AUSTRALIAN
LAW REPORTS

BEING REPORTS OF CASES DECIDED BY THE HIGH COURT OF AUSTRALIA, THE FEDERAL COURT OF AUSTRALIA, AND STATE SUPREME COURTS EXERCISING FEDERAL JURISDICTION AND OTHER FEDERAL COURTS AND TRIBUNALS; INCORPORATING THE AUSTRALIAN CAPITAL TERRITORY REPORTS AND THE NORTHERN TERRITORY REPORTS

PRIOR v MOLE

HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, NETTLE and GORDON JJ

6 December 2016, 8 March 2017 — Canberra

[2017] HCA 10

Criminal law — Offences — Statutory power of apprehension — Lawfulness of apprehension — Where exercise of power conditioned on existence of reasonable grounds for belief — Where person drinking alcohol in public place near shops selling alcohol — Where person intoxicated and behaving belligerently towards police — Reliance on policing experience — Power to apprehend person and to take into protective custody — Where likely anticipated further offence of minor nature — Whether taking person into custody disproportionate exercise of power — Whether apprehension exceeded limits of power — (NT) Liquor Act ss 101T, 101U, 101V, 101Y — (NT) Police Administration Act ss 127A, 128, 129.

On the afternoon of New Year's Eve 2013, the appellant, Anthony Prior (Prior), was apprehended by Constable Blansjaar on the footpath outside the Westralia Street shops in Stuart Park, Darwin. The police constable apprehended Prior pursuant to s 128 of the Police Administration Act (NT) (the PAA). Under that section, a police officer relevantly has the power to apprehend a person without a warrant where the police officer has reasonable grounds for believing the person is intoxicated; the person is in a public place; and the police officer has reasonable grounds for believing that, because of the person's intoxication, the person may intimidate, alarm or cause substantial annoyance to people or is likely to commit an offence. A person apprehended pursuant to that section is to be held in custody for so long as it reasonably appears to the police officer that the person remains intoxicated. Constable Blansjaar believed that Prior would commit the offences of drinking in a regulated place and disorderly behaviour.

Prior was charged with behaving in a disorderly manner in a public place; unlawfully assaulting a police officer while in the execution of his duty; and behaving in an indecent manner in a public place. The lawfulness of Prior's apprehension became a live issue in relation to the prosecution of the offence of unlawfully assaulting a police officer while in the execution of his duty. At first instance in the Court of Summary Jurisdiction in Darwin, Cavanagh SM found that Prior had been lawfully apprehended under s 128 of the PAA.

The magistrate acquitted Prior of the offence of behaving in a disorderly manner in a public place but convicted him of the other two offences.

In the Supreme Court of the Northern Territory, Southwood J found that Constable Blansjaar had reasonable grounds for believing that Prior was likely to commit the offence of drinking in a regulated place in contravention of s 101U of the Liquor Act (NT) (Liquor Act) but did not have reasonable grounds for believing that, because of his intoxication, Prior might intimidate, alarm or cause substantial annoyance to people. However, his Honour excluded the evidence of the conduct charged as the two offences should be excluded pursuant to s 128 of the Evidence (National Uniform Legislation) Act (NT) on the basis that it had been obtained as a consequence of an impropriety. Southwood J accepted that the police taking Prior into custody was unnecessary and had fallen below the standard of conduct required of those enforcing the law. See *Prior v Mole* [2015] NTSC 65. The Court of Appeal of the Supreme Court of the Northern Territory allowed the appeal against the exclusion of evidence. It further found that Southwood J was correct to find that the prosecution had proven to the criminal standard that Constable Blansjaar had reasonable grounds to believe that Prior was going to commit the offence against s 101U of the Liquor Act. It also found, on the civil standard of proof, that Constable Blansjaar had reasonable grounds for believing that, because of his intoxication, Prior may intimidate, alarm or cause substantial annoyance to people. See *Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2. Prior was granted special leave to appeal to the High Court of Australia.

Held, per Kiefel, Bell, Nettle and Gordon JJ (Gageler J dissenting), dismissing the appeal:

Per Kiefel and Bell JJ

(i) At trial, the police constable was not questioned about his policing experience or his assumptions about the conduct of Aboriginal persons. Any inference that the police constable's reliance on his policing experience to cloak racial or other prejudice should be rejected: at [17].

(ii) It was not irrational for the police constable to take into account observed patterns of human behaviour in predicting the likely behaviour of an individual. The lack of particulars about the police constable's policing experience did not deprive the courts below with the capacity to assess the reasonableness of his belief: at [18], [19].

(iii) An object of s 128 was the prevention of alcohol-related offences. It was not confined to the prevention of offences punishable by imprisonment. It was within the scope of the power to take Prior into custody in the circumstances of this case. The taking of Prior into custody based on a belief that he was likely to commit an offence which was punishable by no more than forfeiture of alcohol and the issue of a contravention notice was not so disproportionate as to exceed the limits of the power: at [20].

Per Nettle J

(iv) A police officer may bring previous experience to aid in the detection and policing of past and anticipated offending. Where past experience has indicated that certain circumstances coincide with particular kinds of offending, it is reasonable to infer that the occurrence of similar circumstances entails the possibility of coincident similar offending: at [69].

(v) The allegation of racial prejudice on the part of the police constable was not raised at first instance or on appeal to the Supreme Court of the Northern Territory. It was not open to Prior to raise the issue for the first time on further appeal: at [70].

(vi) It was not correct that the only experience relevant to how Prior might act was how he himself had behaved in the past. It was not necessary for the police constable to identify precisely each fact and circumstance he took into account. It was sufficient for the police constable to outline his past experience and his observations of Prior and the surrounding circumstances: at [72].

(vii) The s 128 was introduced expressly to prevent the commission of alcohol-related offences. It is consistent with that object that, where a police officer finds a person intoxicated in a public place in contravention of the Liquor Act that, unless the person is taken into protective custody, the person may continue to drink there. The exercise of the power in such a way was not disproportionate or otherwise an abuse of power: at [77].

Per Gordon J

(viii) The circumstances and matter identified by the police constable would lead a reasonable person to be inclined to accept, rather than reject, the proposition that Prior, because of his intoxication, was likely to commit an offence of drinking alcohol in a regulated placed in contravention of s 101U(1) of the Liquor Act: at [108]–[112].

George v Rockett (1990) 170 CLR 104; 93 ALR 483, applied.

(ix) Issues of racial stereotyping and prejudice as factors affecting the police constable's belief were not put to the police constable at trial: at [114].

(x) The decision of the police constable to place Prior in custody pursuant to s 128 was based on the police constable's observations and his prior policing experience. The absence of particulars as to the police constable's policing experience was not a valid reason for not relying on that experience. The apprehension of Prior therefore was lawful pursuant to s 128(1)(c)(iv) of the PAA: at [118], [119].

(xi) There was no evidence upon which a reasonable person would be led to be inclined to accept, rather than reject, the proposition that Prior, because of his intoxication, may intimidate, alarm or cause substantial annoyance to others. Therefore, his apprehension could not have been supported, pursuant to s 128(1)(c)(iii) of the PAA: at [124].

George v Rockett (1990) 170 CLR 104; 93 ALR 483, applied.

(xii) The power to apprehend a person under s 128 of the PAA has protective and preventative purposes. It is conditioned on a number of bases but the seriousness of the likely future offence and the police officer's options to address a person's past behaviour are not among them. The exercise of power in the present case was within the legal limits and was proper: at [130].

Per Gageler J (dissenting)

(xiii) The police constable's brief observations of Prior were insufficient to lead a reasonable person to form the belief that Prior might intimidate, alarm or cause substantial annoyance to any member of the public or that Prior was likely to continue to consumer liquor in contravention of s 101U of the Liquor Act. The police constable formed the belief about Prior causing alarm to members of the public based on Prior's anger and abuse but that anger and abuse was directed solely towards members of the police force: at [34], [36], [40], [47].

(xiv) A reasonable person, observing the behaviour of Prior, may have formed the belief that Prior would purchase more alcohol from a nearby shop and continue drinking. However, the police constable's evidence did not disclose relevant patterns of behaviour. Unless those relevant patterns of behaviour were disclosed, they could not be taken into account when making an independent assessment of the objective circumstances which the police constable considered when forming his belief about Prior: at [42].

(xv) The police constable's policing experience could not assist in an independent assessment of the objective circumstances which the police constable considered when forming his belief about Prior because there was no explanation as to what the experience was: at [43], [45], [46].

Appeal

This was an appeal against a decision of the Court of Appeal of the Supreme Court of the Northern Territory [*Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2] in relation to a person's challenge to the lawfulness of his apprehension pursuant to s 128 of the Police Administration Act (NT).

B E Walters QC, *E M Nekvapil* and *F L Batten* instructed by *North Australian Aboriginal Justice Agency* for the appellant (Anthony Prior).

S L Brownhill SC, Solicitor-General (NT) and *T J Moses* instructed by *Solicitor for the Northern Territory* for the respondent (Robert Mole).

[1] Kiefel and Bell JJ. Section 128(1) of the Police Administration Act (NT) (the PAA) confers power on a member of the Police Force of the Northern Territory to apprehend without warrant a person who the member has reasonable grounds for believing is intoxicated (s 128(1)(a)) and is either in a public place or trespassing on private property (s 128(1)(b)). The power is further conditioned on the member having reasonable grounds for believing that because of the person's intoxication the person: is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else (s 128(1)(c)(i)); or may cause harm to himself or herself or someone else (s 128(1)(c)(ii)); or may intimidate, alarm or cause substantial annoyance to people (s 128(1)(c)(iii)); or is likely to commit an offence (s 128(1)(c)(iv)). A person who is apprehended under s 128 is to be held in the custody of a member of the Police Force but only for so long as it reasonably appears to the member that the person remains intoxicated.[1]

[2] In the mid-afternoon on New Year's Eve 2013, Mr Prior was apprehended under s 128(1) of the PAA by Constable Blansjaar on the footpath outside the Westralia Street shops, in Stuart Park. Constable Blansjaar believed that Mr Prior was intoxicated in a public place and, because of his intoxication, that Mr Prior might intimidate, alarm or cause substantial annoyance to people and that it was likely that he would commit an offence. The offences that Constable Blansjaar believed it was likely that Mr Prior would commit involved drinking in a regulated place or disorderly behaviour.

[3] In the Supreme Court of the Northern Territory, Southwood J found that Constable Blansjaar had reasonable grounds for his belief that Mr Prior was likely to commit the offence of drinking at a regulated place contrary to s 101U(1) of the Liquor Act (NT) ("the Liquor Act offence").[2] The Court of Appeal of the Supreme Court of the Northern Territory (Riley CJ, Kelly and Hiley JJ) upheld that finding.[3] By grant of special leave, Mr Prior appeals to this Court.

1. Section 129(1) of the PAA. In the case of a person who has been taken into custody under s 128 and who is in custody after midnight and before half past 7 o'clock in the morning on that day, s 129(3) provides that the person may be held in custody until half past 7 o'clock in the morning of that day notwithstanding that the person is no longer intoxicated. Section 131(1) authorises the member of the police force in whose custody a person is held under s 128 to release the person at any time into the care of a person who the member reasonably believes is a person capable of taking adequate care of the person.
2. *Prior v Mole* [2015] NTSC 65 (*Prior*) at [36].
3. *Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2 (*Mole*) at [69]–[70].

[4] The principles governing the exercise of a power that is conditioned on the existence of reasonable grounds for belief are not in question.[4] The lawful exercise of the power conferred by s 128(1) required that Constable Blansjaar in fact hold each of the beliefs referred to in subs (1)(a) and (b) and one or more of the beliefs referred to in subs (1)(c) and that the facts and circumstances known to Constable Blansjaar constituted objectively reasonable grounds for those beliefs. Proof of the latter requires that those facts and circumstances be sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance of the subject matter of the belief. This is not to say that it requires proof on the civil standard of the existence of that matter. Facts and circumstances that suffice to establish the reasonable grounds for a belief may include some degree of conjecture.[5]

[5] It is common ground that Constable Blansjaar in fact held each belief and that there existed reasonable grounds for his belief that Mr Prior was intoxicated and that Mr Prior was in a public place. Mr Prior contends that the Court of Appeal erred in holding that Constable Blansjaar had reasonable grounds for his belief that, because of his intoxication, Mr Prior was likely to commit the Liquor Act offence in circumstances in which Constable Blansjaar knew nothing of Mr Prior's background and based his belief at least in part on his policing experience. For the reasons to be given, we consider that it was open in law to find that Constable Blansjaar had reasonable grounds for his belief.

Procedural history

[6] The lawfulness of Mr Prior's apprehension arises in circumstances in which, after being taken into custody as an intoxicated person pursuant to s 128(1) of the PAA, Mr Prior engaged in conduct which led to him being arrested and charged with three criminal offences: behave in a disorderly manner in a public place (offence (i));[6] unlawfully assault a police officer, Sergeant O'Donnell, whilst in the execution of his duty (offence (ii));[7] and behave in an indecent manner in a public place (offence (iii)).[8] All three offences were tried before the Court of Summary Jurisdiction in Darwin (Cavanagh SM). Proof of offence (ii) required the prosecution to establish beyond reasonable doubt that Sergeant O'Donnell was acting in the execution of his duty at the time of the assault. At that time, Sergeant O'Donnell was placing Mr Prior in the rear of a police vehicle following Constable Blansjaar's decision to take Mr Prior into custody under s 128 of the PAA. Mr Prior argued that the prosecution had not proved that his apprehension was lawful. Relying on the same claimed illegality, Mr Prior submitted that evidence of the conduct charged in offences (i) and (iii) should be excluded in the exercise of the discretion conferred by s 138 of the Evidence (National Uniform Legislation) Act (NT) (the Evidence Act).[9]

4. *George v Rockett* (1990) 170 CLR 104; 93 ALR 483 (*George*).
5. *George* at CLR 116; ALR 491.
6. Section 47(a) of the Summary Offences Act (NT).
7. Section 189A of the Criminal Code (NT).
8. Section 47(a) of the Summary Offences Act (NT).
9. Section 138(1) of the Evidence Act provides that evidence that was obtained (a) improperly or in contravention of an Australian law; or (b) in consequence of an impropriety or of a contravention of an Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

[7] Cavanagh SM found that Mr Prior had been lawfully apprehended under s 128 of the PAA. Mr Prior was convicted of offences (ii) and (iii). Cavanagh SM was not satisfied that the prosecution had proved that Mr Prior behaved in a disorderly manner and he was acquitted of offence (i). On appeal in the Supreme Court,[10] Southwood J was satisfied beyond reasonable doubt that there were reasonable grounds for Constable Blansjaar's belief that, because of his intoxication, Mr Prior was likely to commit the Liquor Act offence. Proof of the belief sufficed to establish the lawfulness of Mr Prior's apprehension and to remove any doubt that Sergeant O'Donnell was acting in the execution of his duty at the time of the assault charged as offence (ii). His Honour was not satisfied on the criminal standard that there were reasonable grounds for Constable Blansjaar's belief that because of his intoxication Mr Prior might intimidate, alarm or cause substantial annoyance to people.[11]

[8] Mr Prior relied on a new argument for discretionary exclusion of evidence before Southwood J. Mr Prior argued that even if his apprehension was lawful and the evidence of the conduct charged as offences (ii) and (iii) was not obtained in consequence of a contravention of Australian law it should nonetheless be excluded under s 138 of the Evidence Act because it had been obtained in consequence of an impropriety. The action of the police in taking Mr Prior into custody was said to have been unnecessary and to fall below the minimum standard of conduct required of those charged with enforcing the law.[12] This argument succeeded before Southwood J.[13] That acceptance was the subject of the prosecution's successful appeal to the Court of Appeal.[14] The Court of Appeal's conclusion that evidence of the conduct charged in offences (ii) and (iii) should not have been excluded on the ground that it was obtained in *consequence of an impropriety* is not the subject of this appeal.

[9] This appeal is from the Court of Appeal's dismissal of Mr Prior's amended notice of contention, which sought to support Southwood J's orders acquitting him of both offences on two additional grounds. The first ground contended that the evidence did not establish on the criminal standard that there were reasonable grounds for Constable Blansjaar's belief that Mr Prior was likely to commit the Liquor Act offence.[15] The second ground was directed to the discretionary exclusion of the evidence of each offence as having been obtained in *consequence of a contravention of Australian law*. Mr Prior contended that he had discharged the onus of proving, on the civil standard, that Constable Blansjaar did not have reasonable grounds for his belief under s 128(1)(c)(iii) or s 128(1)(c)(iv).[16]

[10] The Court of Appeal considered that it was clearly established on the civil standard that Constable Blansjaar had reasonable grounds for his belief under s 128(1)(c)(iii) that because of his intoxication Mr Prior may intimidate, alarm

10. *Prior* at [36]. The appeal was brought under s 163(1)(b) of the Justices Act (NT), which confers a right of appeal on a matter or question of fact, law or both fact and law. The Justices Act has since been renamed by s 5 of the Local Court (Repeals and Related Amendments) Act 2016 (NT) as the Local Court (Criminal Procedure) Act (NT).
11. *Prior* at [37].
12. *Prior* at [45].
13. *Prior* at [70]–[72].
14. *Mole* at [14].
15. *Mole* at [64].
16. *Mole* at [64].

or cause substantial annoyance to people.[17] It did not determine whether the prosecution had proved the existence of reasonable grounds for that belief on the criminal standard for the purposes of proof of offence (ii). The Court of Appeal was satisfied that Southwood J had been right to hold that the prosecution had proved on the criminal standard that Constable Blansjaar had reasonable grounds for belief in the likely commission of the Liquor Act offence.[18] The question that is determinative of the appeal in this Court is whether, in law, it was open to the Court of Appeal to find that the facts and circumstances known to Constable Blansjaar provided reasonable grounds for his belief that because of Mr Prior's state of intoxication it was likely that Mr Prior would continue drinking alcohol in the street outside the Westralia Street shops, thereby committing the Liquor Act offence.

[11] Evidence of the facts and circumstances leading up to the decision to apprehend Mr Prior was given by Constable Fuss and Constable Blansjaar. Cavanagh SM found both officers to be credible and reliable witnesses. Cavanagh SM's reasons were brief and did not include findings as to the precise sequence of events. The appeal to the Supreme Court, by way of rehearing, was conducted on the transcript of the proceedings and the exhibits admitted into evidence in the Court of Summary Jurisdiction.[19] Southwood J made detailed factual findings which were accepted by the Court of Appeal. Those findings are set out in Gordon J's reasons and need not be repeated here. Some of Mr Prior's submissions in this Court amounted to an invitation to depart from the concurrent findings below, as with the submission that Mr Prior was apprehended before the incident involving children being placed in a car occurred. That invitation should be resisted and the question of principle determined on the basis of Southwood J's factual findings.

[12] Southwood J's conclusion that there were reasonable grounds for Constable Blansjaar's belief that, because of his state of intoxication, Mr Prior would commit the Liquor Act offence took into account that alcohol was readily available for purchase at the Westralia Street location and that Mr Prior had been drinking alcohol in company with others in that location before the arrival of the police.[20] In particular, it took into account that the arrival of the police did not cause Mr Prior to change his behaviour. Mr Prior behaved in a belligerent and defiant manner towards the police and in their presence sat back on a ledge outside the shops and picked up a container of red wine.[21]

[13] The Court of Appeal upheld Southwood J's finding largely on the strength of his Honour's analysis. In this Court Mr Prior repeats a criticism of that analysis which was rejected by the Court of Appeal. He points to the lack of evidence that he had the means to purchase more alcohol and he submits that his evident state of intoxication made it less likely that he would continue drinking alcohol following the confiscation of his wine. It is said to have been less likely because the Liquor Act (NT) makes it an offence for a licensee or the employee of a licensee to supply liquor to a person who is intoxicated.[22] The Court of Appeal rejected these arguments, observing that it should not be assumed that

17. *Mole* at [62].
18. *Mole* at [75].
19. *Prior* at [5].
20. *Prior* at [26].
21. *Prior* at [26].
22. Section 102 of the Liquor Act (NT).

Mr Prior would have had to purchase alcohol himself.[23] Their Honours considered that Constable Blansjaar had reasonable grounds for believing that Mr Prior would continue to drink on the footpath outside the Westralia Street shops irrespective of how he obtained the alcohol.[24]

Reliance on policing experience

[14] The error which Mr Prior contends vitiates the Court of Appeal's finding is the holding that:[25]

> Constable Blansjaar was also entitled to, and did, rely upon his experience of more than 12 years as a police officer and his dealings with people displaying similar behaviour to that displayed by [Mr Prior].

[15] The Court of Appeal's reference was to an answer given by Constable Blansjaar in cross-examination. It was put to Constable Blansjaar that he had no reason to think that it would not have been effective to tell Mr Prior to stop drinking and that he was not allowed to drink alcohol on the footpath outside the Westralia Street shops. Constable Blansjaar rejected this proposition, saying "[m]y experience as a police officer tells me that there's a good chance if we left he would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking." Constable Blansjaar stated that his belief in this respect also took into account Mr Prior's "general demeanour" and his behaviour, which was "very telling". There the matter was left. Both Constable Fuss and Constable Blansjaar had earlier given evidence of Mr Prior's demeanour and behaviour.

[16] Mr Prior's argument is that an "undifferentiated pool of experience" about other people cannot provide a reasonable ground for a belief about how a person, of whom the police officer has no knowledge, is likely to behave. There are two strands to the argument. The broad strand asserts that a police officer's experience of others cannot rationally bear on whether a particular individual, because of his or her intoxication, is likely to commit an offence. The narrower strand accepts that a police officer's experience may inform his or her belief but contends that the court cannot assess the reasonableness of the grounds for the belief unless the experience is particularised. It is said that, absent particularisation, the court cannot exclude the possibility that "arbitrary assumptions" are at play. The submission is apt to suggest that the experience on which Constable Blansjaar relied may have been based upon arbitrary assumptions about the behaviour of Aboriginal persons.

[17] That submission does not take account of the conduct of the proceedings below. The cross-examiner did not raise with Constable Blansjaar the features of his policing experience or Mr Prior's general demeanour or behaviour on which Constable Blansjaar's belief in the likely commission of the Liquor Act offence was based. It was not put to Constable Blansjaar that he acted on the basis of assumptions about the conduct of Aboriginal persons. It was not put to Constable Blansjaar that the decision to apprehend Mr Prior was a reaction to his offensive gesture or abuse of the police. The evidence that the initial response of the police to Mr Prior's conduct in drinking alcohol in a regulated place and making the offensive gesture was to issue him with an infringement notice was unchallenged. Any invitation to infer that Constable Blansjaar's reliance on his policing experience may have cloaked racial or other prejudice should not be accepted.

23. *Mole* at [70].
24. *Mole* at [70].
25. *Mole* at [74].

[18] Mr Prior is right to submit that Constable Blansjaar's belief about how he, Mr Prior, was likely to behave was informed at least in part by Constable Blansjaar's experience of other people. This is not to accept that it is irrational to take into account observed patterns of human behaviour in predicting the likely behaviour of an individual. In the circumstances of this case, we do not consider that the lack of particulars of Constable Blansjaar's experience can be said to have deprived the Court of Appeal of the capacity to assess the reasonableness of the grounds of his belief.

[19] The Court of Appeal drew the inference from Constable Blansjaar's evidence that the experience of which he spoke was of dealing with intoxicated people who were, for that reason, behaving in the aggressive, abusive way in which Mr Prior was behaving.[26] This was a fair inference to draw. The Court of Appeal accepted that Mr Prior's judgment was impaired by his intoxication.[27] The Court of Appeal considered that it was reasonable, based on his experience in dealing with people whose judgment is impaired by intoxication, for Constable Blansjaar to believe that informing Mr Prior that he was not allowed to drink alcohol in that location was unlikely to achieve the desired result. The Court of Appeal considered that it was reasonable, based on his experience in dealing with people whose judgment is impaired by intoxication, for Constable Blansjaar to believe that Mr Prior's likely reaction in his intoxicated condition to having his alcohol confiscated would be to procure more alcohol and to continue drinking where he was. The Court of Appeal's capacity to assess the reasonableness of these conclusions did not depend upon, and was unlikely to be advanced by, an account of Constable Blansjaar's history of dealing with intoxicated persons. The assessment is one about which reasonable minds may differ, but in our view the Court of Appeal's finding was open to it.

The alternative ground

[20] Mr Prior relies on an alternative ground which accepts that the preconditions for the exercise of the s 128 power were met but contends that the decision to apprehend him nonetheless exceeded the limits of the power. To apprehend Mr Prior and take him into custody based on a belief that he was likely to commit an offence which is punishable by no more than forfeiture of the alcohol and the issue of a contravention notice is challenged as having been out of all proportion to the protective purposes for which the power is conferred. No basis apart from the nature of the offence that it was believed Mr Prior was likely to commit is identified in support of the contention that the decision to apprehend him was taken for a "disproportionate and illegitimate purpose", a contention which was not put below. The purposes of the power include protection of the intoxicated person and other persons and the prevention of the commission of offences by intoxicated persons. Section 128(1) in its current form was inserted with the object among other objects of preventing the commission of alcohol-related offences.[28] This object is not confined to the prevention of offences punishable by imprisonment.[29] It was within the scope of the power to take Mr Prior into custody in circumstances in which Constable Blansjaar had

26. *Mole* at [74].
27. *Mole* at [72].
28. Sections 3 and 84 of the Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011 (NT).
29. Section 116(6) of the PAA defines "offence" for the purposes of Pt VII, which includes s 128, to include any offence triable summarily.

reasonable grounds for believing that because of Mr Prior's intoxication he was likely to continue drinking alcohol at a regulated place.

[21] For these reasons, we would dismiss the appeal.

Gageler J.

Principle

[22] Personal liberty is "the most elementary and important of all common law rights".[30] Critical to its preservation is that "the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable".[31]

[23] Section 128(1) of the Police Administration Act (NT) adheres to that precept. The provision does so in the precondition it imposes for the exercise of the power it confers on a member of the Police Force, without warrant, to apprehend a person and to take that person into what can be described as "protective" custody.[32] The power is expressed to arise only "if the member has reasonable grounds for believing" the matters specified in each of the three lettered paragraphs of that provision. What is required to satisfy a precondition expressed in those "widely used"[33] terms was spelt out in *George v Rockett*.[34]

[24] First, the member must have an actual subjective belief in the existence of each of the specified matters. Belief is more than "suspicion"; it is not merely an "apprehension" or even a "fear"; it is an actual "inclination of the mind".[35] Second, the subjective belief of the member must be a belief that is formed by the member by reference to objective circumstances. The relevant objective circumstances are those known to and taken into account by the member in forming the belief. That is not to say that those circumstances might not include information provided to the member by someone else.[36] Nor is it to say that the formation of the belief by reference to those circumstances might not involve an element of surmise or conjecture on the part of the member.[37] Third, the objective circumstances by reference to which the belief is formed must be such as can be determined by a court to be "sufficient to induce that state of mind in a reasonable person".[38] Even if the formation of the belief might involve an element of surmise or conjecture on the part of the member, the sufficiency of the objective circumstances to induce that belief in a reasonable person must be capable of appearing to the satisfaction of a court.

[25] For a court to resolve a controversy as to whether the precondition was met in a case where a member of the Police Force, without warrant, has in fact apprehended a person and taken that person into custody, the court must look in

30. *Trobridge v Hardy* (1955) 94 CLR 147 at 152; [1956] ALR 15; *Williams v R* (1986) 161 CLR 278 at 292; 66 ALR 385 at 395.
31. *Donaldson v Broomby* (1982) 40 ALR 525 at 526.
32. Compare *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; 326 ALR 16; [2015] HCA 41 at [69].
33. Compare *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516; [2006] HCA 45 (*McKinnon*) at [10].
34. (1990) 170 CLR 104; 93 ALR 483 (*George*).
35. *George* at CLR 115–16; ALR 490–1.
36. Compare *Liversidge v Anderson* [1941] 3 All ER 338 at 359; [1942] AC 206 at 242 (*Liversidge*); *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 289; 1 All ER 129 at 137.
37. *George* at CLR 116; ALR 491.
38. *George* at CLR 112; ALR 488.

the first instance into the mind of the member of the Police Force who purported to exercise the power. Two initial questions arise. What was his belief? What were the objective circumstances by reference to which he formed that belief? Other evidence might shed light on the objective circumstances. Only his evidence can identify them directly.

[26] Having identified the objective circumstances by reference to which the member of the Police Force who purported to exercise the power formed his subjective belief, and assuming that subjective belief to be in the existence of matters specified in each of the three lettered paragraphs of s 128(1), the court must then ask and answer the third and critical question. Did those objective circumstances provide a sufficient foundation for a reasonable person to form the requisite state of mind, being a belief in (and not merely a suspicion of) the existence of the matters in s 128(1)(a) and (b) and of one or more of the matters in s 128(1)(c)(i) to (iv)?

[27] The manner in which the court answers the third of those questions is central to realisation of the legislative purpose of the precondition of guarding against an arbitrary deprivation of liberty. To answer that third question, the court must assess the identified circumstances for itself. Reference to the member's actual process of reasoning might assist that assessment. But this is not an occasion on which a court can be justified in giving weight to the opinion of the repository whose exercise of power is the subject of judicial review.[39] The whole point of requiring "reasonable grounds" for the requisite belief is to ensure that the reasonableness of the belief appear to a court and not merely to the member.[40] That the member, as an experienced member of the Police Force, might have thought that his belief was reasonable is not to the point.[41] The member's belief in the reasonableness of his own belief is not relevant to the task of the court. The court must arrive at its own independent answer through its own independent assessment of the objective circumstances which the member took into account.

Application

[28] The member of the Police Force who purported to exercise the power conferred by s 128(1) of the Police Administration Act to apprehend Mr Prior and take him into custody was Constable Blansjaar. Analysis must in the first instance be directed to his state of mind.

[29] Constable Blansjaar believed that Mr Prior was intoxicated and in a public place. His belief was in those respects objectively based and unquestionably objectively correct. There is no issue that Constable Blansjaar had reasonable grounds for believing the matters specified in s 128(1)(a) and (b).

[30] Constable Blansjaar also believed that Mr Prior, because of his intoxication, might intimidate or alarm or cause substantial annoyance to members of the public, and was likely to continue to consume liquor where he was, a public place within 2 km of licensed premises, in contravention of s 101U(1) of the Liquor Act (NT). That belief, in the existence of matters specified in the Police Administration Act in s 128(1)(c)(iii) or s 128(1)(c)(iv) respectively, is more problematic.

39. Compare *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 411; 43 ALR 649.
40. Compare *George* at CLR 112–13; ALR 488–9; *Liversidge* at All ER 351; AC 237.
41. *Bradley v Commonwealth* (1973) 128 CLR 557 at 574–5; 1 ALR 241; *McKinnon* at [10]; *Liversidge* at All ER 355, 359; AC 239, 243.

[31] The principal issue confronting this Court, putting itself for the purposes of this appeal in the position of the Court of Appeal of the Supreme Court of the Northern Territory, is whether the objective circumstances which Constable Blansjaar identified in his evidence as the foundation for his belief in the existence of those matters were sufficient to lead a reasonable person to form that belief.

[32] Constable Blansjaar did not know Mr Prior. He had not been told anything about Mr Prior. What Constable Blansjaar believed about Mr Prior was based solely on his observation of Mr Prior in the few minutes before he apprehended Mr Prior near the shops in Westralia Street in Darwin shortly after 3.30pm on 31 December 2013.

[33] What Constable Blansjaar observed of Mr Prior in those few minutes is not very complicated and can be summed up quite shortly. Mr Prior was standing, and his two companions were sitting, on the pavement only 20 metres from a bottle shop. They were in possession of alcohol. Mr Prior was obviously intoxicated. Mr Prior was angry and abusive towards Constable Blansjaar and Constable Fuss.

[34] Constable Blansjaar's brief observations, in my opinion, were insufficient to lead a reasonable person to form the belief that Mr Prior might intimidate or alarm or cause substantial annoyance to any member of the public. Constable Blansjaar's observations, in my opinion, were also insufficient to lead a reasonable person to form the belief that Mr Prior was likely to continue to consume liquor, if left where he was, in contravention of s 101U(1) of the Liquor Act.

[35] To explain why I consider Constable Blansjaar's observations to have been insufficient to lead a reasonable person to form the requisite belief, I need to refer in more detail to the objective circumstances. Doing so, it is best that I address each of the two problematic aspects of Constable Blansjaar's belief separately.

[36] Constable Blansjaar formed his belief that Mr Prior might cause alarm to members of the public, if left where he was, by reference to Mr Prior's anger and abuse. Important to recognise in assessing the reasonableness of that belief is that, from the beginning to the end of Constable Blansjaar's observations of him, Mr Prior's anger and abuse were directed solely towards Constable Blansjaar and Constable Fuss.

[37] Mr Prior's gesturing and shouting to them as they drove by on patrol caused Constable Blansjaar and Constable Fuss to turn their police car around and come back to him. The long and the short of what then happened, as recorded in a written statement made by Constable Blansjaar, which he agreed in cross-examination was substantially correct, was as follows:

> Fuss and I immediately approached the defendant. Whilst speaking to him in relation to his behaviour it was apparent to me that he had been drinking alcohol and was affected by liquor. The defendant's breath smelled strongly of liquor and his general appearance was dishevelled. His eyes were bloodshot and he was very belligerent to Fuss and I. When Fuss ... asked the defendant why he was making insulting hand gestures towards us the defendant stated: 'Because youse are just cunts and last week you gave me the finger'. I immediately informed the defendant I was now taking him into protective custody.

[38] Constable Blansjaar gave evidence that he was not himself intimidated or alarmed by Mr Prior's conduct. Never has it been suggested that Constable Fuss was intimidated or alarmed or that Mr Prior caused annoyance to Constable Blansjaar or Constable Fuss.

[39] There were members of the public in the vicinity who evidently saw the encounter unfold between Mr Prior and the two constables. The only evidence of any of them reacting to the encounter was evidence about a young family whose car was parked close by. Constable Blansjaar described them as having showed signs of alarm. He referred to the parents grabbing their children, putting them in the car and driving off. He said that they drove off shortly after Mr Prior had been taken into custody and "while we were placing him in the cage". The inference is at least equally available that their alarm was caused by Mr Prior's apprehension as it was by his behaviour.

[40] The primary judge thought, as did the Court of Appeal, that Mr Prior's behaviour towards the two constables "showed that his judgment was noticeably impaired and that he did not appreciate the effect that his behaviour was having on others".[42] That may be accepted. But his behaviour was not suggestive of a disposition to try to annoy anyone other than a member of the Police Force. Mr Prior's anger and abuse, directed as it was solely towards Constable Blansjaar and Constable Fuss, was not enough to lead a reasonable person to form the belief that he might intimidate or alarm or cause substantial annoyance to any member of the public.

[41] Constable Blansjaar and Constable Fuss poured out all of the alcohol which Mr Prior and his two companions had in their possession. The foundation for Constable Blansjaar's belief, that Mr Prior was nevertheless likely to continue to consume liquor in contravention of s 101U(1) of the Liquor Act, was explored in the cross-examination of Constable Blansjaar as follows:

> You knew nothing about his background? — Knew nothing about him or his history.
>
> You therefore had no reason to think that a direction to simply stop drinking would have been ineffective, did you? — Well he's drinking in a public place, he's already committing an offence.
>
> What I'm asking you is you had no reason to think that if you just said look, can you stop drinking, ... you're not allowed to drink here, that would have been effective? — Just his general demeanour. My experience as a police officer tells me that there's a good chance if we left he would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking.
>
> But this wasn't a person that you know had done that before, was it? — No, no.
>
> That was just an assumption that you made, wasn't it? — Well the assumption was based on a very short dealing but his behaviour during that was very telling.
>
> But you would agree, wouldn't you, that it was an assumption? — If you're referring to knowledge of his history, I guess you could say an assumption but it's an educated assumption made on the circumstances right down there and my experience.

[42] Behind the "educated assumption", which Constable Blansjaar referred to himself as having made, might well be observed patterns of behaviour. Understanding those observed patterns of behaviour might well lead a reasonable person observing the behaviour of Mr Prior to conclude that he would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking. The problem is that no relevant patterns of behaviour were disclosed by the

42. *Prior v Mole* [2015] NTSC 65 (*Prior*) at [24]; *Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2 (*Mole*) at [72].

evidence of Constable Blansjaar. Unless disclosed, they are not available to be taken into account in undertaking an independent assessment of the objective circumstances which Constable Blansjaar took into account as the foundation for his belief about Mr Prior.

[43] The Court of Appeal referred to Constable Blansjaar being entitled to take into account "experience over many years of the patterns of behaviour of people found intoxicated, drinking in the daytime in public areas close to liquor outlets".[43] So he was. But Constable Blansjaar's experience cannot assist an independent determination of the critical question of whether his observation of Mr Prior provided a sufficient foundation for a reasonable person to form the belief that Constable Blansjaar in fact formed unless Constable Blansjaar's experience was explained by him. That explanation was wholly lacking. Without further explanation of the experience to which he was referring, for Constable Blansjaar to say, in effect, "I formed my belief as an experienced policeman" is no more helpful to a court undertaking its own assessment of whether the objective circumstances which Constable Blansjaar observed and which he took into account in forming his belief about Mr Prior were sufficient to induce that state of mind in a reasonable person than if he had simply said "I formed my belief as a policeman".

[44] The Court of Appeal noted evidence of Constable Fuss, based on his own experience as a police officer, to the effect that a person who is intoxicated in a public place near a liquor outlet is likely to continue drinking "if they've still got money on them".[44] Even if Constable Fuss's experience could be attributed to Constable Blansjaar, there are difficulties with it.

[45] Taken at face value, without qualification as to the time, the place and the current and antecedent behaviour of the person in question, Constable Fuss's experience gives rise to a generalisation that is too broad to allow a reasonable person comfortably to predict the future behaviour of a particular person. There might have been more to Constable Fuss's experience, but what more there might be was also unexplained.

[46] Even if Constable Fuss's experience, were it to be adequately explained, might be sufficient to allow a prediction about the likelihood of a person who is intoxicated in a public place near a liquor outlet continuing to drink if he has money on him, there would remain difficulties about extrapolating from that experience to predict such a likelihood in the particular circumstances of Mr Prior. One of them is that no consideration appears to have been given to whether Mr Prior in fact had money on him. Another is that any objective assessment of the likelihood of Mr Prior purchasing more alcohol needed to take account of the prohibition imposed by s 102 of the Liquor Act on the sale of alcohol to a person who is drunk. There was no evidence to suggest that anyone working at the nearby bottle shop might disregard that prohibition.

[47] Without being so naïve as to think that a person intoxicated in a public place in the middle of the afternoon on New Year's Eve might not continue drinking, I am also not so naïve as to think that a member of the Police Force on patrol in the middle of the afternoon on New Year's Eve finding himself abused by an intoxicated person in a public place might not be inclined to nip a possible crime in the bud rather than to wait around to see if the possibility ripened into

43. *Mole* at [53].
44. *Mole* at [53].

a likelihood. The facts of the case illustrate the importance of the independent curial assessment that is statutorily required.

[48] Making my own independent assessment, I consider there to have been an insufficient basis in the objective circumstances as disclosed by evidence to found a reasonable belief (as distinct from a reasonable suspicion) that Mr Prior was likely to have continued to consume liquor in contravention of s 101U(1) of the Liquor Act at the time Constable Blansjaar took him into custody. That Mr Prior had most likely already been consuming liquor in contravention of that provision before his encounter with Constable Blansjaar and Constable Fuss, that he was obviously intoxicated, and that he was angry and abusive towards the constables do not alone or in combination make it reasonable to conclude that the likelihood was that Mr Prior would somehow have obtained more alcohol and would have continued to consume it in a public place within 2 km of licensed premises — in contravention of that prohibition — if he had not been apprehended.

Conclusion

[49] The result is that I would allow the appeal and set aside the order of the Court of Appeal. That would have the effect of reinstating the order of Southwood J, which quashed Mr Prior's convictions for offences he is alleged to have committed while in custody and acquitted him of those offences.

[50] **Nettle J.** In the middle of the afternoon on New Year's Eve in 2013, Mr Prior ("the appellant"), an Aboriginal man, and two other men of Aboriginal descent were drinking liquor in front of the Westralia Street shops in Darwin, Northern Territory. The appellant was situated on the footpath between two licensed premises which sold liquor. By consuming liquor in that place,[45] the appellant was committing an offence against s 101U(1) of the Liquor Act (NT). The following description of the events that ensued emerges from the judgments of the courts below.[46]

[51] Constables Fuss and Blansjaar of the Northern Territory Police Force drove past the Westralia Street shops in a marked police car. As they did, the appellant gestured at them with the middle finger of his right hand, while shouting at them in an angry, abusive and defiant manner. Constable Fuss, who was driving the police car, made a U-turn so as to park the car in front of where the appellant was standing. As Constable Fuss parked the car, the appellant sat down on a window ledge and picked up a large plastic bottle containing red wine. Constable Blansjaar observed several bottles of beer in the area where the three men were sitting.

[52] Constable Blansjaar got out of the police car and approached the appellant. He had a brief conversation with him and inspected the contents of the plastic bottle. Section 101Y of the Liquor Act empowered Constable Blansjaar, if he believed on reasonable grounds that the appellant was committing an offence under s 101U(1), to seize any open or unopened container, which there was reason to believe contained liquor, in the appellant's possession or immediate vicinity and empty or destroy the container. Having determined that the plastic bottle contained red wine, Constable Blansjaar poured out the contents and put the bottle into a nearby rubbish bin. Constable Fuss then began writing out an

45. Section 101T(1)(a) of the Liquor Act (NT).
46. *Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2 (*Mole*) at [1]–[8]; *Prior v Mole* [2015] NTSC 65 (*Prior*) at [15]–[31].

infringement notice pursuant to s 101V of the Liquor Act. The penalty attaching to an offence of consuming liquor in a regulated place contrary to s 101U(1) was the forfeiture of the seized liquor. An offence of causing nuisance while consuming liquor in a regulated place contrary to s 101V carried a maximum penalty of five penalty units.[47]

[53] Constable Blansjaar asked the appellant to speak with him at the police car. The appellant complied. He was unsteady on his feet, although not staggering, and he smelled strongly of liquor. His eyes were bloodshot and his appearance dishevelled. Constable Fuss asked the appellant why he had gestured at and abused them. The appellant replied: "because you are all cunts and you gave me the finger last week". The police officers also asked the appellant why he was consuming liquor in a regulated place. His response was belligerent and aggressive, and he was slurring his words. The appellant's behaviour and judgment were noticeably impaired and he did not appear to appreciate the effect of his behaviour on members of the public who were present. The parents of two children who were nearby appeared alarmed and placed their children quickly into their car. They told Constable Fuss that what they were hearing was "not nice".

[54] After observing and speaking to the appellant, Constable Blansjaar determined to place the appellant into protective custody under s 128(1) of the Police Administration Act (NT), which provides that:

> A member may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:
>
> (a) the person is intoxicated; and
> (b) the person is in a public place or trespassing on private property; and
> (c) because of the person's intoxication, the person:
>
> (i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or
> (ii) may cause harm to himself or herself or someone else; or
> (iii) may intimidate, alarm or cause substantial annoyance to people; or
> (iv) is likely to commit an offence.

[55] Constable Blansjaar's evidence was that he placed the appellant into protective custody because the appellant was intoxicated (s 128(1)(a)); was in a public place (s 128(1)(b)); had already committed an offence by consuming liquor in a regulated place contrary to s 101U(1) of the Liquor Act; would have defied any direction by the police officers to stop consuming liquor in that place; therefore, was likely to have continued to commit an offence under s 101U(1) (s 128(1)(c)(iv)); and might also have intimidated, alarmed or caused substantial annoyance to other people (s 128(1)(c)(iii)).

[56] After the appellant was told that he was being taken into protective custody, he became more abusive. Constable Blansjaar called for an additional police unit equipped with a car with a "cage on the back" to transport the appellant to the police station. Constable Mole and Sergeant O'Donnell answered the call. After they arrived, Constable Blansjaar told the appellant that he would be conveyed to the police station in the cage. The appellant picked up his backpack and walked to the rear of the vehicle. At that point, Constable Blansjaar took the backpack from the appellant. Sergeant O'Donnell asked the appellant to

47. Sections 101U(2) and 101V(1) of the Liquor Act.

hand over the mobile phone in his possession. The appellant refused, saying that he wanted to call his wife. He was told he would have an opportunity to call a sober adult when they arrived at the police station. The appellant became angry and more aggressive, and repeatedly called Sergeant O'Donnell a "dog cunt". Sergeant O'Donnell then forcibly removed the mobile phone from the appellant's hand. As the appellant was being placed in the cage, he hawked back as if to spit at the police officers and, as the officers moved back to close the door, the appellant spat in Sergeant O'Donnell's face and on his shirt. The appellant was placed under arrest for assaulting Sergeant O'Donnell in the course of his duty.

[57] Sergeant O'Donnell and Constable Mole drove in the vehicle transporting the appellant, while Constables Blansjaar and Fuss followed behind in the police car. As both vehicles stopped at traffic lights at the intersection of Westralia Street and Stuart Highway, the appellant continued to shout abuse and to spit. He stood up in the cage, undid his zipper, withdrew his penis and attempted to urinate on the police car occupied by Constables Blansjaar and Fuss.

The proceedings before the Supreme Court of the Northern Territory

[58] The appellant was convicted in the Court of Summary Jurisdiction of unlawfully assaulting a police officer (Count 2) and of behaving in an indecent manner in a public place (Count 3).[48] He was acquitted of behaving in a disorderly manner in a public place (Count 1).[49] The appellant appealed to the Supreme Court against conviction on grounds that the Magistrate had erred in finding his apprehension under s 128 of the Police Administration Act to be lawful and that the evidence going to Counts 2 and 3 should have been excluded in a proper exercise of the discretion under s 138 of the Evidence (National Uniform Legislation) Act (NT).

[59] Southwood J ("the primary judge") rejected the first of those grounds of appeal. His Honour was not satisfied that the prosecution had proved that there were reasonable grounds for Constable Blansjaar to believe, for the purpose of s 128(1)(c)(iii), that the appellant would intimidate, alarm or substantially annoy other people.[50] But his Honour was satisfied that the prosecution had proved beyond reasonable doubt that: (1) the appellant was intoxicated within the meaning of s 127A of the Police Administration Act;[51] (2) there were reasonable grounds for Constable Blansjaar to believe that the appellant was intoxicated and that, if he were not apprehended, he may continue to consume liquor in a regulated place contrary to s 101U(1) of the Liquor Act;[52] and (3) Constable Blansjaar held the belief required by s 128 of the Police Administration Act to justify the appellant's apprehension. Consequently, the primary judge held that Constable Blansjaar had lawfully apprehended the appellant.[53]

[60] Despite that, however, the primary judge allowed the appeal on the ground that, although intoxicated for the purpose of s 127A of the Police Administration Act, the appellant was "not seriously affected by alcohol" and, although it was likely the appellant would have continued to consume liquor in the same place

48. Count 3 (behaving in an indecent manner contrary to s 47(a) of the Summary Offences Act (NT)) related to the appellant's attempt to urinate on the police car.
49. Count 1 (behaving in a disorderly manner contrary to s 47(a) of the Summary Offences Act) related to the appellant's behaviour at the Westralia Street shops.
50. *Prior* at [37].
51. *Prior* at [43].
52. *Prior v* at [36].
53. *Prior v* at [36], [44].

had he not been apprehended, it was unlikely that he would have engaged in any other offending.[54] It followed, the primary judge held, that, although lawful under s 128 of the Police Administration Act, the appellant's apprehension was unnecessary and, as such, inconsistent with the minimum standards of acceptable police conduct.[55] Therefore, the Magistrate should have excluded the evidence of the appellant's assault on Sergeant O'Donnell and his conduct said to constitute indecent behaviour, pursuant to s 138 of the Evidence (National Uniform Legislation) Act, as evidence which had been improperly obtained or obtained in consequence of an impropriety.[56]

The proceedings before the Court of Appeal

[61] There were two principal issues in the Court of Appeal. The first was whether the appellant was lawfully apprehended under s 128 of the Police Administration Act. The second was whether, if the appellant were lawfully apprehended, the evidence concerning Counts 2 and 3 should have been excluded under s 138 of the Evidence (National Uniform Legislation) Act on the basis that his apprehension was unnecessary and that Constable Blansjaar's conduct in apprehending him thereby failed to comply with the minimum standards of acceptable police conduct.

[62] The Court of Appeal held unanimously that the apprehension of the appellant under s 128 was lawful.[57] Their Honours found no error in the primary judge's conclusion that it was established beyond reasonable doubt that there were reasonable grounds for Constable Blansjaar's belief that the appellant was intoxicated and was likely to commit a further offence of consuming liquor in a regulated place contrary to s 101U(1) of the Liquor Act.[58] In contrast to the primary judge, however, the Court of Appeal held that there was also a rational basis for Constable Blansjaar to believe that, if the appellant were permitted to remain at the Westralia Street shops, he may intimidate, alarm or cause substantial annoyance to other people.[59]

[63] In the result, the Court of Appeal held that the primary judge was in error in ruling that the evidence concerning Counts 2 and 3 should have been excluded under s 138 of the Evidence (National Uniform Legislation) Act.[60] Their Honours accepted that a police officer contemplating placing an individual into protective custody must keep in mind that protective custody should only be used as a last resort,[61] and that it is desirable, where it is practicable to do so, for police officers actively to consider alternative courses and to ask relevant questions in order to assess the situation.[62] But their Honours held that it is not a pre-condition of the exercise of the power under s 128 of the Police Administration Act that a police officer must in every case turn his or her mind to such alternatives.[63] As was observed:[64]

54. *Prior* at [70].
55. *Prior* at [50], [70]–[71].
56. *Prior* at [71].
57. *Mole* at [75], [77].
58. *Mole* at [72]–[75].
59. *Mole* at [62].
60. *Mole* at [56].
61. *Mole* at [42], [43].
62. *Mole* at [51]–[52].
63. *Mole* at [51], [55].
64. *Mole* at [51].

> The circumstances are almost infinitely variable and sometimes an experienced police officer will know from the person's behaviour and other surrounding circumstances, that protective custody is the only available option.

[64] The Court of Appeal added that the police officers in this case appeared to have "acted to a certain degree on stereotyping the [appellant]".[65] But, apart from observing that stereotyping is "highly undesirable", their Honours did not go on to explain what they meant by that description.

The appellant's contentions

[65] Before this Court, the appellant contended that the Court of Appeal erred in holding that there were reasonable grounds for Constable Blansjaar's asserted belief that the appellant's intoxication would have led him to continue consuming liquor in the same regulated place, or to intimidate, alarm or cause substantial annoyance to other people. In particular, it was submitted that the Court of Appeal erred in holding that Constable Blansjaar was entitled to act on the basis of his experience with other offenders. Counsel for the appellant argued that a police officer's previous experience of other persons, as opposed to his or her experience of the particular person to be apprehended, cannot rationally bear on the question whether the particular person is likely to commit an offence. Consequently, it was not enough, for the purpose of identifying reasonable grounds for his belief under s 128 of the Police Administration Act, for Constable Blansjaar to rely upon the appellant's "general demeanour" or "behaviour"; "the circumstances" surrounding the appellant's apprehension; his "experience as a police officer"; or an "educated assumption" based on that experience.

[66] Alternatively, it was said that, in any event, the fact that Constable Blansjaar had observed the appellant consuming liquor and behaving in a belligerent and abusive manner was insufficient basis to found a reasonable belief that the appellant would continue to consume liquor in the same way. The evidence was clear that Constable Blansjaar had poured out the appellant's wine. There was no evidence that the appellant had means to purchase any more alcohol. And, since the appellant was intoxicated, it would have been an offence for the proprietor of either of the licensed premises to sell the appellant alcohol.

[67] It was further contended that, apart from the appellant's intoxication — which of itself did not provide reasonable grounds to place the appellant into protective custody — there was no basis from which to infer that the appellant might intimidate, alarm or cause substantial annoyance to other people, or commit any further offence. In particular, there was no evidence that the appellant had intimidated, alarmed or caused substantial annoyance to other people prior to his apprehension. The most the evidence showed was that the appellant had behaved towards the police officers in a disorderly and offensive manner. And, in the absence of admissible evidence that the appellant had intimidated, alarmed or caused substantial annoyance to others, there was not a rational basis to suppose that he may continue to do so.

[68] Lastly, in the appellant's contention, it was apparent that what the Court of Appeal meant by its reference to "stereotyping the [appellant]" was that Constable Blansjaar's actions had been influenced by a prejudice against Aboriginal persons, and it was submitted that prejudice of that kind could not

65. *Mole* at [53].

ever be regarded as a reasonable basis for placing an offender into protective custody under s 128 of the Police Administration Act.

The appellant's behaviour and the circumstances surrounding his apprehension

[69] The appellant's contentions as to the relevance of Constable Blansjaar's previous experience as a police officer should be rejected. A police officer may, and ordinarily is expected to, bring to bear his or her previous experience as an aid in the detection and policing of past and anticipated offending. Where past experience has taught that identified circumstances coincide with particular kinds of offending, it is logical and reasonable to infer that the occurrence of similar circumstances entails a possibility of coincident similar offending.

[70] The appellant's submission that the Court of Appeal suggested that Constable Blansjaar acted on the basis of racial stereotypes, and that such improper reasoning could not be excised from the belief upon which Constable Blansjaar acted, should also be rejected. The appellant did not contend before the Magistrate or the primary judge that Constable Blansjaar was prejudiced against Aboriginal persons. Nor did the appellant's counsel cross-examine Constable Blansjaar to the effect that his decision to apprehend the appellant was the product of such prejudice. In those circumstances, it was not open to the appellant to allege racial prejudice for the first time on appeal. Furthermore, whatever the Court of Appeal may have meant by "stereotyping", it does not appear to have involved prejudice. As has been seen, their Honours concluded that the belief Constable Blansjaar acted upon in apprehending the appellant was justified on the basis of the appellant's behaviour and Constable Blansjaar's experience, over a significant number of years, of similar offending.[66]

[71] Granted, experience may sometimes breed prejudice, which is regrettable. Prejudice is irrational and does not afford reasonable grounds for decision-making, and in the case of a police officer it is unacceptable. But knowledge born of experience is not irrational — it is empirical — and, depending on the experience of a police officer, may properly comprise a significant part of the officer's crime detection and prevention armoury. For example, a police officer might use knowledge based on previous experience to identify particular circumstances and behaviour that support a belief on reasonable grounds that observed individuals have engaged in a drug transaction.[67] A further example was posed by counsel for the appellant in oral argument: it might be open to a police officer to believe on reasonable grounds that a visibly intoxicated person walking towards a car holding what appear to be keys to a car might be about to commit an offence of driving under the influence of alcohol.[68] Accordingly, where a police officer encounters circumstances of a kind which, by reason of his or her previous experience, he or she rationally associates with an identified class of committed or anticipated offending, the occurrence of those circumstances may reasonably lead the officer to conclude that there is a significant probability of that identified class of offending taking

66. *Mole* at [53].
67. See and compare, for example, *Azar v Director of Public Prosecutions (NSW)* (2014) 239 A Crim R 75; [2014] NSWSC 132 at [38]–[39]; *R v Dam* (2015) 123 SASR 511; [2015] SASCFC 131 at [38]–[40].
68. See and compare *Davies v Waldron* [1989] VR 449; *Macdonald v Bain* 1954 SLT (Sh Ct) 30.

place. As was observed by the United States Supreme Court in *Terry v Ohio*,[69] although little weight can be given to an officer's "inchoate and unparticularized suspicion or 'hunch'",[70] due weight must be given to the specific reasonable inferences which a police officer is entitled to draw from the facts in light of his or her experience.[71]

[72] Contrary to the appellant's submissions, therefore, it is not correct that the only experience that could logically be regarded as indicative of how the appellant might behave was experience of how the appellant himself had behaved in the past. Nor was it necessary for Constable Blansjaar to identify precisely each fact and circumstance that he took into account, by inference or deduction, in forming the view that the appellant should be placed into protective custody. It was sufficient, for the purpose of the court's assessment of his evidence, for Constable Blansjaar to outline, as he did, his past experience and his pertinent observations of the appellant and the surrounding circumstances. As he deposed, he had 12 years of experience of the patterns of behaviour of people found drinking liquor in public places in close proximity to licensed premises, displaying aggressive and abusive behaviour indicative of intoxication and a consequent lack of judgment. His experience was that, despite being directed to stop, such persons would continue to consume liquor. In essential respects, the appellant was no different from those other offenders upon whom Constable Blansjaar's experience was based. The appellant was drunk, disinhibited, abusive and blatantly consuming liquor in a conspicuous public place in close proximity to licensed premises. Additionally, that particular place was known to Constable Blansjaar, from his experience as a police officer, as a site where liquor was consumed illegally. On those bases, Constable Blansjaar came to the view that the appellant would have continued to drink and behave as he had unless taken into protective custody.

[73] It is true that there was no direct evidence that the appellant had sufficient money to purchase more alcohol, or that one of the two licensed premises would have been prepared to sell it to him. But, even if he did not, and they would not, there was reason to suspect that the men with whom the appellant was sitting might keep him supplied. Granted, the test of reasonable grounds for a belief is objective.[72] But, depending on the circumstances, belief may leave "something to surmise or conjecture".[73] And, as was stated in *George v Rockett*[74] while the objective circumstances necessary to found reasonable grounds to believe must point sufficiently to the subject matter of that belief, they need not be established on the balance of probabilities.

[74] Although it is unnecessary to decide, it may be that it was less likely the appellant would intimidate, alarm or cause substantial annoyance to others if he was not apprehended, than it was that he would continue to consume liquor in a regulated place. The only direct evidence that any person had been alarmed by the appellant's conduct up to the point of his apprehension was the evidence that

69. (1968) 392 US 1 (*Terry*).
70. *Terry* at 27 per Warren CJ (delivering the opinion of the court).
71. See also *United States v Cortez* (1981) 449 US 411 at 418; *Illinois v Wardlow* (2000) 528 US 119 at 122–5.
72. *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516; [2006] HCA 45 at [10] per Gleeson CJ and Kirby J.
73. *George v Rockett* (1990) 170 CLR 104 at 116; 93 ALR 483 at 491 (*George*).
74. *George* at CLR 116; ALR 491.

two parents, appearing alarmed and concerned for their children, reacted to the way in which the appellant spoke to the police officers. Seemingly, that was more a reaction to what happened after the officers informed the appellant that he would be taken to the police station than to anything which the appellant had said or done before that point and, necessarily, before the point at which Constable Blansjaar formed the view that the appellant should be taken into protective custody.

[75] It is possible that, if the police had given the appellant an infringement notice and departed the scene, he would have continued to consume liquor in the same place but without causing further alarm or annoyance. But, at the same time, it would hardly be surprising or unreasonable to think that at least some members of the public, particularly the elderly or children, may be alarmed by an intoxicated person drinking in a public place on the footpath between licensed premises in a strip of shops in the middle of the afternoon, or that other members of the public may be substantially annoyed that such behaviour is permitted to continue after the intoxicated person has been expressly directed by police officers to cease and desist. That may be so regardless of whether the intoxicated person is aggressive or belligerent towards those members of the public directly. Police officers in Constable Blansjaar's position are warranted to take account of that possibility and to act accordingly.

Excess of power

[76] Counsel for the appellant argued in the alternative that, if Constable Blansjaar had power under s 128 of the Police Administration Act to take the appellant into protective custody, the most likely anticipated further offence of continuing to consume liquor in a regulated place was of such a minor nature that taking the appellant into custody on that basis was a disproportionate exercise of the power and, as such, an abuse of power.

[77] That argument should also be rejected. No doubt, where it is necessary for a police officer to deal with an offender in respect of a minor offence, a question will arise as to whether it is unreasonable for the police officer to arrest the offender rather than to proceed by way of summons. Several members of this Court made mention of that in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*[75] in relation to the power of detention under Div 4AA of Pt VII of the Police Administration Act. But, unlike Div 4AA of Pt VII, protective custody under s 128 is not directed to dealing with an offender in respect of offending which has already been committed. Section 128(1) was inserted, in its present form, into the Police Administration Act by the Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011 (NT) with the express object of preventing the commission of alcohol-related offences, preventing the misuse of alcohol and protecting people from harm or nuisance resulting from the misuse of alcohol by others.[76] It is consistent with the object of that legislation, and not excessive or unreasonable, that, where a police officer finds an offender in a drunk, disorderly and abusive state, drinking in a regulated place in contravention of the Liquor Act, in such circumstances that it appears on reasonable grounds that, unless the offender is taken into protective

75. (2015) 256 CLR 569; 326 ALR 16; [2015] HCA 41 at [99] per Gageler J, at [241] per Nettle and Gordon JJ.
76. Sections 3 and 84 of the Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011 (NT).

custody, he or she may continue to drink there, a police officer is justified in taking the offender into protective custody for the protection of the offender and for the protection of others.

Conclusion and orders

[78] For these reasons, the appeal should be dismissed.

[79] **Gordon J.** Anthony Prior was in a public place — on the footpath in front of the Westralia Street shops in Darwin and between two shops that sold alcohol — drinking red wine. He was with two other Aboriginal men. He was intoxicated. As a police car drove past, he gestured to the police officers with the middle finger of his right hand (that is, he gave them "the bird") and shouted abuse at them.

[80] Constables Blansjaar and Fuss parked the car in front of the men and got out. Constable Blansjaar poured out the contents of the bottles of alcohol. Constable Fuss began writing out an infringement notice for Mr Prior for drinking alcohol in a regulated place and causing a nuisance contrary to s 101V of the Liquor Act (NT). The police asked Mr Prior to speak to them at their car and he walked to the police car. He was a bit unsteady on his feet but not staggering, smelled strongly of liquor, had bloodshot eyes and was dishevelled. In response to questions from the police about why he had given them "the bird" and abused them, Mr Prior was belligerent and aggressive, swore and slurred his words. Two parents nearby with their children told Constable Fuss that what they were hearing was not nice.

[81] Constable Blansjaar ("the Apprehending Officer") apprehended Mr Prior and took him into custody under s 128(1) of the Police Administration Act (NT) (the PA Act), which provides:

> A member [of the Police Force[77]] may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:
>
> (a) the person is intoxicated; and
>
> (b) the person is in a public place or trespassing on private property; and
>
> (c) because of the person's intoxication, the person:
>
> (i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or
>
> (ii) may cause harm to himself or herself or someone else; or
>
> (iii) may intimidate, alarm or cause substantial annoyance to people; or
>
> (iv) is likely to commit an offence.

[82] Mr Prior was charged with three offences for conduct that occurred following his apprehension. It was alleged that he unlawfully assaulted a police officer in the execution of the officer's duty contrary to s 189A of the Criminal Code (NT) when he spat twice on a sergeant whilst he was being placed in a caged vehicle ("count 2"). It was also alleged that he behaved in a disorderly manner in a public place contrary to s 47(a) of the Summary Offences Act (NT) ("count 1"), and that he behaved in an indecent manner in a public place contrary to s 47(a) of the Summary Offences Act ("count 3") when he stood up in the back of the caged vehicle, unzipped his jeans, withdrew his penis and attempted to urinate on the police car occupied by the Apprehending Officer and Constable Fuss.

77. See s 4(1) of the PA Act.

[83] It was not contested that the elements of s 128(1)(a) and (b) of the PA Act were satisfied — Mr Prior was intoxicated in a public place. The central issue on appeal to this Court was whether, at the time of Mr Prior's apprehension under s 128(1) of the PA Act, the Apprehending Officer had reasonable grounds for believing that, because of Mr Prior's intoxication, Mr Prior may have "intimidate[d], alarm[ed] or cause[d] substantial annoyance to people" or was "likely to commit an offence" within the meaning of s 128(1)(c)(iii) or s 128(1)(c)(iv) of the PA Act.

[84] If the Apprehending Officer did not have that subjective belief and did not hold that subjective belief on reasonable grounds at the time he apprehended Mr Prior, Mr Prior's apprehension would not have been lawful. And if Mr Prior's apprehension was not lawful, then the respondent accepted both that the assaulted police officer would not have been acting in the execution of his duty when he was spat on,[78] and that it was open for the evidence of all the charged conduct to be found inadmissible under s 138(1) of the Evidence (National Uniform Legislation) Act (NT) (the Evidence Act).[79]

[85] For the reasons that follow, the appeal to this Court should be dismissed. The apprehension of Mr Prior was lawful.

Decisions below

[86] In the Court of Summary Jurisdiction, Mr Prior was acquitted of count 1 but convicted of counts 2 and 3. Mr Prior appealed against his convictions to the Supreme Court of the Northern Territory. That appeal was by way of rehearing.

[87] Southwood J held that Mr Prior's apprehension under s 128(1) was lawful.[80] His Honour was not satisfied that the prosecution had proved that there were reasonable grounds for the Apprehending Officer to have formed the opinion that Mr Prior's behaviour at the time would intimidate, alarm or cause substantial annoyance to any other person.[81] His Honour did make a finding that the prosecution had proved (a) that Mr Prior was intoxicated within the meaning of s 127A of the PA Act; (b) that there were reasonable grounds for the Apprehending Officer to believe that Mr Prior was intoxicated and, if the police left Mr Prior at the shops, he would likely commit an offence under s 101U of the Liquor Act for drinking in a regulated place; and (c) that the Apprehending Officer held the requisite belief.[82]

[88] However, Southwood J also held that the apprehension, while lawful, was ill-advised and unnecessary when regard was had to General Orders issued by the Commissioner of the Northern Territory Police, which provided that arrest was an "action of last resort".[83] His Honour held that evidence of the charged conduct was therefore obtained in consequence of an impropriety, and that it should have been excluded under s 138(1) of the Evidence Act.[84] Accordingly, Southwood J allowed the appeal, set aside Mr Prior's convictions on counts 2 and 3 and acquitted him of those counts.

78. See *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182; [2004] HCA 39 at [118]–[121].
79. Compare *Parker v Comptroller-General of Customs* (2009) 252 ALR 619; 83 ALJR 494; [2009] HCA 7 at [30].
80. *Prior v Mole* [2015] NTSC 65 (*Prior*) at [36].
81. *Prior* at [37].
82. *Prior* at [28], [36].
83. *Prior* at [48], [70]–[71].
84. *Prior* at [70]–[71].

[89] The prosecution appealed to the Court of Appeal of the Northern Territory. The Court of Appeal (Riley CJ, Kelly and Hiley JJ) allowed the appeal and reinstated the findings of guilt and the entry of conviction on counts 2 and 3. Among other findings, the Court of Appeal rejected Southwood J's conclusion in respect of impropriety under s 138(1).[85] That issue was not the subject of a grant of special leave to appeal to this Court. The ground of appeal in this Court in relation to the Evidence Act is limited to whether the apprehension was unlawful and therefore "in contravention of an Australian law" within the meaning of s 138(1) of the Evidence Act.

Statutory framework

[90] Section 128 is in Pt VII of the PA Act, which deals with police powers. Division 3 of that Part is titled "Arrest", while Div 4 — which contains s 128 — is titled "Apprehension without arrest".

[91] The text of s 128(1) has been set out earlier. For the purposes of Div 4 of Pt VII, s 127A provides that "a person is *intoxicated* if: (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and (b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug".

[92] As stated earlier, there is no dispute that s 128(1)(a) was satisfied. There is also no dispute that Mr Prior was in a "public place" and that s 128(1)(b) was satisfied.

[93] That leaves s 128(1)(c). If s 128(1)(a) and (b) are satisfied, a member of the Police Force may apprehend a person and take the person into custody if the member has reasonable grounds for believing, because of the person's intoxication, the person satisfies one of the criteria in s 128(1)(c)(i) to (iv).

[94] At the time of the apprehension, the member must hold a relevant subjective belief and that subjective belief must be based on identifiable grounds and those grounds must be reasonable.[86] It is necessary to say something further about each of these matters.

Subjective belief

[95] As already noted, the member must hold a relevant subjective belief. But it is important to stress that the belief held by the member must be that, *because of the person's intoxication*, one of the matters set out in s 128(1)(c) is engaged. It is not enough that a member have the belief that a person "may intimidate, alarm or cause substantial annoyance to people" or "is likely to commit an offence". The belief held by the member must be that, *because of the person's intoxication*, the person "may intimidate, alarm or cause substantial annoyance to people" or "is likely to commit an offence".

[96] The importance of the link between the person's intoxication and the matters in s 128(1)(c) is reinforced by s 129. Subject to the other provisions in Div 4 of Pt VII, s 129 limits the period of detention for a person apprehended and taken into custody under s 128(1). The person can be held in custody "only for so long as it reasonably appears to the member of the Police Force in whose custody [they are] held that the person remains intoxicated".[87] Once it

85. *Mole v Prior* (2016) 36 NTLR 171; 304 FLR 418; [2016] NTCA 2 (*Mole*) at [54]–[56].
86. See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; 254 ALR 432; [2009] HCA 15 at [56].
87. Section 129(1) of the PA Act.

"reasonably appears ... that the person is no longer intoxicated", the person must be released from custody.[88] Section 129, together with s 130 — which prohibits a person from being charged with an offence or questioned in relation to an offence while in custody after apprehension under s 128(1) — reflects the "evident protective function served by Div 4":[89] the evident function being both the protection of an intoxicated person from themselves and the protection of other people; the protection being necessary because of certain things the intoxicated person is unable to or might do as a result of their intoxication.

Reasonable grounds

[97] Next, for the member to have the power to apprehend a person under s 128(1), the member must have "reasonable grounds" for holding the requisite belief.

[98] When a statute prescribes that there must be "reasonable grounds" for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person.[90] It is an objective test.[91] The question is not whether the relevant person thinks they have reasonable grounds.[92]

[99] In explaining the connection between the "reasonable grounds" and the requisite "belief", this Court in *George v Rockett* stated:[93]

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof.

[100] Belief is not certainty. "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture".[94]

[101] Those considerations are important in this appeal. The matters set out in s 128(1)(c)(iii) and (iv) are the "subject matter" of the belief. That subject matter necessarily involves an element of opinion and judgment[95] — a predictive opinion and judgment about what the person (here, Mr Prior) *may* or is *likely* to do in the future. That opinion and judgment is related to, but separate from, the objective facts and circumstances. Together, they constitute all of the relevant circumstances for assessing the reasonableness of the grounds. Accordingly, when considering whether there were reasonable grounds for the relevant belief for the purposes of s 128(1)(c)(iii) and (iv), matters of both fact and opinion must be considered.[96]

88. Section 129(2) of the PA Act.
89. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; 326 ALR 16; [2015] HCA 41 (*NAAJA*) at [69].
90. *George v Rockett* (1990) 170 CLR 104 at 112; 93 ALR 483 at 488 (*George*).
91. *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516; [2006] HCA 45 (*McKinnon*) at [10].
92. *McKinnon* at [10].
93. *George* at CLR 116; ALR 491.
94. *George* at CLR 116; ALR 491.
95. See *McKinnon* at [12].
96. See *McKinnon* at [12].

Apprehending officer's decision

[102] That the Apprehending Officer had formed a subjective belief, and the content of that subjective belief, were not in dispute. The subjective belief has been set out earlier in these reasons.[97]

[103] Further, there was no dispute that the Apprehending Officer's decision to apprehend Mr Prior under s 128(1) of the PA Act was based on three circumstances:

(1) the behaviour of Mr Prior at the relevant time, which was aggressive, abusive and indicative of intoxication, displayed a lack of judgment and included drinking in a public place in the presence of police;[98]
(2) the Apprehending Officer's experience over many years of the patterns of behaviour of people found intoxicated, drinking in the daytime in public areas close to liquor outlets, and displaying similar behaviour to that of Mr Prior;[99] and
(3) the presence of members of the public who appeared to be alarmed by Mr Prior's actions.[100]

[104] Against that background, it is necessary to turn to consider s 128(1)(c)(iii) and (iv) separately. It is appropriate to consider subpara (iv) before subpara (iii).

"Likely to commit an offence" — Section 128(1)(c)(iv)

[105] Were there reasonable grounds for the Apprehending Officer to form the belief that Mr Prior, because of his intoxication, was likely to commit an offence?

[106] First, it is necessary to identify the offence. For the purpose of s 128(1)(c)(iv), "offence" is relevantly defined to include "a crime, a felony, a misdemeanour and any offence triable summarily" and includes "an offence against a law ... of the Territory".[101] The offence relied on in this appeal was that provided by s 101U(1) of the Liquor Act. Under s 101U(1) of the Liquor Act, "[a] person commits an offence if the person consumes liquor at a regulated place". A "regulated place" relevantly includes a place that is within 2km of licensed premises and is in a public place.[102]

[107] The circumstances and matters on which the Apprehending Officer relied in forming the subjective belief that Mr Prior, because of his intoxication, was likely to commit an offence against s 101U(1) of the Liquor Act have been set out earlier.[103] Those circumstances and matters must be considered together.[104]

[108] Mr Prior submitted that the Apprehending Officer's reference to, and reliance on, Mr Prior's "general demeanour", his "behaviour" and "the circumstances" were not sufficiently particularised to rationally bear upon the matters in s 128(1)(c)(iii) or s 128(1)(c)(iv). That submission should be rejected. The circumstances and matters identified by the Apprehending Officer would induce a reasonable person to be inclined to accept, rather than reject, the

97. See [87] above.
98. *Mole* at [53], [62], [72].
99. *Mole* at [53], [74].
100. *Prior* at [27]. See also *Mole* at [62].
101. Section 116(6) of the PA Act.
102. Section 101T(1)(a) of the Liquor Act.
103. See [103] above.
104. *McKinnon* at [12].

proposition that Mr Prior, because of his intoxication, was likely to commit an offence of drinking alcohol in a regulated place contrary to s 101U(1) of the Liquor Act.

[109] First, there were the observations that the Apprehending Officer made of Mr Prior. Mr Prior was intoxicated. He was aggressive and abusive. He swore at the police. His judgment was impaired. There is no dispute that, prior to his apprehension, Mr Prior was drinking liquor in a regulated place and that he was committing an offence against s 101U(1) of the Liquor Act. Even though it is an offence to sell liquor to a person who is drunk,[105] there were two bottle shops nearby where liquor was available to be purchased.

[110] But, of course, that was not all. The Apprehending Officer relied upon his 12 or 13 years' experience as a police officer to predict that there was a good chance that if the police left, Mr Prior would simply purchase more alcohol at the bottle shop 20 metres away and continue drinking. The Apprehending Officer did not know Mr Prior before the incident, but made an "educated assumption", based on Mr Prior's behaviour, the circumstances and his own experience, that it was "most likely" that Mr Prior would have purchased more alcohol when the police left. The Apprehending Officer's prior policing experience was *a*, not *the*, basis for his belief. Moreover, the Apprehending Officer's prior policing experience was not relied upon in a vacuum. It was experience relied upon in the context of Mr Prior's "general demeanour", his "behaviour" and "the circumstances".

[111] And it must be recalled that the Apprehending Officer's reference to and reliance on Mr Prior's "general demeanour", his "behaviour" and "the circumstances" occurred in the context of the Apprehending Officer considering what activities Mr Prior "may" or was "likely to" engage in within a relatively short space of time after police left the scene. It was a predictive judgment. It was dealing with what might happen, not what would certainly happen.

[112] The behaviour that the Apprehending Officer predicted — drinking alcohol in a regulated place — was what Mr Prior had been doing. Mr Prior was intoxicated and his judgment was noticeably impaired. As the Court of Appeal found, an absence of evidence that Mr Prior had the means to purchase more alcohol, or that it would be sold to him despite his intoxication, did not deny the existence of the relevant belief[106] or suggest that the grounds relied on by the Apprehending Officer were not sufficient to induce that state of mind in a reasonable person.

[113] Mr Prior submitted that the inclusion in the "reasonable grounds" for the relevant belief of the Apprehending Officer's prior policing experience of persons who "exhibited similar characteristics" to Mr Prior was impermissible on two bases. First, it was an irrelevant and improper consideration because, given the very short period of contact between the Apprehending Officer and Mr Prior, there was an inference open to be drawn that the Apprehending Officer had "stereotyped" Mr Prior; and, second, there was an absence of particulars of the Apprehending Officer's experience to provide any basis for relying on that experience. In respect of the second basis of his submission, Mr Prior accepted that an apprehending officer could rely upon their experience but submitted that

105. See s 102 of the Liquor Act. "[D]runk" is defined in s 7 of the Liquor Act relevantly identically to "intoxicated" in s 127A of the PA Act.
106. *Mole* at [69]–[70].

the experience might not assist in establishing that the grounds were reasonable. Both of those contentions should be rejected.

[114] Mr Prior did not contend at trial that the Apprehending Officer "stereotyped" Mr Prior, and did not cross-examine the Apprehending Officer about Mr Prior's "characteristics" or how they were relevant to or affected the Apprehending Officer's belief. In particular, it was not contended at trial, and it was not put to the Apprehending Officer in cross-examination, that Mr Prior was apprehended, or treated in a particular manner, because he was an Aboriginal person. Questions about Mr Prior's characteristics and how they were relevant to or affected the Apprehending Officer's belief (if at all) should have been addressed and considered at trial. The same is true for issues of whether the Apprehending Officer turned his mind to consider options other than apprehending Mr Prior, such as asking Mr Prior about his personal circumstances — for example, where he lived and whether someone was able to collect him; those being issues that are said to be relevant to Mr Prior's submission that his apprehension was a disproportionate exercise of the power under s 128(1). That submission is considered below.

[115] Put another way, the power of the police to apprehend a person under s 128(1) is only to be exercised for the purposes for which the power is granted and, therefore, only for a legitimate reason.[107] If the apprehension is unlawful, then actions in assault, trespass and false imprisonment may lie.[108]

[116] These kinds of facts and matters may be relevant in assessing whether an apprehension under s 128(1) was lawful and, in particular, in identifying an apprehending officer's subjective belief, the grounds on which that belief was held and whether those grounds were reasonable. And if these kinds of facts and matters are considered relevant, then they should be raised at trial and the apprehending officer should be cross-examined about them.

[117] The matter may be tested this way. If a police officer sees a person who is drinking alcohol in public, apparently intoxicated, aggressive and abusive and displaying the lack of judgment associated with being intoxicated, and, having poured that person's alcohol down the gutter, that officer concludes that it is likely that the intoxicated person will endeavour to obtain more alcohol to keep drinking, that may be described as a predictive opinion and judgment based on the police officer's own observations and some assumptions about the human behaviour of intoxicated persons.

[118] That was what occurred here. The decision of the Apprehending Officer to place Mr Prior in custody under s 128(1) was based on Mr Prior's behaviour at the time, described above. That behaviour not only was observed by the Apprehending Officer but was directed at him and the other police officer. Then, by reference to the Apprehending Officer's prior policing experience, the Apprehending Officer predicted what a person exhibiting that kind of behaviour may do, or was likely to do, in the near future. The contention that there was an absence of particulars of the Apprehending Officer's experience to provide any basis for relying on that experience should be rejected.[109]

[119] Mr Prior's apprehension was lawful. His appeal should be dismissed.

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107. Compare *NAAJA* at [241].
108. Compare *NAAJA* at [241].
109. See [110] above.

May intimidate, alarm or cause substantial annoyance to people" — Section 128(1)(c)(iii)

[120] Although it is strictly unnecessary to consider whether there were reasonable grounds for the Apprehending Officer to form the further belief that Mr Prior, because of his intoxication, might intimidate, alarm or cause substantial annoyance to people, it is appropriate to make the following observations.

[121] In the Supreme Court, Southwood J referred to the fact that the Apprehending Officer's evidence was that he had formed the opinion that Mr Prior's behaviour at the time would intimidate, alarm or cause substantial annoyance to any other person and there were members of the public present.[110] The behaviour referred to and relied upon by the Apprehending Officer was that, in response to questions from the police about why Mr Prior had given them "the bird", he abused them, was belligerent and aggressive, swore and slurred his words.

[122] However, Southwood J went on to note that Mr Prior's behaviour "seem[ed] to have been solely directed at the police who were not alarmed or intimidated".[111] The facts suggest that his behaviour was a direct consequence of being questioned by the police. Indeed, one of the key reasons the officers stopped him initially was that Mr Prior gave them "the bird" and abused them as they drove past. Before the arrival of the police, there had been no complaints or reports about the behaviour of Mr Prior.

[123] The Court of Appeal noted that the initial abuse and gesture to the police car was "unprovoked".[112] The Court of Appeal considered that this was a basis on which the relevant belief could be formed because Mr Prior might "similarly confront others passing by or entering and leaving the shops".[113] But the evidence was that, when asked by the police why he gave them "the bird", Mr Prior swore at them and said it was because "you gave me the finger last week".[114] Mr Prior's behaviour was directed towards the police. He had done nothing to indicate that he would engage in similar behaviour with people who were not the police.

[124] There was no evidence upon which a reasonable person would be induced to be inclined to accept, rather than reject, the proposition that Mr Prior may intimidate, alarm or cause substantial annoyance to others because of his intoxication. There was no evidence upon which the condition in s 128(1)(c)(iii) could have been satisfied.

[125] But for the reliance on s 128(1)(c)(iv), Mr Prior's apprehension would have been unlawful.

Exercise of s 128(1) power did not exceed limits of power

[126] Mr Prior submitted that, even if the pre-conditions to the exercise of the power of apprehension under s 128(1)(c)(iii) or s 128(1)(c)(iv) were satisfied, his apprehension under s 128(1) of the PA Act was a disproportionate exercise of power that exceeded the purpose for which the statutory power was conferred,

110. *Prior* at [28], [36].
111. *Prior* at [27].
112. *Mole* at [62].
113. *Mole* at [62].
114. *Prior* at [20].

and was therefore unreasonable, an abuse of power and not a proper exercise of that power. That submission should also be rejected.

[127] The Apprehending Officer was required to, and did, identify his subjective belief. That belief was required to be held on "reasonable grounds". The requirement that there be "reasonable grounds" opens "many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers".[115]

[128] The legal standard of reasonableness is the standard indicated by the proper construction of the statute in issue.[116] Put another way, "[e]very statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred".[117] And, of course, an inference of unreasonableness may be objectively drawn even where a particular error in reasoning cannot be identified.[118]

[129] But judicial review for unreasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment was rationally open to the decision-maker.[119] And it does not provide a mechanism for later seeking to challenge a decision that, for whatever reason, was not challenged on particular grounds at trial.

[130] Unlike the "ill-defined" discretion considered by this Court in *Li*,[120] s 128(1) of the PA Act specifies mandatory pre-conditions for the exercise of the power. Those mandatory pre-conditions do not include the seriousness of the likely future offence or an officer's options to address a person's past behaviour. That is not surprising. The purpose of the apprehension power in s 128(1) is to prevent the commission of alcohol-related offences and the misuse of alcohol, and to protect people from harm or nuisance resulting from misuse of alcohol.[121] The power has both a protective and a preventative function. An exercise of the power for the purpose of preventing an intoxicated person, because of their intoxication, from possibly intimidating, alarming or causing substantial annoyance to people or from likely future consumption of alcohol in a regulated place is, upon the true construction of s 128(1) of the PA Act, within the bounds of legal reasonableness and a proper exercise of the power. That is what occurred here.

115. *George* at CLR 112; ALR 488 citing *Attorney-General of Saint Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129; [1980] AC 637.
116. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; 297 ALR 225; 139 ALD 181; [2013] HCA 18 (*Li*) at [67].
117. *Li* at [23]; see also at [67], [90].
118. *Li* at [68].
119. *Li* at [30].
120. At [67].
121. See s 3(1)(a), (b) and (d) of the Alcohol Reform (Prevention of Alcohol-related Crime and Substance Misuse) Act 2011 (NT). Section 128(1) of the PA Act in its current form was inserted by s 84 of the 2011 Act as a "consequential amendment" to the reforms introduced by that Act. See also Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 March 2011.

Conclusion and order

[131] For those reasons, the appeal should be dismissed.

Order

Appeal dismissed.

DR DAVID ROLPH