Wilson v Brown [2015] NTSC 89

PARTIES:	WILSON, Darius
	v
	BROWN, Steven Edward
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 11 of 2015 (21439344)
DELIVERED:	15 December 2015
HEARING DATE:	9 September 2015
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	E MORRIS SM

CATCHWORDS:

JUSTICES APPEAL – Appeal against conviction – appeal dismissed

CRIMINAL LAW – Appellant is a paraplegic – apprehended on a warrant – placed in caged section on the rear of police utility – resist arrest – police officers assaulted – whether police officers assaulted in the execution of their duty – whether police officers used unnecessary force

EVIDENCE – Whether breach of police General Orders – whether evidence of police officers obtained in consequence of an impropriety – s 138 of the *Evidence (National Uniform Legislation) Act* (NT)

Anti-Discrimination Act 1992 (NT) s 24
Criminal Code (NT) s 1, s 27(a), s 189A

Evidence (National Uniform Legislation) Act (NT) s 138
Police Administration Act (NT) s 158

DPP v AM (2006) 161 A Crim R 219; *Prior v Mole* [2015] NTSC 65, referred to

DPP v Carr (2001) 127 A Crim R 151; *Dumoo v Garner* (1998) 143 FLR 245; *R v Dalley* (2002) 132 A Crim R 169; *Robinett v Police* (2000) 78 SASR 85, cited

Director of Public Prosecutions v Coe [2003] NSWSC 363, not followed

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	A C Swindley

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
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

Wilson v Brown [2015] NTSC 89
No. JA 11 of 2015 (21439344)

BETWEEN:

DARIUS WILSON
Appellant

AND:

STEVEN EDWARD BROWN
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 December 2015)

Introduction

[1] This is a justices' appeal brought by the appellant against his convictions in the Court of Summary Jurisdiction on 10 March 2015 for two counts of assaulting police officers in the course of their duty[1] and two counts of resisting arrest.[2]

[2] The grounds of appeal are that the trial Magistrate erred in finding that:

1. the police officers were acting in the execution of their duty,

2. the evidence of the police officers was not obtained in consequence of an impropriety, and by

[1] s 189A of the Criminal Code (NT).
[2] s 158 *Police Administration Act* (NT).

3. failing to exclude the evidence going to the four counts in a proper exercise of discretion under s 138 of the *Evidence (National Uniform Legislation) Act* (NT).

[3] All three grounds of appeal turn on whether (1) the decision of the police officers to place the appellant in the caged section of the police motor vehicle amounted to an impropriety because it was inconsistent with police General Orders, and (2) the police applied unnecessary force to the appellant before he assaulted them.

The facts

[4] The offender is a 34 year old Aboriginal man who was born in Maningrida. In July 2008 he was in a motor vehicle accident and he sustained a traumatic T10 paraplegia. As a complete paraplegic, the appellant is at risk of sustaining pressure injuries. He has a history of these injuries requiring hospitalisation for treatment. Early in 2014 the appellant spent a considerable amount of time in Darwin Private Hospital having bilateral gluteal flap surgery to treat severe bilateral ischial pressure injuries. In September 2014 he had bilateral trochanteric pressure injuries requiring regular wound care. He requires and has a special pressure relieving mattress to reduce the risk of further pressure injury development.

[5] In September 2014 the appellant was in supported accommodation at Golden Glow Nursing Home and relied on a manual wheelchair for his mobility. He was able to transfer and attend to personal care independently. He had an indwelling urethral urinary catheter which required regular six weekly

changes. The urinary drainage bag required regular emptying throughout the day and was changed weekly.

[6] The appellant also sustained axonal brain damage. The residual effects of his brain injury affect his ability to control his behaviour. He has a history of displays of violent, aggressive and inappropriate sexual behaviour towards nursing staff at the Golden Glow Nursing Home. The appellant consumes alcohol and cannabis on a regular basis.

[7] On 3 September 2014 Senior Constable Ray Stedman and Constable Mehtap Ozdemir were on duty and were travelling along Progress Drive, Nightcliff in a dual cabin police utility which had a caged section on the back for transporting prisoners. They noticed a group of people including the appellant at the entrance to Litchfield Court Flats. There was a warrant for the apprehension of the appellant so the police officers returned to the flats. Constable Ozdemir, who was driving, parked the police motor vehicle. They got out of the vehicle and approached the appellant who was seated in a wheelchair on the footpath.

[8] Constable Ozdemir gave the following evidence in the Court of Summary Jurisdiction.

[9] She asked the appellant his name and he replied, “Cebu”. Constable Ozdemir asked him if he used any other names and he said, “Yes, Darius Wilson.” Senior Constable Stedman had a conversation with the appellant who is known to him. He told the appellant there was a warrant for his arrest

because he failed to appear at court and they needed to sort out the situation at the police station. The conversation lasted some time.

[10] The appellant was mostly cooperative during his conversation with Senior Constable Stedman. He said several times that he was waiting for the police to take him to court. The appellant thought it was the job of the police to take him to court and he got a little irate because they had not done so.

[11] Senior Constable Stedman told the appellant that he was under arrest and that he would have to go to the police station. The appellant was on the pavement and Senior Constable Stedman told him he would help him get down off the footpath. He took hold of the handles at the back of the appellant's wheelchair, assisted him over the kerb and pushed him towards the back of the police utility.

[12] Constable Ozdemir said she opened the door of the cage on the back of the police utility which was about two metres from the kerb. Meanwhile, Senior Constable Stedman let go of the wheelchair and the appellant backed up and positioned himself with his back to the open cage door. He then applied the brakes of the wheelchair.

[13] Constable Ozdemir's evidence was that she told the appellant they were going to help him into the caged section of the police utility. Senior Constable Stedman took hold of the appellant's right arm and Constable Ozdemir used both her hands to take a firm grip under the appellant's left

shoulder and upper arm. The appellant appeared to be somewhat irate but he did not behave aggressively.

[14] Constable Ozdemir then gave evidence that as they "went to lift him" into the cage the appellant struck Senior Constable Stedman on his left arm using his right arm in a downward motion from shoulder height to waist height. Constable Ozdemir said to the appellant, "Stop hitting us we are trying to help you. I am trying to help you. Don't hit us we are trying to help you."

[15] Both police officers then applied the same grip as before to once again try and assist the appellant into the cage. The appellant then struck Constable Ozdemir with his left hand in a similar movement to the manner in which he struck Senior Constable Stedman. He hit her on her right forearm once. That was when she said to the appellant, "Stop hitting us. We are trying to help you."

[16] The appellant then suddenly grabbed Senior Constable Stedman by the throat with his right hand. Constable Ozdemir took hold of the appellant's left arm and attempted to move it behind his back with the intention of hand-cuffing him. However, the appellant broke free and struck Constable Ozdemir in the upper chest. She lost her balance and hit her head on the cage.

[17] The appellant still had a grip on Constable Stedman's throat when Constable Ozdemir lost her balance. The appellant then grabbed hold of Senior Constable Stedman's right forearm with both hands and bit his forearm.

Constable Ozdemir used her right hand to push the appellant on the left side of his face to move him off Senior Constable Stedman's arm. She also told him to stop biting. She was unable to stop the appellant biting Senior Constable Stedman by trying to break his grip so she struck him once under the ribs. That also had no effect.

[18] After a number of unsuccessful attempts, Senior Constable Stedman was able to free his forearm from the appellant's bite. At that point, Constable Ozdemir felt the appellant biting a small finger and ring finger near the knuckles of one of her hands. The bite did not break the skin but it left a minor red mark. Constable Ozdemir moved away from the appellant, and Senior Constable Stedman and she lifted the appellant out of the wheelchair and ground stabilised him face down. The appellant was handcuffed, lifted and placed on his side in the cage. They thought he would be most comfortable in that position.

[19] The police then drove to the Darwin watch house and the appellant was processed and placed in a cell. The appellant's wheelchair was left at the scene and later recovered by the police.

[20] Constable Ozdemir gave evidence that the appellant was not placed on the rear seat of the cabin of the police utility because there was no room in that area. The area contained the police kit bags and ballistic vests. It was also police policy to place people who had been taken into custody in the cage

for safety reasons. Police are vulnerable if somebody is placed on the rear seat of a police motor vehicle.

[21] During her cross-examination Constable Ozdemir gave evidence that the assault occurred at the beginning of their attempts to lift the appellant into the cage. It was a joint decision to place the appellant in the cage. All people who are arrested are placed in the caged section of the police utility. It is general practice and it is for the safety of all people involved. She believed the appellant would be more comfortable in the cage because he could spread his legs out.

[22] During re-examination Constable Ozdemir also stated that she believed she acted in accordance with police General Orders. She believed she had to act in the way she did and that she was not too forceful in trying to lift the appellant into the cage on the back of the police utility. In other words, Constable Ozdemir's evidence was that she believed she only used necessary force to execute the warrant.

[23] Senior Constable Stedman also gave evidence in the Court of Summary Jurisdiction.

[24] He said that he knew the appellant. He was aware that the appellant could be a bit abrasive. He was stationed in Maningrida at the time the appellant was in the motor vehicle accident that caused his paraplegia. He attended at the accident scene in the course of his duty as a police officer.

[25] Senior Constable Stedman stated that after he and Constable Ozdemir got out of the police motor vehicle he had a discussion with the appellant. He asked the appellant what was going on. The appellant said he had done nothing wrong. He told the appellant he was correct. He had done nothing wrong but there was a warrant for his arrest. The appellant said he was not a drug dealer. Senior Constable Stedman replied that the warrant was not for drug dealing but for failure to attend court. The appellant said the police should have picked him up. Senior Constable Stedman told him it was his responsibility to attend court. The appellant persisted in saying that it was the job of the police to come and pick him up. Senior Constable Stedman then told him he was under arrest. He could not go home. He had to go with the police.

[26] The conversation lasted for 10 to 15 minutes. Senior Constable Stedman gave evidence that during the conversation the offender's speech was abrasive and direct. His demeanour was like, "I don't care what you say. I am doing what I am doing. I am going away. I haven't done anything wrong."

[27] There was another person, Sammy Goyola, nearby. Senior Constable Stedman asked him if he could assist in explaining the situation to the appellant. Mr Goyola spoke to the appellant in language and he appeared to calm down. Senior Constable Stedman told the appellant that he did not want to use force. He did not want to drag the appellant to the police utility. He wanted the apprehension to be done as smoothly as possible.

[28] Eventually, the appellant appeared to accept that he was under arrest and he asked if he could speak to his mother who was in flat 39. Senior Constable Stedman told him he was happy for the appellant to speak to his mother and he would take him to her. However, the appellant first had to be placed in the caged section on the back of the police utility. That was the safest way. He could then be driven down to tell whoever needed to be told what had happened to him. The appellant said that Senior Constable Stedman was just arresting him so he could get more money.

[29] Senior Constable Stedman then walked behind the appellant's wheelchair and said, "Look let's get it done. I will give you a hand." He unclipped the brakes on the wheelchair and started to push the appellant towards the police utility. There was quite a large gutter which Senior Constable Stedman was worried may cause the appellant to tip out of his wheelchair. He told the appellant that he would give him a hand to get over the gutter and he put an arm around the appellant to hold him in his wheelchair. He guided the appellant across the gutter and towards the rear of the police utility. Once they crossed the gutter the appellant started wheeling himself to the police utility. When they were part-way across the road to the police utility the appellant said he would like to go in the rear of the cabin on the police utility. Senior Constable Stedman said that was not happening. He would need to go into the cage.

[30] Senior Constable Stedman told the Court of Summary Jurisdiction that the reason for placing the appellant in the cage is that police have equipment in

the rear of the cabin and there was also the unpredictability of an apprehended person being seated behind the arresting police officers. “There is an unknown factor if the person is a bit agitated about being arrested to begin with.” He was not going place the appellant behind him while he drove. I understand Senior Constable Stedman to be stating that, in circumstances where the appellant was known to him, had behaved abrasively, indicated at the outset that he did not want to be apprehended, and had started to become agitated again that Senior Constable Stedman was concerned for their safety if the appellant was placed on the rear seat of the cabin of the police utility.

[31] The appellant did say that the caged area was too hard. Senior Constable Stedman thought the appellant meant that it was too hard for him to get into the cage. He replied to the appellant that he would help him. By this time Constable Ozdemir was holding the cage door open and Senior Constable Stedman told the appellant that it was okay. He would give the appellant a hand. The appellant turned around and backed his wheel chair up against the rear of the police utility, close to the open door. Senior Constable Stedman thought the movements of the appellant were unusual. He was thinking of assisting the appellant with him facing the rear of the police utility. However, he thought the appellant would know the best way to do it.

[32] Senior Constable Stedman and Constable Ozdemir then held the appellant under both arm pits to lift him up. They crouched close to the appellant to get some leverage to lift him up. As they started doing that the appellant

became more angry and abrasive. He said they were just locking him up for money and he was not doing anything wrong. Senior Constable Stedman ignored the appellant at first but the appellant thrashed his arms and broke the grip of both officers. Senior Constable Stedman said he lifted up the appellant's arm and the appellant put his arm over his and broke his grip. The appellant then started to raise his arm again. He put his hand into a locked fist and started hitting in a hammer like downwards motion. He did it once. He hit Senior Constable Stedman's arm down and away. Then he hit Constable Ozdemir's arm.

[33] Senior Constable Stedman told the appellant that they did not need to go down this path. He tried to get the appellant to realise that his actions were making the incident worse. The appellant then grabbed Senior Constable Stedman firmly by the throat. Senior Constable Stedman tried to move back a little bit but the appellant's grip was a bit firm. Senior Constable Stedman pushed the appellant against the side of the base of his neck to break his hold. He was unsuccessful and the appellant held his grip. Senior Constable Stedman then tried to manoeuvre himself so he could use his right arm to break the appellant's grip on his throat. As he did that the appellant grabbed his arm and bit him. Senior Constable Stedman told Constable Ozdemir what was happening. He tried to pull his arm away but could not do so. He tried a second time and was successful. The appellant then tried to bite Constable Ozdemir and Senior Constable Stedman applied his elbow in a downwards motion to the base of the appellant's neck to try and drive his face down into

his body and away from Constable Ozdemir. After that the appellant seemed to stop and the officers ground stabilised and handcuffed him. The appellant resisted being handcuffed. Once he was handcuffed he was placed in the caged section at the rear of the police utility.

[34] The police officers then drove towards the Darwin Police Station. After they turned the first corner, they stopped to check if the appellant was okay. He was found to be on his side and asleep. The police then completed the journey to the Darwin watch house where the appellant was processed. It is 12 and a half kilometres from the Litchfield Court Flats on Progress Drive to the Darwin watch house.

[35] During cross-examination Senior Constable Stedman stated that as he and the appellant moved towards the police utility, the appellant's demeanour became as abrasive as it was when he first spoke to him. The appellant was saying they were locking him up for money but it was not until "we get close to going to lift him" that he assaulted them.

[36] Senior Constable Stedman stated that it was the appellant's behaviour that made his going onto the back seat of the cabin unacceptable. He did not see anything that made the appellant's going into the cage a large issue. The appellant is not frail. He did not know that the appellant required a foam mattress or that he had pressure sores. He had discretion as to where the appellant was placed in the police motor vehicle and it was his opinion that it was not safe to place the appellant on the rear seat of the cabin. The

appellant did not say to him that he could not go into the cage because of bed sores or any other aspect to do with his physical condition. Senior Constable Stedman assessed that there should not be any issue putting the appellant in the cage. At no stage did he understand that the appellant did not want to go into the cage because the surface was too hard. He believed that when the appellant said that it was too hard he meant that getting into the cage was too hard and he resolved that issue by offering to help the appellant to get into the cage. At no stage prior to the appellant assaulting him did Senior Constable Stedman force the appellant to do anything. He was assisting him. He did not consider that he had any option other than transporting the appellant in the cage.

[37] The appellant gave evidence in the Court of Summary Jurisdiction. His evidence was rejected by the trial Magistrate to the extent that it was inconsistent with the evidence of the two police officers. She was correct to do so. The appellant's evidence was internally inconsistent and contradictory. He conflated the police response to his assault on them with what occurred in the time leading up to the police first placing their hands on him for the purpose of trying to assist him into the cage. At the end of his cross-examination, the appellant conceded that he bit Senior Constable Stedman because he was angry with him not because he was hurt.

[38] The appellant gave the following evidence in the Court of Summary Jurisdiction.

[39] He had a car accident in 2008 and he injured his spine. He is still in pain. His shoulders and spine are still sore. He gets pressure sores because he is in a wheelchair. He said the police came and grabbed his arm. One of them twisted his arm really hard and he felt pain, the worst pain. He was feeling pain and then he beat them to make them let go of his arm. When the police officer tried to grab his arm again he bit him.

[40] During his examination-in-chief the appellant said that he asked the police to put him in the back of the cabin of the police utility because he had pressure sores. However, at no stage did the appellant's counsel ask the police if the appellant told them that he had pressure sores or was experiencing any pain. Nor was the appellant asked by his counsel in the Court of Summary Jurisdiction if he suffered any pain or discomfort as a result of being transported in the caged section on the rear of the police utility.

[41] During his cross-examination the appellant admitted that the police told him there was a warrant for him because he did not go to court. They told him that was why he had to be arrested.

[42] There was the following exchange between the prosecutor and the appellant during the appellant's cross-examination in the Court of Summary Jurisdiction.

> Prosecutor: Now, Officer Stedman, Ray, he spoke to you for a long time about why it was that they had that

warrant and why you had to go with them to the police station?

Appellant: Mm mm.

Prosecutor: Yes, and he said to you that you have to go in the cage; you can't go in the back and he explained to you why, correct?

Appellant: Yeah and I told because I got pressure sore, I can't go in the back, I want to sit on the seat.

Prosecutor: You did not say anything about the pressure sores did you? You just said you did not want to go in the cage?

Appellant: No, I told them when I was laying down and telling them.

Prosecutor: So after you had done everything and you were lying on the ground that is when you said that?

Appellant: No, before.

Prosecutor: When before?

Appellant: They was dragging me, putting me on the ground.

Prosecutor: So after you bit him?

Appellant: Yeah.

Prosecutor: That is the only time you mentioned the pressure sores?

Appellant: Yeah.

Prosecutor: Yes?

Appellant: No, when they put – after I bit him and then after that they put me on the ground and they handcuff on me and then I told them I got pressure sores, sit in the back, and they said no you are not allowed to sit.

[43] In the circumstances, it may be confidently concluded that, even on the appellant's evidence, he said nothing to the police about pressure sores until after he assaulted them. The evidence of the police officers, which the trial Magistrate preferred, was that the appellant never said anything at all about pressure sores.

[44] A little later in cross-examination, there was the following exchange between the prosecutor and the appellant.

Prosecutor: While you were at the back of the police wagon, before anything happened, they tried to help you into that car and you didn't want that?

Appellant: Yeah. I didn't want that, no, just leave me, I didn't want that.

Prosecutor: Yes?

Appellant: Like I said that and they said I (inaudible) we will come down and drag you from your wheel chair.

Prosecutor: And they tried to grab you and lift you up, you flung your hands down?

Appellant: Yeah.

Prosecutor: And then you grabbed Ray by the throat?

Appellant: Yeah.

Prosecutor: And you did that?

Appellant: And Ray hold me – just my arm and that is why I choke him.

[45] Further –

Prosecutor: You didn't tell anyone about your injuries from that night did you?

Appellant: Mm mm.

Prosecutor: You didn't tell the custody nurse?

Appellant: No, no, nurse knows.

Prosecutor: Which nurse?

Appellant: One that do my dressing.

Prosecutor: The one with that doctor came?

Appellant: Yes.

Prosecutor: But no one at that police station nurse?

Appellant: No.

Prosecutor: She did not know.

Appellant: No. Only she gave me a tablet for morning tablet, that is all she gave me, tablet and I took my medication box.

[46] The appellant was then cross-examined about the fact that he had made no complaint about how the police treated him at the time he was arrested. He

was unable to give any explanation about why he made no complaint. The absence of any complaint by the appellant is inconsistent with his evidence in the Court of Summary Jurisdiction. Finally, there was the following exchange between the prosecutor and the appellant during cross-examination.

> Prosecutor: That is because they treated you good way, isn't it and they tried to do the right thing by you and you got angry when they tried to lift you into the paddy wagon, and you didn't like that?
>
> Appellant: No.
>
> Prosecutor: You bit that officer's arm because you were angry with him, not because you were being hurt?
>
> Appellant: Yeah.

[47] It may fairly be concluded that by the end of his cross-examination the appellant accepted that he assaulted the police simply because he was angry and did not want to be apprehended.

The reasons for decision of the trial Magistrate

[48] The findings of the trial magistrate are summarised as follows.

> Both police officers were telling the truth to the best of their knowledge and memory. If there is any difference between the evidence of the police officers and the evidence of the appellant the evidence of the police officers is to be preferred.
>
> The police officers approached the appellant because there was an outstanding warrant of apprehension for him. The appellant was argumentative. He made remarks to the effect that it was the police's

job to get him to court. The police were only bothering or arresting him so they could get more money.

Eventually the two officers and the appellant moved towards the door of the cage on the back of the police utility. Constable Ozdemir opened the door and Senior Constable Stedman assisted the defendant who was in a wheelchair down a gutter. Once they got near the police utility the defendant turned his wheelchair around and backed himself up to the open cage door.

The appellant told Senior Constable Stedman that he wanted to go in the back of the cabin of the police utility and Senior Constable Stedman said no, he had to go in the cage.

The two police officers attempted to lift the appellant with their hands under his arms and he hit or pushed their arms away. The appellant then put a hand around the throat of Officer Stedman who said things had gone “pear shaped”. He attempted to move the appellant’s hand from his throat and the appellant bit him with considerable force. Senior Constable Stedman managed to wrench his arm way from the appellant’s teeth and he pushed the appellant’s head forward. The appellant then placed his mouth and teeth on the thumb and wrist area of one of Constable Ozdemir’s hands. It was a much less painful bite than the appellant inflicted on Senior Constable Stedman.

The appellant was ground stabilised, handcuffed and assisted up into the cage on the police utility. They then drove off. After they had driven a very short distance, the police officers checked on the appellant who they found to be on his side and asleep.

[49] In summary, her Honour held -

There was no question that the warrant the police were attempting to execute was a lawful warrant and they believed it to be so.

Constable Ozdemir did not really turn her mind to where the appellant would be placed. She assumed he would be put in the cage. However, it is clear that Senior Constable Stedman had turned his mind to it because the appellant had asked if he could go on the back seat. Both officers believed that for reasons of safety the cage was the only viable method of conveying the appellant. It would be

unsafe if apprehended persons were placed immediately behind them. Also the police car had very little room in the back seat area because the front seats had been pushed back and their equipment and a fire extinguisher were in the area of the back seat.

There was no impropriety on the part of the police. The police acted with great propriety in all of the circumstances they were faced with. It is undignified for anybody to be arrested and placed in the cage. No one wants to get in the back of the cage. Getting arrested is not a dignified process which is not to say that people who are arrested should not be treated with as much dignity as can be found. It is clear that the police also think that way because such principles are set out in their general orders.

On this occasion, the police officers did not make the arrest of the appellant any more undignified than the process had to be by its very nature. There was one request to go in the back seat which was denied. There were words, which it was agreed were spoken, “it’s too hard”. Senior Constable Stedman made it very clear that he believed they were spoken about how the defendant would get from his wheel chair into the cage, not about the cage itself being too hard.

There was little evidence that it was inappropriate for the appellant to be placed in the cage on the rear of the police motor vehicle. While the technique that the police were first going to use to lift the appellant into the cage was not medically the best way to lift a paraplegic, there was no evidence of any injuries being sustained by the appellant and he conceded that he did not complain to the custody nurse that he had received any injuries. The appellant was comfortable enough to fall asleep.

There was no breach of the police General Orders. The police have acted appropriately and properly at all times with consideration for the defendant. There was no excessive use of force and they were compliant with their General Orders [emphasis added].

In the circumstances of this case, the police had no other real options available to them to convey the appellant to the watch house. A taxi with a civilian driver is not appropriate when someone is in police custody and the back of the police utility was neither safe nor practical. Even if there may have been other options, it does not mean that the option chosen was not lawful.

> The evidence of the police officers about the offences committed by the appellant is admissible and the police were acting in the execution of their duty.

[50] The appellant also relied on defensive conduct in the Court of Summary Jurisdiction as an answer to the four charges he faced. The trial Magistrate found that defensive conduct was disproved by the Crown because s 29(5) of the Criminal Code (NT) applied to this case. The evidence established that the appellant reacted violently to the lawful conduct of the police officers and the appellant knew the conduct of the police was lawful. Further, the appellant's reaction to the police was an excessive reaction in all of the circumstances.

[51] I can see no error in the approach taken by the learned trial Magistrate in this case.

The appellant's submissions on ground 1

[52] As to ground 1, the appellant made the following submissions.

[53] Ground 1 raises the following issues.

- Was the learned magistrate in error by failing to make findings as to whether the force used by the police to execute the warrant was not unnecessary force?

- Does the failure to comply with police General Orders give rise to a reasonable possibility that the police were not acting in the execution of their duty?

[54] As to unnecessary force, s 27(a) of the Criminal Code (NT) places limitations on the force that a police officer is entitled to use to execute a

warrant of apprehension. The subsection provides that the application of force is justified if it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm.

[55] The prosecution must exclude beyond reasonable doubt both parts of the definition of unnecessary force in s 1 of the Criminal Code (NT), that is:

1. force that the user of such force knows is unnecessary and disproportionate to the occasion, and

2. force that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion.

[56] Counsel who appeared for the appellant in the Court of Summary Jurisdiction submitted to that court there was a reasonable possibility that an ordinary person similarly circumstanced to the police officers would regard the force they used to execute the warrant as unnecessary for and disproportionate to the occasion. The trial Magistrate made no findings about the second part of the definition of unnecessary force. Her Honour did not address the characteristics of an ordinary person similarly circumstanced to the person using such force. Nor did her Honour address whether such a person would regard the force used by the police officers as unnecessary for such an occasion. The failure to address this issue meant that the learned Magistrate did not exclude the possibility that the police used unnecessary force when executing the search warrant. This in turn meant that there was a reasonable possibility that the police were not acting in the execution of

their duty from the time they used force to try and lift the appellant into the cage.

[57] The level of force used by police when executing a warrant must be justified by the circumstances. When police officers use a greater force than is justified they act outside the course of their duty. There is no general rule that people who are arrested and taken to a watch house to be charged must be transported in the caged section on the rear of a police utility. The attempts to lift the appellant into the cage in an unsupported way must be found in some additional circumstances such as the necessity to prevent him from escaping, or committing a further offence or endangering the safety of persons or property.

[58] Neither police officer gave genuine consideration to whether the circumstances justified the decision to detain and convey the appellant in the cage, with the additional restraint that involved, or justified the subsequent use of force deployed in attempting to lift him into the cage. The decision of the police involved an uncritical application of their general practice without any consideration of the appellant's unique circumstances. Non-specific notions of safety or unpredictability were an insufficient basis to justify the decision to place the appellant in the cage. Those considerations amounted to "unreasonable precautions" and "unnecessary measures" to secure the safe custody of the appellant. The appellant did not present a risk to the safety of the officers in any identified way.

[59] Police are required to be aware of the hazards of transporting a person in custody in the caged section of a police vehicle. When escorting frail persons in custody police should consider placing them in the cabin of the escort vehicle. The police failed to give proper consideration to these matters. Further, the police failed to ask the appellant whether his condition was such that he could not be safely transported in the caged section of the police motor vehicle or that it would be detrimental to his health.

[60] As to the suggested failure to comply with police General Orders, the appellant submitted that conduct by a police officer does not need to be unlawful to place the officer outside the ambit of his or her duty. Conduct which is *prima facie* lawful but nevertheless improper, inappropriate or unnecessary may be sufficient to place a police officer outside the ambit of his or her duty. The existence of impropriety is ascertained by asking whether what was done by the police was inconsistent with the minimum standards of police conduct applicable in the relevant circumstances. The content of the minimum standard of police behaviour is informed by the particular legislative provisions or administrative guidelines or instructions or codes of practice issued by the Commissioner of Police which operate with respect to the actions or conduct of the police.[3] In the Northern Territory, police General Orders indicate the standard of propriety to be

[3] *DPP v AM* (2006) 161 A Crim R 219 at 229; cited in *Prior v Mole* [2015] NTSC 65 at [46].

observed by the police.[4] A failure to comply with the General Orders may place a police officer outside the execution of the officer's duty.

[61] The appellant submitted that the trial Magistrate erred in finding that there was no breach of police General Orders. The relevant General Orders were said to be (1) paragraphs 43, 47 and 48 of the General Order, *Transport of Persons – In Custody or by Consent*; (2) paragraphs 20 and 21 of the General Order, *Custody*; and (3) paragraphs 8, 9, 19, 20, 21, 22 and 23 of the General Order, *Operational Safety and Use of Force*.

[62] Paragraphs 43, 47 and 48 of the General Order, *Transport of Persons – In Custody or by Consent* provide as follows:

> 43. Members need to be aware of the hazards involved in transporting a person in custody in the caged section of a police vehicle. These areas by necessity do not have:
>
> - Padded seating or backrests;
> - Restraining devices;
> - Controlled temperatures; or
> - Any means of communication.
>
> 47. When determining seating and security arrangements for a police vehicle escort, members should consider:
>
> - criminal history, sobriety, gender, physical size, age, number and general cleanliness of persons being escorted;

[4] *Dumoo v Garner* (1998) 143 FLR 245 at 261.

- demeanour, health and presence of injuries of the person being escorted;

- experience of the escorting member(s);

- distance and conditions of the road(s) to be travelled; current prevailing weather conditions; and

- the type of vehicle chosen for the escort.

48. When escorting youth, women, frail or older persons, members should consider the placement of persons in custody in the cabin of the escort vehicle.

[63] Paragraphs 20 and 21 of the General Order, *Custody*, provide as follows.

20. The simplest approach to an understanding of the nature of duty of care is to ask the question – 'How would I want myself or a member of my family to be treated if I or they were in custody?' The appropriate response should invoke issues of reasonableness, lawfulness, humanity, civility and an active concern for safety and welfare. These are matters of reasonableness and should provide no difficulty in application in most situations. This may involve making inquiries about the person's health or the reason they have been taken into custody. This means that a person leaves police custody without having suffered injury, damage or loss that cannot be explained or justified. In short, a person in custody should be safe and kept safe from harm.

21. It is recognised that what action is reasonable to meet a standard of care will depend on individual circumstances and situations. If members behave in a way which is reasonable in the circumstances, lawful, humane and civil and with concern for the safety and welfare of the person in custody, then duty of care obligations will generally be met.

[64] Paragraphs 8, 9, 19, 20, 21, 22 and 23 of the General Order, *Operational Safety and Use of Force*, provide as follows.

8. Officers should only use the minimum amount of force necessary to defend themselves or another, control a subject and/or effect arrest and apprehension.

9. The application of force, particularly the use of lethal force, must always be necessary and lawfully justifiable in the circumstances.

19. The use of force by Officers raises fundamental human rights issues. Allegations regarding improper use of force undermine the legitimacy of police and, therefore, undermine public confidence and respect for police.

20. Officers must comprehensively understand the situations and circumstances in which they can use force, and the legal foundation of their use of force. They must also be able to justify these actions at law.

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

22. The goal of ensuring a safe and secure community requires the application of force by police on a daily basis. One of the challenges police face lies in balancing the need to bring situations to a safe and effective conclusions with the need to avoid any unnecessary application of force.

23. Officers must operate according to the principle of reasonable, necessary, proportionate and appropriate force that is the minimum required to safely and effectively carry out their duties. Force should only be employed in a manner consistent with the provisions of the *Criminal Code Act* or any other legislation empowering officers to use force.

[65] The appellant submitted that Constable Ozdemir did not consider or apply the relevant police General Orders. Further, Senior Constable Stedman's evidence demonstrates a significant failure to comply with important aspects

of the police General Orders. He failed to enquire if the appellant could travel safely in the caged section of the police vehicle. The appellant was in a wheelchair. The appellant could not use his legs. The appellant had requested to sit in the cabin of the police vehicle. He stated that the caged area was too hard. The police did not lift the appellant in the medically correct manner. Senior Constable Stedman failed to actively consider the safety and welfare of the appellant. The police officer failed to consider the appellant's health and the presence of any injuries. A genuine consideration of all of these matters by the police officers was required by the minimum standard of conduct imposed on them.

Consideration of ground 1

[66] Ground 1 of the appeal cannot be sustained.

[67] Before considering the specific submissions of the appellant about ground 1 it is important to note the most salient facts. It is notorious that arresting a person is one of the most difficult and dangerous duties a police officer has to perform. It is the occasion when police officers are most likely to be assaulted and injured. Senior Constable Stedman is an experienced police officer who has known the appellant and had dealings with him since at least 2008. Although he did not clearly say so, it was apparent from the very outset that Senior Constable Stedman thought the appellant would be a difficult person to arrest safely. It was apparent from the outset that the appellant did not want to be arrested. He blamed the police's failure to pick him up for the existence of the warrant, said the police were only arresting

him so they could make more money, kept saying that he had done nothing wrong and indicated that he wanted to keep doing what he was doing at the time the police first approached him. The appellant's demeanour was variously described as agitated, irate and argumentative. The appellant is not frail and has considerable upper body strength. It took the two police officers some time to restrain him after he assaulted them. Apart from being a paraplegic since 2008, and being in a wheelchair, the appellant did not appear to have any additional health problems or visible injuries, nor did he complain to the police about any such problems. It was Senior Constable Stedman's assessment that there were no health issues which prevented the appellant from being safely transported in the caged section on the rear of the police utility. His assessment was correct. The journey to the watch house was a short journey. The appellant fell asleep on the journey and sustained no injuries, whatsoever, as a result of his journey in the caged section of the police utility. Senior Constable Stedman spoke to the appellant for 10 to 15 minutes before he even placed his hands on the handles of the appellant's wheelchair and assisted him to the police utility.

[68] It was in these circumstances that Senior Constable Stedman decided it would be unsafe to place the appellant on the rear seat of the cabin of the police utility. He also considered that there was insufficient room in the rear of the cabin. His assessment about the danger of placing the appellant in the rear of the cabin was also correct because when the appellant got to the rear

of the caged section he assaulted both police officers. The appellant did so because he was angry, not because he was hurt.

[69] The police applied very little force to the appellant before he assaulted both of them, one of whom was a female police officer. All they did was take hold of his arms and shoulders preparatory to lifting him up into the cage. The trial magistrate found that this caused minimal and momentary pain to the appellant. The better view on the evidence is that the force applied by the police to the appellant caused him no pain at all because the police officers did not even get to the stage of lifting the appellant up off his wheelchair to any extent. The appellant did not complain to the police officers about being in any pain before he assaulted them. The police were only going to lift the appellant from this position because the appellant had voluntarily place himself in his wheelchair with his back to the open door of the cage and he appeared to be consenting to being lifted into the cage from that position. The appellant then assaulted the police officers and the police responded to his assault on them.

[70] Contrary to the submissions of the appellant, the trial Magistrate did consider if the police used unnecessary force. Her Honour found they did not do so. This is not a case which requires detailed analysis of the elements of unnecessary force. The evidence establishes beyond reasonable doubt that both police officers believed the force they used to apprehend the appellant was necessary and proportionate force, and objectively an ordinary person similarly circumstanced to the two police officers would not regard the force

they used as unnecessary or disproportionate. All the police officers did prior to being assaulted by the appellant was place their hands on his shoulders preparatory to trying to lift him into the cage from a position he had voluntarily placed himself in. It is fanciful to suggest the force applied by the police was unnecessary force. The fact that the trial Magistrate did not refer to the specific elements of unnecessary force does not mean that she did not consider those elements. Her Honour found there was no breach of the General Orders. The police acted appropriately and properly at all times with consideration for the appellant. There was no excessive use of force and they were compliant with their General Orders. Her Honour was correct in doing so.

[71] Contrary to the submissions of the appellant, the decision of the police officers to place the appellant in the caged section of the police utility was justified on the grounds of their safety. The evidence clearly establishes that the appellant did present a risk to the safety of the police officers and it was both reasonable and necessary to place him in the caged section of the police vehicle. As the trial Magistrate found, the evidence also establishes that Senior Constable Stedman gave genuine consideration to the wellbeing of the appellant and the necessity for the additional restraint involved in conveying the appellant in the caged section of the police utility. The behaviour of the appellant was unpredictable and he behaved in a violent manner before he was placed in the cage. He did so because he was angry, not because he was hurt. There were no significant issues about placing the

appellant in the cage. It was a short journey. He was transported safely to the watch house and he suffered no injuries. The police stopped and checked to make sure the appellant was safe and he was found to be a sleep.

[72] Contrary to the submissions of the appellant and consistent with the findings of the trial Magistrate, the police officers complied with the police General Orders. The police officers were aware of the hazards involved in transporting a person in custody in the caged section of the police vehicle. They stopped to see if the appellant was okay, he was found to be a sleep on his side, and they obviously drove the short distance to the Darwin watch house in a safe manner. The appellant arrived safely at the watch house. Senior Constable Stedman considered the physical state and health of the appellant, his demeanour and the type of vehicle they had and the constraints that it imposed. He also considered the placement of the appellant in the cabin and he correctly rejected such a placement for safety reasons. The police officers acted lawfully, humanely, civilly and had an active concern for the safety and welfare of the appellant. The appellant left their custody without having suffered any injury whatsoever. They acted reasonably and only used the minimum force necessary for the safe and effective performance of their duties. The force they used was appropriate to the circumstances of the particular situation they were dealing with. They brought the apprehension and transport of the appellant to a safe and effective conclusion which was consistent with the provisions of the Criminal Code and the *Police Administration Act*.

[73] On the whole of the evidence it was open to the learned trial Magistrate to be satisfied beyond reasonable doubt that the police officers were acting in the execution of their duty, used only necessary force to apprehend the appellant and did not engage in any impropriety. Her Honour was correct to do so. Having reviewed all of the evidence, I entertain no reasonable doubt about the guilt of the appellant of the four counts he stood trial on in the Court of Summary Jurisdiction.

The appellant's submissions on ground 2

[74] As to this ground of appeal, the appellant submitted that the evidence about the appellant's criminal conduct should have been excluded because the appellant's behaviour was a natural consequence of the improper conduct of the police and the level of his offending was not disproportionate to level of impropriety of the police conduct. It was therefore obtained in consequence of an impropriety.

The appellant's submissions on ground 3

[75] As to the third ground of appeal, the appellant made the following submissions.

[76] Consistent with the decisions of *DPP v AM*,[5] *DPP v Carr*,[6] *R v Dalley*[7] and *Robinett v Police*[8] evidence is obtained in consequence of an impropriety within the meaning of s 138 of the *Evidence (National Uniform Legislation)*

[5] (2006) 161 A Crim R 219.
[6] (2001) 127 A Crim R 151.
[7] (2002) 132 A Crim R 169.
[8] (2000) 78 SASR 85.

Act where the Court determines there is a causal connection between the improper police conduct and the criminal behaviour of the offender and that behaviour is not disproportionate to the level of impropriety of the police conduct.

[77] The appellant submitted that his criminal behaviour and the improper conduct of the police were closely related and interconnected. The appellant was initially argumentative but eventually complied with the request of the police to move his wheelchair towards the police utility. At that point he had clearly submitted to the authority of the police and the fact that he was under arrest. When nearing the police car he requested to travel on the back seat of the cabin. There were good reasons for this request. The request was rejected without further inquiry or discussion. When the appellant moved closer to the caged section of the police vehicle he said to Senior Constable Stedman, “It’s too hard.” Even at that stage, there was no further inquiry of the appellant by the police. The police then “grabbed” the appellant and attempted to lift him. The manner used to try and lift the appellant was not the medically appropriate lifting technique. The appellant experienced some pain. The appellant responded by thrashing his arms. There was a second attempt to lift the appellant and the appellant grabbed Senior Constable Stedman by the throat. The situation deteriorated from that point.

[78] The appellant further submitted that the desirability of admitting the evidence did not outweigh the undesirability of admitting the evidence for the following reasons. The offences were in the low to mid range of

seriousness. The appellant had tried to explain why he should not travel in the cage. The appellant was lifted in an unsafe manner and he experienced pain. The appellant's conduct was an instantaneous response to the situation he found himself in. The community has an interest in ensuring police exercise their powers in accordance with their minimum standards of behaviour. The police conduct constituted a significant impropriety. The police failed to give proper consideration to important orders contained in the police General Orders. There was no justification for the conduct of the police. But for the impropriety, the appellant would not have behaved as he did.

Consideration grounds 2 and 3

[79] Grounds 2 and 3 of the appeal cannot be sustained either.

[80] Consistently with what I held in *Prior v Mole*,[9] I accept the appellant's submission that the principles as to the meaning of "evidence that was obtained in consequence of an impropriety" enunciated in *DPP v AM*,[10] *DPP v Carr*,[11] *R v Dalley*[12] and *Robinett v Police*[13] are to be preferred to the approach taken by Adams J in *Director of Public Prosecutions v Coe*.[14] However, the principles I applied in *Prior v Mole* have no application to this case.

[9] [2015] NTSC 65 at [69].
[10] (2006) 161 A Crim R 219.
[11] (2006) 127 A Crim R 151.
[12] (2002) 132 A Crim R 169.
[13] (2000) 78 SASR 85.
[14] [2003] NSWSC 363.

[81] The police officers in this case did not commit any impropriety. There was no causal connection between an impropriety committed by the police officers and the offences committed by the appellant. The behaviour of the police officers was not inconsistent with minimum standards of acceptable police conduct. There was nothing in the conduct of either police officer which would have made either of them realise that if they continued doing what they were doing their conduct would lead to the assaults committed by the appellant. They carefully explained to the appellant why he was being arrested, they assisted him over the gutter and towards the police utility and they were endeavouring to help him into the caged section of the police utility from a position the appellant had voluntarily placed himself in. There was not a single element of the police officers' behaviour that would justify the Court expressing disapproval of their conduct by imposing a sanction against their conduct by declaring their evidence inadmissible. The appellant violently overreacted to the assistance the police were endeavouring to give him. The public interest in this case is in securing the appellant's conviction for the offences he committed.

Section 24 of the *Anti-Discrimination Act (NT)*

[82] During his oral submissions, counsel for the appellant argued that the police officers had acted improperly by failing to comply with s 24 of the *Anti-Discrimination Act 1992* (NT) because they had failed to accommodate the appellant's special needs as a paraplegic. The argument was not raised in the Court of Summary Jurisdiction and the provisions of s 24 of the *Anti-*

Discrimination Act 1992 (NT) were not put to either police officer during their cross examination.

[83] Under s 24 of the *Anti-Discrimination Act 1992* (NT) a person must not fail or refuse to accommodate, which includes making inadequate or inappropriate provision to accommodate, a special need that another person has because of an attribute. A failure to accommodate a special need occurs when a person acts in a way which unreasonably fails to provide for a special need which another person has because of an attribute. Whether a person has unreasonably failed to provide for a special need depends on all the relevant circumstances, including the nature of the special need, the cost of accommodating it and the number of people who would benefit or be disadvantaged, the financial circumstances, the disruption which would be caused by accommodating the need, and the nature of any benefit or detriment to all concerned.

[84] It is too late for the appellant to make this submission and it would be unfair to the respondent to allow the appellant to do so. In any event, there was no breach of s 24 of the *Anti-Discrimination Act 1992* (NT). Given that the police officers were acting pursuant to a warrant of apprehension, no other form of conveyance was reasonably available, it was necessary to place the appellant in the caged area of the police utility for safety reasons, the police officers treated the appellant with dignity and endeavoured to assist him into the cage, it was a short journey and they drove appropriately and checked on

the appellant to make sure he was safe, the police officers did not unreasonably fail to provide for the special needs of the appellant.

Conclusion

[85] The appeal is dismissed. I will hear the parties further as to costs and any ancillary orders.
