232)
DELIVERED:	1 February 2024
HEARING DATE:	29 March 2022
JUDGMENT OF:	Barr J

CATCHWORDS:

CRIME – Appeal from Local Court to Supreme Court – Appeal against conviction – Errors of law – *Firearms Act 1997* – Whether the findings of guilt are unreasonable or cannot be supported by evidence – Whether there was a miscarriage of justice

Appellant found guilty under *s 76 Firearms Act 1997* in Local Court – Held on appeal that a firearm cannot be classified as unsafe simply because it was loaded – Finding of guilt on Charge 1 was unreasonable – Appeal allowed - Guilty verdict and conviction quashed – Verdict of not guilty entered.

Appellant found guilty under s 78(3) *Firearms Act 1997* in Local Court – Whether charge laid was defective – Whether the charged conduct occurred in a public place – Whether the charged conduct occurred within a town or local government area – Held that it was not established that the finding of guilt was affected by legal error or was unreasonable – Finding of guilt and conviction on Charge 3 affirmed.

Criminal Code Act 1983 (NT), *s 18*

Crown Lands Act 1992 (NT), s 3

Evidence Act 1939 (NT), s 62A(1)

Firearms Act 1997, s 76, s 78(1), s 78(3), 78(5)

Interpretation Act 1978 (NT), s 17

Local Court (Criminal Procedure) Act 1928 (NT), s 163(1), s 171, s 172

Local Government Act 2019 (NT), s 7, s 14(a), s 15

Status of Palmerston Act 2000 (NT)

Summary Offences Act 1923 (NT), s 5

Ashley v Nalder [2007] NTSC 23; *Campbell v Gokel* [2003] NTSC 81; *Dew v Delegate of Anti-Discrimination Commissioner* (1996) 130 FLR 1; *FN v The Queen* [2021] NTCCA 5; *Foster v The Queen* [2021] NTCCA 8; *GAX v The Queen* (2017) 344 ALR 489 ; *Hall v Rigby* [2018] NTCA 1; 275 A Crim R 376; *Hansford v McMillan* [1976] VR 743; *Libke v The Queen* (2007) 230 CLR 559; *Lynch v The Queen* [2020] NTCCA 6; *M v The Queen* (1994) 181 CLR 487; *McDonough v The Queen* [2021] NTCCA 9; *Metwally v University of Wollongong* (1985) 60 ALR 68; *MLW v The Queen* [2022] NTCCA 2; *Morluk v Firth* [2017] NTSC 91; *Pell v The Queen* (2020) 268 CLR 123; *SKA v The Queen* (2011) 243 CLR 400; *Warford v Firth* [2017] NTSC 75; *Willcocks v The Queen* [2021] NTCCA 6; *Wurramarba v Langdon* [2017] NTSC 5, referred to.

REPRESENTATION:

Counsel:

Appellant:	K Roussos
Respondent:	D Payne

Solicitors:

Appellant:	
Respondent:	Office of the Director of Public Prosecutions

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

Pikos v O'Neill [2024] NTSC 6
No. LCA 34 of 21 (22035232)

BETWEEN:

ANASTASIOS PIKOS
Appellant

AND:

JULIE O'NEILL
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 1 February 2024)

Introduction

[1] On 13 October 2021 the appellant was found guilty by Judge Fong Lim in the Darwin Local Court of:

Count 1	Possessing an unsafe firearm Committed on 6 July 2020 Contrary to s 76 of the *Firearms Act*
Count 3	Carrying a loaded firearm in a public place within a town or local government area Committed on 6 July 2020 Contrary to s 78(3) of the *Firearms Act*

[2] The learned Judge convicted the appellant and sentenced him to an aggregate fine of $1200 with victim levies totalling $300. The appellant was also ordered to pay a half-day's costs ($750).

[3] I set out below the specific words of charge 1:

> On the 6th July 2020 at Palmerston in the Northern Territory of Australia; did possess a firearm, namely a Dickinson 12 gauge shotgun, that was unsafe:
>
> Contrary to section 76 of the *Firearms Act*
>
> AVERMENT that the said firearm ... was a firearm within the meaning of the *Firearms Act*

[4] Section 76 *Firearms Act 1997* is extracted below:

> **76 Unsafe firearms**
>
> (1) Subject to this Act, a person must not possess or use an unsafe firearm.
>
> Maximum penalty: 50 penalty units or imprisonment for 12 months.
>
> (2) The holder of a firearms armourer licence or firearms armourer permit may have an unsafe firearm in his or her possession in the ordinary course of his or her business or for the purpose of repairing it.
>
> (3) The holder of a firearms collector licence, antique firearms collector licence, firearms instructor licence or firearms museum licence may have an unsafe firearm in his or her possession.
>
> (4) It is a defence to a prosecution for an offence against subsection (1) for the defendant to prove that he or she did not know and could not reasonably have known that the firearm was unsafe.

[5] I set out below the specific words of charge 3:

> On the 6th day of July 2020 at Palmerston in the Northern Territory of Australia; within the boundaries of a Town, Municipality or Community Government, namely, Palmerston carried a loaded firearm, namely a Dickinson 12 gauge shotgun, exposed to view in a public place, namely Palmerston:
>
> Averments under section 104 [*blank: there were no averments*]
>
> Contrary to section 78 (3) of the *Firearms Act*.

[6] Section 78 *Firearms Act 1997* is extracted below:

> **78 Carrying firearms in public places**
>
> (1) In this section:
>
> ***public place***, see section 5 of the *Summary Offences Act 1923*.
>
> ***town,*** see section 3 of the *Crown Lands Act 1992*.
>
> (2) A person must not carry a firearm exposed to public view in a public place within a town or local government area.
>
> Maximum penalty: 200 penalty units or imprisonment for 12 months or, if the offence relates to a category A firearm or category B firearm, 100 penalty units or imprisonment for 6 months.
>
> (3) A person must not carry a loaded firearm in a public place within a town or local government area.
>
> Maximum penalty: 400 penalty units or imprisonment for 2 years or, if the offence relates to a category A firearm or category B firearm, 200 penalty units or imprisonment for 12 months.
>
> (4) Subsections (2) and (3) do not apply to or in relation to the holder of a firearms employee licence who is carrying out the duties of his or her employment in relation to which the licence was granted.
>
> (5) It is a defence to a prosecution for an offence against this section for the defendant to prove that he or she had a lawful excuse for performing the act that would otherwise constitute the offence.

[7] In relation to the drafting of charge 3, several things may be noted. The charge did not allege that the appellant carried a loaded firearm "in a public place". Rather the charge alleged that the appellant carried a loaded firearm "exposed to view in a public place". Moreover, the charge did not allege that the public place was "within a town or local government area", but instead alleged "within the boundaries of a Town, Municipality or Community

Government". Not only did the charge omit reference to the word "area", but it introduced three concepts or words/expressions not referred to in s 78(3), namely "within the boundaries of a Town"; "Municipality" and "Community Government".

[8] On 1 November 2021, the appellant filed a Notice of Appeal pursuant to s 171 and s 172 of the *Local Court (Criminal Procedure) Act 1928*. On the hearing of the appeal, the appellant sought to amend the Notice of Appeal to substitute the following specific grounds, the subject of an amended Notice of Appeal filed on 24 February 2022:

1. Charge 3 was faulty in its material particularities [sic]. The findings of guilt should be set aside on the ground that the charge was erroneous in law.
2. Charges 1 and 3 are duplicitous, founded on facts which are the same as or similar, thereby contrary to s 18 of the *Criminal Code*.
3. As there was no evidence before the Court to prove that the offences occurred "at Palmerston in the Northern Territory of Australia", the findings of guilt are erroneous in law.
4. The Learned Judge impermissibly considered submissions from the Bar table as evidence after the prosecution closed its case and during her deliberations and thus erred in law.
5. The Learned Judge did not properly differentiate between prosecution and defence onus of proof and failed to give herself the reverse onus and standard of proof direction pertaining to charges 1 and 3.
6. The Learned Judge erred in law by failing to address the defence of lawful excuse in charge 3.
7. The findings of guilt should be set aside on the ground that it is unreasonable, or cannot be supported, and having regard to the evidence a substantial miscarriage of justice has occurred.

General Principles Applicable to Appeals

[9] A party to proceedings before the Local Court may appeal to the Supreme Court from a conviction, order or adjudication on a ground which involves, inter alia, an error or mistake on the part of the Local Court, on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law.[1]

[10] On the hearing of the appeal, counsel for the appellant did not press the second ground of appeal. The remaining grounds 1, 3, 4, 5 and 6 all allege errors of law. Notwithstanding the drafting of ground 7, I propose to treat it as raising distinct grounds: (1) that the findings of guilt were unreasonable or cannot be supported having regard to the evidence and (2) that there was a miscarriage of justice.

[11] As is apparent from the authorities, the contention or conclusion that a verdict is unreasonable or cannot be supported having regard to the evidence is often expressed in terms that the verdict is 'unsafe and unsatisfactory'. The principles governing appeals on this ground have been reviewed in a series of recent decisions by the Court of Criminal Appeal.[2] In brief, the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's

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1 *Local Court (Criminal Procedure) Act 1928*, s 163(1).

2 *MLW v The Queen* [2022] NTCCA 2 at [59]-[67]; *McDonough v The Queen* [2021] NTCCA 9 at [7]-[14]; *Foster v The Queen* [2021] NTCCA 8 at [2]-[4]; *Willcocks v The Queen* [2021] NTCCA 6 at [18]-[24]; *FN v The Queen* [2021] NTCCA 5 at [15]-[21]; *Lynch v The Queen* [2020] NTCCA 6 at [16]-[22].

guilt.[3] An appeal of this kind requires an appellate court to make its own independent assessment of the whole of the evidence, weighing any competing evidence that might tend against the verdict reached by the jury, and determine whether, having regard to any advantages the jury had, it holds a reasonable doubt about the guilt of the appellant.[4]

[12] In *M v The Queen,* the High Court stated:[5]

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence … The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand".
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe and unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regards to those considerations.

[13] The test in *M v The Queen* has been affirmed in subsequent decisions of the High Court.[6] Whether it was open to a jury to be satisfied of guilt beyond a

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3 *Libke v The Queen* (2007) 230 CLR 559 at [113] per Hayne J, approved in *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45] and *M v The Queen* (1994) 181 CLR 487 at 494.

4 *Lynch v The Queen* [2020] NTCCA 6 and the authorities there cited.

5 *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

6 *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14]; *GAX v The Queen* (2017) 344 ALR 489 at [25]; *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45].

reasonable doubt requires consideration of whether the jury *must*, as distinct from *might*, have entertained a doubt about guilt.[7]

[14] These principles have been applied by this Court in appeals against findings of guilt made in the Local Court or the Court of Summary Jurisdiction.[8]

[15] On hearing an appeal, the Supreme Court may (amongst other things):

> (a) affirm, quash, or vary the conviction, order, or adjudication appealed from, or substitute or make any conviction, order, or adjudication which ought to have been made in the first instance; or
>
> (b) remit the case for hearing or for further hearing before the Local Court,
>
> pursuant to section 177(2)(c) and (d) of the Local Court (Criminal Procedure) Act.

Evidence in the Local Court

[16] Evidence was called in the prosecution case from two witnesses: Mason Barnes,[9] and Darryl Yesberg.[10] Mr Yesberg was the owner of the business 'Coolalinga Guns & Ammo'. The prosecution did not tender any exhibits. Following the close of the prosecution case, the appellant gave evidence and was cross-examined. The hearing ran over one day on 13 October 2021.

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7 *Libke v The Queen* (2007) 230 CLR 559 at 596 per Heydon J.

8 See for example *Ashley v Nalder* [2007] NTSC 23 at [3]; *Campbell v Gokel* [2003] NTSC 81 at [44]; *Wurramarba v Langdon* [2017] NTSC 5 at [43], [44]; *Warford v Firth* [2017] NTSC 75 at [10]-[12]; *Morluk v Firth* [2017] NTSC 91 at [33], [34].

9 Transcript pp. 4-8.

10 Transcript pp. 8-17.

[17] Mr Barnes gave evidence as follows. On 6 July 2020 he was a customer inside the Coolalinga Guns & Ammo store premises when a shotgun went off. He knew the appellant because they both worked in the concreting industry. Based on his conversation with the appellant, he thought that the appellant was looking to sell a gun to the store. Mr Barnes had a work-related conversation with the appellant, who gave Mr Barnes his phone to put his number in. Mr Barnes then returned the appellant's phone to him. The store owner, Darryl Yesberg had the gun pointed to the roof. Mr Barnes thought that "there must have been something going on with it".[11]
Mr Yesberg pulled the gun's action back, probably 10-15 times.

[18] In response to a question in cross-examination, Mr Barnes said that he did not see Mr Yesberg pull the trigger and did not see his hand or finger in the trigger guard. He added that he saw Mr Yesberg's finger out of the trigger guard.[12] Shortly after Mr Barnes turned around to walk to another part of the store, the gun went off. He was approximately three or four metres away when the gun went off. There were about six or seven people in the store at the time. Mr Barnes said that some girls present ran upstairs out of concern for a dog which usually slept on the mezzanine. Mr Barnes saw a 35cm to 40cm hole in the mezzanine roof. Mr Yesberg yelled at the appellant and

11 Transcript p 5.

12 Transcript p 7.

then checked if everyone was alright.[13] According to Mr Barnes, the appellant "looked a bit stunned … he didn't say a great deal".

[19] After about 15 minutes, Mr Barnes made a purchase and left the store. The appellant left the store at the same time, taking the firearm with him. Mr Barnes had not seen the appellant bring the firearm into the store, but saw a "bag" on the bench and concluded that the appellant had brought the gun in the bag. Mr Barnes was pretty sure that the gun was in the bag when the appellant walked out of the shop.[14]

[20] Darryl Yesberg gave evidence that he was the proprietor of the Coolalinga Guns & Ammo business, which he had owned for 5 years. He has been a licensed firearm dealer for that time and he had inspected fifteen to twenty firearms a day. He gave evidence that, on 6 July 2020, the appellant entered his shop with a loaded firearm, a Dickinson 12-gauge shotgun. He had known the appellant since he first bought the store. The appellant wanted to sell the gun,[15] but did not give any reason for wanting to sell. The appellant did not give any indication that the firearm was loaded, or may have been loaded.

[21] The procedure normally followed by Mr Yesberg when a customer brought a firearm into the store was to "clear the gun". For the appellant's gun, he pulled the bolt action back three times, or a minimum of three times, and

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13 Transcript p 6.5.

14 Transcript p 7.2.

15 Transcript p 10.4.

cleared the chamber.[16] He physically inspected the chamber and saw nothing in there. He then "slammed it shut again" and held it above his head, pointing towards the ceiling. He pulled the trigger and the gun went off. In cross examination, Mr Yesberg said that he could not understand why he had pulled the trigger, because it was not something he would normally do with a shotgun, to avoid damage to the firing pin.[17]

[22] After the gun went off, Mr Yesberg cleared the firearm again, and this time another live round came out.[18] His conclusion was that, at the time he received the firearm from the appellant, there were two live rounds in the magazine.[19]

[23] Mr Yesberg gave the gun back to the appellant and got cross at him and told him to "eff off". The appellant appeared reasonably calm, and even asked him about a pig hunting competition, which seemed strange to Mr Yesberg. The appellant then put his gun in his bag and walked out of the store.

[24] Mr Yesberg thought that the gun was faulty.[20] He gave a more detailed explanation in cross examination, as follows:[21]

> Normally they're very smooth action guns. As soon as you strike the straight-pull action it will bring up a shotgun [cartridge] up from the magazine. That's how the action works. It comes up from the tube mag

16 Transcript p 9.7.

17 Transcript p 14.9.

18 Transcript p 10.9.

19 Transcript p 10.9, 15.4.

20 Transcript p 10.6.

21 Transcript p 12.1.

> and it goes up into the chamber. I did this three times. There was nothing. And I slammed it on the fourth, gave it a good shuck and put it to the roof. So obviously, I would say the big slamming of the action has unjammed something from inside the mag tube. …
>
> I remember on the fourth time, I gave it a good smack. …
>
> No, I've never seen that fault with one of those shotguns before, no.

[25] The exact fault he identified was that a round was jammed in the magazine tube.[22] However, when asked if anyone would have been able to work out that the gun was faulty, based on the way it was presented to him, he replied, "Those sort of guns, you're not going to know until you actually try to use them".[23] Although he had inspected the chamber on each of the three times he had pulled back the bolt, he did not see a round in there.[24] That meant that the round which he actually fired and the second round which he found on clearing the weapon had been "loaded inside the magazine".[25] Although he agreed that even an experienced gun operator would have trouble detecting that there was a live ammunition in the magazine, he further answered as follows, "If I put four shells in a shotgun and I shoot two, I know there's two left".[26]

[26] Mr Yesberg explained in his evidence in chief that, if he had been made aware that the gun was faulty, he would have taken it out to the back of the store into a blast chamber area in order to take the gun apart and carry out

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22 Cross examination, transcript p 12.8.

23 Transcript p 11.7.

24 Transcript p 13.6.

25 Transcript p 13.9

26 Transcript p 14.2.

an inspection. If it could not be fixed, it would be taken to a gunsmith.[27] Apparently referring to past practice, he told the trial judge, "The customer will actually come and see me before they enter the store, tell me what's wrong with the firearm and then I'll go and handle the firearm appropriately and take it out the back".[28]

[27] The appellant gave evidence. He had held a licence for two years, but had previously been around guns for some years. He purchased the Dickinson 12-gauge shotgun as soon as he got his licence.[29] It was brand-new when he purchased it, and he used it probably once to twice a week. The gun took four bullets. His general standard procedure after using the gun was to check it; make sure it was all clear: "pull the lever back", "probably two, three times"; put it in the case; take it home clean it, and put in the safe.[30] He used a spray to maintain the gun.

[28] The appellant had last used the gun approximately two weeks prior to 6 July 2020, when he had gone pig shooting.[31] After that hunt he cleaned the gun, as he did every time. He also said that he checked the gun to ensure that it was "all clear inside", that is, that there were "no bullets coming out". He was unable to recall how many times he pulled the lever back to check.[32]

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27 Transcript p 11.5.

28 Transcript p 16.8.

29 Transcript p 18.2.

30 Transcript p 19.2, 19.4.

31 Transcript p 19.8.

32 Transcript p 20.4.

[29] The appellant also give evidence as to his standard practice when hunting with the shot gun. That evidence was as follows:[33]

> So when you go pig shooting, when you fire that weapon, how often do you reload?---(Inaudible) because the gun is a (inaudible) gun, if you shoot, then one, two bullets, or one, then you try and put another one back on again, and this I can't remember, like how often you shoot.
>
> Okay, so what if you shoot twice, would you reload?---Yes.
>
> Would you reload in full?---I reload two because for my safety, because I'm not good runner (?), and then that's all – it's usually most of the time, the gun, is when I'm taking it hunting, for my safety, because it's a lot of buffaloes out there, cows pigs you know. Always try to keep it safe.

[30] It is tolerably clear from the above evidence that the appellant's standard practice when hunting with the shot gun was to ensure that the gun was fully loaded, as a safety measure against the feral animals mentioned.

[31] In cross examination, the appellant agreed that when he was out pig shooting, he always reloaded after every shot.[34] The cross examination continued as follows:

> So when you're finished with pig shooting, you then know you've got four shells in the shot gun, correct?---Yes.
>
> You used the shot gun a week before, or two weeks before you said? ---Yes, something like this.
>
> You would have known then that there were four shells in the shot gun, correct?---Probably yes, but not.
>
> So you knew that it was in an unsafe condition?---No.
>
> You just said that you agreed that there were four shells in the shotgun?---I can't give you this answer, no. .....

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33 Transcript p 20.5.

34 Transcript p 23.4.

> So when you returned from the pig shoot, you don't always clear your gun do you?---Yes.
>
> If you cleared your gun each time, you'll have four bullets, you say, every time. What did you do on this occasion?---Can't remember.

[32] Notwithstanding his earlier evidence (referred to in [28] above) that after his most recent pig shooting excursion he cleaned the gun and checked it, the appellant had now admitted in cross examination that he probably had not checked the gun at that time. This admission was in the course of cross-examination, as follows:[35]

> So when you – you also mentioned about cleaning your gun. Do you remember saying that to Mr McLaughlin?---Yes.
>
> And you were worried about rust?---Yes. .....
>
> So if you are going to use one of your firearms, any of your firearms, what would you do first?---Check the gun.
>
> Check the gun. And you'd make sure when you finished with it, it has no bullets left inside, correct?---Yes.
>
> And you didn't do that this time, did you?---In my brain, I done it.
>
> In your brain you've done it?---Yep.
>
> But you didn't do it this time did you?---Probably not.
>
> Probably not?--- I guess.

[33] The necessary conclusion is that the appellant had probably not checked to make sure that there were no bullets left inside the shotgun's magazine at or shortly after the time when he had last used it, at which stage there were probably four cartridges left in the magazine in accordance with the appellant's usual practice to reload after each shot or each two shots fired. I was initially concerned that the context of the questioning reproduced in

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35 Transcript p 24.5, 25.1.

the previous paragraph might have been some other context than immediately following the most recent pig shoot. However, the only evidence given by the appellant to Mr McLaughlin about a specific occasion on which he cleaned the gun was after that most recent pig shoot.[36]

[34] In re-examination, the appellant said that he cleaned the gun in the morning before he left to take it to the Coolalinga Guns & Ammo store. He said also that he checked for ammunition in the gun by pulling the lever back and that "there was nothing – any bullets were coming out".[37] That was consistent with his evidence in chief that the first thing he did in the morning of the day he took the gun to the store to sell was to "get the gun, check and make sure it's clean".[38]

[35] It is apparent from the appellant's evidence in chief that when he took the gun to the Coolalinga Guns & Ammo store, he had it in a bag: "I drive to the shop. I jump out, grabbed the bag, locked my car. Went to Darryl. I said Darryl I want to sell the gun. I put him on the desk, and I left it there".[39] There was some confusion as to whether the appellant transported the gun in a steel box or case, but the reference to the steel safety box was to the storage container at the appellant's house. Defence counsel did not appreciate the difference between that safety case and the bag in which the shotgun was transported to the store, and the evidence in chief became

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36 Transcript p 20.4.

37 Transcript p 25.5.

38 Transcript p 21.1.

39 Transcript p 21.1.

confused as a result. The fact that the appellant carried the shotgun in a bag is consistent with the evidence of Mr Barnes ("there was a bag on the bench"),[40] and Mr Yesberg ("They just carried it in a bag into the store").[41] The weapon was in the back of the appellant's Toyota Hi Lux vehicle: "in the back, in the seat, back seat".[42] It was not in a separate locked compartment. When the appellant arrived at the store he took the gun and walked inside where he told Mr Yesberg that he wanted to sell the gun. He waited about 20 minutes or half an hour before Mr Yesberg was able to attend to him.[43]

[36] I refer below to the evidence and exchanges between counsel and the learned Judge in the Local Court.

[37] In relation to charge 1, the prosecution was required to prove that the appellant's shot gun was unsafe. The prosecutor's closing submission was that the appellant ought to have known that the gun was loaded and therefore that it was unsafe. In full, the prosecutor's submission was as follows (in reference to the appellant):[44]

> He's unsure in relation to [whether] the firearm ... had bullets in it, in terms of he said he probably didn't clear it on the last occasion. Which means he could and should have known and ought to reasonably have known, in relation to s 76 of the *Firearms Act* that the firearm was in an unsafe condition, in that you had at least one if not more shells in there.

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40 Transcript p 7.2.

41 Transcript p 10.3.

42 Transcript p 21.5. See also p 23.9.

43 Transcript p 21.5.

44 Transcript p 26.4.

[38] It may be noted that the prosecution relied on the gun being loaded to establish that it was an "unsafe firearm" for the purposes of s 76 *Firearms Act 1997*. The prosecution did not rely on the evidence of Mr Yesberg that he thought the gun was faulty.[45] To my mind, that is significant. Of equal significance, the judge confirmed that the prosecution case was that the appellant ought to have known that the firearm was loaded and therefore that it was unsafe.[46]

[39] I turn to consider the Judge's reasons for decision in relation to the guilty finding on charge 1.

[40] Her Honour accepted Mr Yesberg's evidence that the firearm was faulty, referring to his "clear opinion" in that respect.[47] Her Honour referred to the fact that Mr Yesberg cleared the firearm at least three times and did not observe any ammunition, whereas, when he pulled the trigger, "somehow ammunition [had] loaded into the chamber". Her Honour concluded that it was clear that the gun must have been faulty.

[41] Her Honour then considered the appellant's knowledge as to whether the firearm was safe and not loaded. Her Honour referred to the appellant's evidence that he always cleaned his guns after use, but could not remember if he did so after the last time he used it; and to the appellant's evidence that

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45 Evidence in chief, transcript p 10.5.

46 Transcript p 26.7.

47 Transcript p 32.2.

he cleaned the gun before he took it to the gun store to sell it.[48] Her Honour considered and accepted the evidence of the appellant that he always reloaded his gun when pig shooting, and concluded that "there was always four shots in the gun for his own safety". Her Honour found that evidence had the ring of truth to it. Her Honour reasoned that the appellant ought to have known that the gun was loaded when he took it home. If the appellant cleaned the gun it and cleared it at the time he took it home after that last hunt, or even if he did so the same day he took it to the store to sell it, only some two weeks later, then he ought to have known that the gun was loaded and, having tried to clear it in the usual fashion, he ought to have known that "the shot was not loading in the usual fashion". Accordingly her Honour found the appellant ought to have known there was still ammunition in the gun and should have realised it may be defective.[49]

[42] In relation to charge 1, her Honour found that there was sufficient evidence to prove beyond a reasonable doubt that the firearm was "faulty, unsafe and loaded" when the appellant possessed it. On that basis, she found the appellant guilty of charge 1.

[43] It is necessary to consider the meaning of the term "unsafe firearm" in s 76 *Firearms Act 1997*. First, the fact that a firearm is loaded does not make it an "unsafe firearm". If it were otherwise, then every Territory hunter carrying or shooting a loaded firearm would be committing the offence of

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48 Transcript p 32.5.

49 Transcript p 32.8.

possessing or using an unsafe firearm. Second, an "unsafe firearm" is one which has damaged mechanisms, technical defects or other sources of malfunctioning which affect its safe operation and render it unsafe. Three, the exceptions contained in s 76(2) and s 76(3) provide further legislative context. For example, a licensed firearms armourer may possess an unsafe firearm in the ordinary course of business or for the purpose of repairing it. A licensed firearms collector or antique firearms collector may have an unsafe firearm in his possession, presumably as a collector's piece.

My conclusion is that the expression "unsafe" does not apply to a firearm simply because it is loaded. Moreover, the description "unsafe" attaches to the firearm itself, not to any situation in which the firearm may be possessed or used.

[44] To the extent that the prosecution case in relation to charge 1 was that the firearm was loaded and therefore unsafe, the prosecution could not succeed, for reasons explained by me in the previous paragraph. Even if, contrary to the prosecution case put in the prosecution closing, the prosecution relied on evidence that the firearm was "unsafe" in the sense explained by me in the previous paragraph, the evidence was insufficient to prove that fact beyond reasonable doubt. At its highest, it depended on the opinion of Mr Yesberg that he thought the gun was faulty,[50] with no explanation as to what the fault actually was, as distinct from what may have been its consequences. It is clear that Mr Yesberg did not take the firearm "out the back" and pull it

50 Transcript p 10.5: "I think the gun was faulty, to be honest."

apart to inspect it. The alleged unsafe firearm was not in evidence. No expert had examined the gun with a view to determining the nature and location of the postulated fault. Further, if the basis of Mr Yesberg's opinion was the failure to feed from the gun's magazine, the prosecution had not established beyond reasonable doubt (or at all) that the problem was with the gun's feed mechanism rather than with one or more of the cartridges. The evidence of Mr Yesberg extracted in [24] above, that he gave the gun's action a "big slamming" might well suggest a problem with the feed mechanism but does not exclude the reasonable possibility that one cartridge was "stuck inside the mag tube" because of the physical characteristics of that cartridge.

[45] I conclude that the finding of guilt on charge 1 should be set aside on the ground (ground 7) that it is unreasonable, or cannot be supported having regard to the evidence. Pursuant to s 177(2)(c) *Local Court Criminal Procedure Act 1928*, I allow the appeal in relation to count 1, quash the guilty verdict and conviction, and enter a verdict of not guilty.

[46] Having found that the prosecution failed to prove beyond reasonable doubt that the appellant's shot gun was an unsafe firearm, it is not necessary for me to consider the grounds of appeal relating to the possible defence(s) available under s 76(4) of the Act.

[47] I therefore turn to consider the conviction on charge 3.

[48] The appellant by the first ground of appeal submits that charge 3 contained the expression “exposed to view in a public place”, whereas s 78(3) uses the expression, simply, “in a public place”. That is correct; I refer to my observations in [7] above.

[49] The respondent concedes that charge 3 was in error in so far as it included additional words not contained within s 78(3). The concession was with respect to the words “exposed to view”. The respondent submits that the charge was not defective because it “contained all of the essential elements required in s 78(3)”.[51] That submission may be accepted to the extent it applies to the superfluous words “exposed to view”.

[50] However, the appellant further submits that charge 3 alleges that the relevant public place was “Palmerston”. Although conceding on this appeal that Palmerston is a “township”,[52] counsel for the appellant contends that the charge had to specify the relevant public place within Palmerston. In my opinion, that contention also is correct. The offence charged contrary to s 78(3) required proof beyond reasonable doubt that the appellant carried a loaded firearm (1) in a public place and (2) that the public place was within a town or local government area.

[51] For the purposes of s 78 *Firearms Act 1997*, a ‘public place’ includes “every place to which free access is permitted to the public, with the express or

51 Respondent’s outline of submissions, par 32.

52 Appellant's outline of submissions, 24 February 2022, p 4.

tacit consent of the owner or occupier" and "every road, street, footway, court, alley or thoroughfare which the public are allowed to use".[53]

[52] Further, for the purposes of s 78 *Firearms Act 1997*, the meaning of the word 'town' is obtained by reference to s 3 *Crown Lands Act 1992*, namely: "a town constituted and defined in accordance with this Act or in accordance with a law in force in the Territory before the commencement of this Act". It is unclear on the evidence before the Local Court whether Palmerston was a 'town' as at 6 July 2020. However, I note that, by the *Status of Palmerston Act 2000*, the town of Palmerston was declared to be a city. It is possible that, notwithstanding its status as a city, Palmerston remained a 'town' for the purposes of s 78(3) *Firearms Act 1997*. However, whatever the position, Palmerston is not and was not a public place. Obviously, there are many public places within the city of Palmerston, just as there are large areas which are not public places. The charge is defective insofar as it identifies the relevant public place as "Palmerston".

[53] In relation to that defect, the question is whether the actual public place, the subject of charge 3, was ever identified in the course of the hearing. The prosecutor called evidence without first delivering an opening address. At no time did the prosecutor identify the "public place", proof of which was an essential element of charge 3. The evidence of the appellant, as mentioned above, is that he drove to the shop, jumped out of his vehicle,

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53 *Firearms Act 1997*, s 78(1); *Summary Offences Act 1923*, s 5 pars (a) and (c) of the definition of 'public place' or 'place of public resort'.

grabbed the bag with the gun in it, locked his car and went to see Mr Yesberg. The evidence does not indicate whether he parked his car on a public road or street or, for example, in a private car park. The latter could well have been a "public place" if free access were permitted to the public,[54] but there was no evidence about the place where the appellant parked.

[54] In his closing address, defence counsel referred to the appellant having transported the firearm in his car and conceded, probably referring to the place where the appellant parked his vehicle, intending to go into the store: "There is no question he was in a public place, of course".[55] Defence counsel also conceded shortly afterwards that the store itself was a public place.[56]

[55] The judge found the appellant guilty of Count 3 on the basis that her Honour was satisfied that (within the municipality of Palmerston) "he did carry a loaded firearm from the car to the shop".[57] It may be implied that the finding was in relation to proof of the element of "public place" referred to in [50] above. However, her Honour did not identify the relevant "public place" and appears to have been more concerned with whether or not Coolalinga was in the Municipality of Palmerston, that is, "within a town or local government area", the words used in s 78(3) of the Act. That was the second matter

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54 In *Hall v Rigby* [2018] NTCA 12, 275 A Crim R 376 at [27], the Court of Appeal held that private property in certain circumstances and from time to time, may be a 'public place'. That finding was made in relation to pars (a)-(c) of the definition of 'public place' in s 120A *Police Administration Act 1978*. Those paragraphs are in near identical terms to pars (a)-(c) of the definition of 'public place' in s 5 *Summary Offences Act 1923*, referred to in [51] above.

55 Transcript p 30.7.

56 See transcript p 30.9.

57 Transcript p 34.4.

identified in [50] which the prosecution was required to prove beyond reasonable doubt.

[56] Although the charge was defective, for reasons explained in [52], no objection was taken to that defect by defence counsel at the outset or at any time during the hearing. In terms of evidence, or lack thereof, there was no evidence that the ground over which the appellant carried the loaded firearm from his car to the shop was a public place. There was no evidence that the 'Cooalinga Guns & Ammo' store was a public place. However, both those matters were conceded by defence counsel. On appeal, the appellant is bound by the manner in which counsel conducted his defence in the Local Court.[58] In my opinion, defence counsel made it clear to the Judge that "public place" was not in issue. To my mind, that resolves any issue as to the defect in charge 3. I would not be prepared to allow the appeal on ground 1.

[57] The appellant's ground 2 was not pressed and I therefore turn to consider grounds 3 and 4. These grounds each relate to the requirement, explained in [50], that the public place in which the appellant carried a loaded firearm was "within a town or local government area".

[58] The appellant contends by ground 3 that, because there was no evidence from any witness to prove that the location in which the alleged offences occurred was "at Palmerston in the Northern Territory of Australia", the

58 See *Metwally v University of Wollongong* (1985) 60 ALR 68, at 71.40.

findings of guilt are not founded on facts and are erroneous in law. The appellant contends by ground 4 that the Judge impermissibly considered evidence from the Bar table after the prosecution closed its case.

[59] I referred to Palmerston's (possible) status as a 'town' in [52] above. No indication is given in s 78(1) *Firearms Act 1997* as to the meaning of the expression "local government area", but s 7 *Local Government Act 2019* provides the following definition: "an area that the Territory is divided into for the system of local government established by this Act".[59] The Territory is divided into local government areas having regard to the various factors set out in s 14(a) of the Act. Pursuant to s 15 of the Act, those local government areas are classified as municipalities, regions or shires according to their geographical size, the density of the population and their degree of urbanisation. There is no indication in s 15 as to whether or not designation as a 'city' means that the area of the city is a 'local government area'.

[60] It can be seen that, given the state of the evidence led in the Local Court, Palmerston may have been a 'town'. Alternatively, if it were a municipality, then the municipality of Palmerston was a 'local government area'. A further alternative is that Palmerston was neither a 'town' nor a 'local government area'. The problem raised on this appeal is that there was no evidence as to the relevant status of Palmerston. It seems to have slipped the

59 That definition is applied to all Northern Territory legislation by s 17 *Interpretation Act 1978*, definition of "local government area".

attention of the prosecutor and defence counsel. Indeed, Palmerston's status did not emerge as an issue until the learned Judge was part way through giving reasons for a verdict on charge 3. The transcript extract below indicates what happened:[60]

> Her Honour: ... in relation to charge 3, pursuant to s 78(3), "a person cannot carry a loaded firearm within the boundaries of a municipality". Obviously, Palmerston is a municipality. However, was it not in Coolalinga?
>
> Prosecutor: I think that might be right, your Honour.
>
> Her Honour: And therefore the charge cannot be made [out].
>
> Prosecutor: Part of the [sic] Palmerston is a municipality though, to my understanding.
>
> Defence counsel: Yarrawonga, Coolalinga, Guns.[61]
>
> Her Honour: Is that part of the Palmerston municipality?
>
> Defence counsel: That's my understanding. I would need to check.
>
> Her Honour: Are you sure it is not part of the Litchfield municipality?
>
> Defence counsel: That's the part I need to check.
>
> Her Honour: Because if it isn't, then the charge is not made out. ...
>
> Defence counsel: Yes. I completely understand. Perhaps if your Honour wishes to stand the sentencing down or the findings down for a little while, I will go and find out. ...
>
> Her Honour: ... Well, actually I'll give you five minutes to give me some confirmation that Coolalinga is in the Palmerston municipality. I think it is in the Litchfield municipality.
>
> Defence counsel: Thank you, your Honour.
>
> [Adjourned/resumed]
>
> Prosecutor: ... I rang the Palmerston City Council and I spoke to a lovely lady by the name of Stacey and my learned friend was privy to the conversation on speaker phone. Coolalinga Guns & Ammo is in the municipality of Palmerston.
>
> Her Honour: Okay.
>
> Prosecutor: Curiously the Stuart Highway is not.

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60 Transcript p 33.2.

61 Possibly a reference to the Palmerston suburb of Gunn.

> Her Honour: All right then. So, given it is in the municipality of Palmerston I am satisfied that he did carry a loaded firearm from the car to the shop. He will be found guilty of charges 1 and 3...

[61] It can be seen that defence counsel was remarkably co-operative in what appears to have been a common effort to assist the prosecution to prove an element of the offence charged as count 3. In addition to his earlier helpful suggestion that Coolalinga was part of the Palmerston municipality, he raised no objection to the prosecutor giving evidence from the Bar table that the Coolalinga Guns & Ammo store was in the municipality of Palmerston, and thereby enabled the judge to find, in effect, that when the appellant carried the loaded firearm from the car to the shop he was in the municipality of Palmerston.

[62] At the time of completion of the evidence in the prosecution and defence cases, there was no evidence that the Coolalinga Guns & Ammo store was in the municipality of Palmerston, and on that basis within a local government area. As mentioned in [53] above, the prosecutor had neglected to prove the relevant 'public place'. That was rectified by the concession from defence counsel referred to in [56]. However, proof of "town or local government area" was not rectified by evidence or by the frank concession of defence counsel.

[63] It is unclear on what basis the judge was able to state that "Palmerston is obviously a municipality". That statement may well be correct but there was no evidence in relation to it. One might pose the question, "Is a city a

municipality?". However, I do not know the answer to that question, and counsel have not sought to enlighten me on appeal. As to the further question, whether the Coolalinga Guns & Ammo store and its immediate environs were within a town or local government area, the prosecution had arguably failed to prove an element or elements of the offence charged as count 3. It is clear from the transcript that the judge identified a deficiency in the prosecution case, evidenced by her statements: "... and therefore the charge cannot be made" and later "because if it isn't, then the charge is not made out". What happened after that point was irregular, occurring after prosecution and defence closing submissions, and, as mentioned, part way through the judge giving reasons for decision.

[64] It should be acknowledged that the general rule is that all available evidence on which the prosecution intends to rely to prove the guilt of an accused should be presented before the close of the case for the Crown. That is not merely a technical rule, but an important role of fairness. For example, evidence admitted at a criminal trial after the close of the Crown case may cause a jury to give greater weight to that evidence. However, there are a number of exceptions to the general rule, including evidence relating to a purely formal matter. Such evidence could include, for example, the fact that a particular official whose consent was necessary to a prosecution had

given it, or the production of an appropriately certified copy of regulations.

As Anderson J observed in *Hansford v McMillan*:[62]

> There is a very substantial weight of authority to the effect that an informant may reopen his case to meet an objection that some formal proof of the matter that really does not admit of denial has been overlooked. The common case is where regulations have not been tendered as part of the informant's case, and it has repeatedly been held that the informant may cure this deficiency in his case after he has closed, even to the extent of tendering such formal proof on the return of an order *nisi* to review. In relatively recent times this Court has allowed the curing of such deficiency in proof, almost without comment [citations omitted]. The reason for allowing such deficiency in proof to be repaired is obvious. Though justice is said to be blind, like Janus she looks both ways and while looking to the interests of an accused person to ensure that all elements of an offence are proved, she does not close her eyes to the injustice to the prosecutor when a technicality which virtually does not admit of challenge has been overlooked.

[65] The question arising from the matters discussed in [63] is the consequence of the irregularity. One possible consequence would be that the 'evidence', that is, information provided by the prosecutor from the Bar table after the brief adjournment, should be retrospectively ruled inadmissible and excluded on appeal. It would follow that the position should be restored to what it was prior to the adjournment, when her Honour remarked to the effect that if the Coolalinga store were not part of the Palmerston municipality, then the charge would not be made out. However, given that that the deficiency in proof related to a formal or technical matter, which was made good with the consent or at least without objection from defence counsel, I would not exclude the formal evidence provided by the prosecutor.

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62 *Hansford v McMillan* [1976] VR 743 at 749.45.

[66] Moreover, on this appeal it is appropriate to have regard to s 62A(1) *Evidence Act 1939*, which reads as follows:

> In any complaint or information an allegation that any place is within a local government area or town is prima facie evidence of the fact so alleged.

[67] The question is whether the complaint, the content of which is set out in [5] above, contained an allegation that a place was "within a local government area". In my judgment, it is tolerably clear that this extract: "... within the boundaries of a Town, Municipality or Community Government, namely Palmerston" was an allegation that Palmerston was at least a town or a municipality. As explained in [58], a municipality is one kind of "local government area". The allegations made by charge 3 included an allegation that the charged conduct occurred at a place "within a local government area or town". As a result, s 62A(1) *Evidence Act 1939* applied. The allegation itself was prima facie evidence of the fact alleged.

[68] The reference to *prima facie evidence* is evidence that, unless rebutted, would be sufficient to prove a particular proposition or fact.[63] The evidence was not rebutted, and I conclude that there was sufficient proof that the charged conduct occurred at a place "within a local government area or town" within the meaning of s 78(3) *Firearms Act 1997*.

[69] Grounds 3 and 4 cannot be maintained.

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63 See, for example, *Dew v Anti-Discrimination Commissioner* (1996) 130 FLR 1 at 17; *Carnesi v Hales* [2000] NTSC 98, 117 A Crim R 363 at [18], [21] and [30].

[70] By ground 5, the appellant contends that the judge did not properly differentiate between prosecution and defence onus and burden of proof (presumably counsel meant "onus/burden and standard of proof"). In my opinion, the ground is quite irrelevant in circumstances where there is no suggestion that the judge required the appellant to establish the s 78(5) defence beyond reasonable doubt. If the judge erred in law in failing to give herself the directions which might well be appropriate in a jury trial, that error of law was irrelevant in the facts of this case.

[71] By ground 6, the appellant contends that the judge did not consider whether or not the appellant had a lawful excuse for performing the act that would otherwise constitute the offence. The defence available under s 78(5) *Firearms Act 1997* required the appellant to prove that he had a lawful excuse for performing "the act that would otherwise constitute the offence", the relevant act alleged being the carrying of a loaded firearm in a public place.

[72] In the Local Court, there was no issue that the appellant was carrying a loaded firearm in a public place. His purpose was to sell the firearm to the owner of the gun store. He was not taking it to be repaired. The issue was whether he was aware (had knowledge) that the firearm was loaded. As mentioned in [41] above, the judge considered the appellant's knowledge as to whether the firearm was safe and not loaded. Her conclusion was that, at the time of the alleged offence, he ought to have known that the gun was loaded. That conclusion was very relevant to whether the appellant had

proved on the balance of probabilities that he had a lawful excuse for carrying the loaded firearm. In my opinion, even if the evidence of the appellant were accepted, that he was not aware on the day that the firearm was still loaded, the judge's conclusion was inconsistent with the appellant having any relevant lawful excuse.

[73] Ground 6 cannot be maintained. On the same basis, I would not allow the appeal against the conviction in charge 3 on the basis of ground 7, the assertion that the finding of guilt was unreasonable or cannot be supported having regard to the evidence.

[74] Pursuant to s 177(2)(c) *Local Court Criminal Procedure Act 1928*, I affirm the finding of guilt and conviction on charge 3.

[75] I reserve the question of costs. My preliminary view is that each party should bear its own costs of the appeal. The appellant has been partially successful, but a considerable amount of time was taken up in arguments that were largely unsuccessful.
