PRIOR v MOLE (D5/2016)

Court appealed from: Court of Appeal of the Northern Territory [2016] NTCA 2

Date of judgment: 3 March 2016

Date special leave granted: 1 September 2016

On New Year's Day 2013 the appellant was drinking red wine outside the Stuart Park shops in Darwin. He was intoxicated. As a police car drove past, the appellant gestured to the police officers and shouted abuse at them. The police car did a U-turn and parked in front of the shops. The police asked the appellant to speak to them and he walked to the police car. He smelled strongly of liquor, his eyes were bloodshot and he was very dishevelled. When he spoke to police, he was belligerent and aggressive and he was slurring his words. Constable Blansjaar told the appellant he was being placed in protective custody. He became more abusive and Constable Blansjaar called for another police unit in a motor vehicle that had a cage on the back. Constable Mole and Sergeant O'Donnell then arrived in the caged vehicle. Constable Blansjaar told the appellant that he would be taken to the police station in the cage, and asked him to hand over his mobile phone. The appellant objected and became more aggressive. Sergeant O'Donnell forcibly took the phone from the appellant and assisted him into the cage. While the appellant was being placed in the cage, he spat on Sergeant O'Donnell twice. He was then placed under arrest for assaulting Sergeant O'Donnell in the course of his duty.

Sergeant O'Donnell and Constable Mole drove off in the caged vehicle and Constables Blansjaar and Fuss followed in their police car. While the vehicles were stopped at traffic lights the appellant stood up, undid the zipper of his jeans, and attempted to urinate on the police car. As a result of these events, the appellant was charged with the offences of behaving in a disorderly manner in a public place contrary to s 47(a) of the *Summary Offences Act 1923* (NT) (count 1); unlawfully assaulting a police officer whilst in the execution of his duty contrary to s 189A of the *Criminal Code 1983* (NT) (count 2); and behaving in an indecent matter in a public place contrary to s 47(a) of the *Summary Offences Act* (count 3).

The charges were heard before the Court of Summary Jurisdiction on 14 May 2014. The magistrate found the appellant guilty of counts 2 and 3 but not guilty of count 1. The appellant appealed to the Supreme Court against his convictions. The two main issues in the appeal were: (1) whether the appellant was lawfully apprehended under the *Police Administration Act 1979* (NT) ("PAA") s 128; and (2) if lawfully apprehended, whether the evidence concerning counts 2 and 3 should nonetheless have been excluded in the exercise of the discretion under the *Evidence (National Uniform Legislation) Act 2011* (NT) ("UEA") s 138 because the conduct of the police in apprehending the appellant failed to comply with minimum standards of police conduct.

Southwood J found that although the appellant was lawfully apprehended, the evidence concerning counts 2 and 3 was obtained in consequence of an impropriety because the apprehension of the appellant was contrary to the proper standards of conduct expected of the police officers in the circumstances of the case, as the apprehension was unnecessary. The appellant's convictions on counts 2 and 3 were set aside and he was acquitted of those counts.

The respondent's appeal to the Court of Appeal (Riley CJ, Kelly and Hiley JJ) was successful. The Court did not agree with the appellant's contention that in each and every situation where the conditions for taking a person into protective custody have been satisfied, a police officer must necessarily turn his or her mind to what alternatives there may be and that it is an error of principle not to take some other course of action less restrictive of the person's liberty. The Court held that although a police officer contemplating placing someone into protective custody must keep firmly in mind that that should only be done as a last resort, and it is plainly desirable, where it is practicable, for police to actively consider possible alternatives, it is not a pre-condition for the exercise of the power that in every case the police officer must turn his or her mind to what alternatives may exist. 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. In this case, it would probably have been desirable for the police officers to have asked the appellant where he lived and if someone could come and get him. On the other hand, they had been subjected to swearing, abuse and aggressive behaviour from the beginning of their dealings with the appellant. They may well have formed the view that such questions would have been futile, given the nature of the answers they had received to the questions they had already asked. The Court found that Southwood J was in error in determining that the evidence relating to counts 2 and 3 should have been excluded under UEA s 138, and the appeal was allowed.

The grounds of appeal include:

- The Court of Appeal erred in failing to dismiss the appeal on the basis that Southwood J should have been satisfied on the balance of probabilities that the appellant was apprehended in contravention of an Australian law, within the meaning of s 138(1) of the *Evidence (National Uniform Legislation)* Act NT, because:

  (a) the precondition in s 128(1)(c) of the *Police Administration Act* 1979 (NT) was not met before Constable Blansjaar apprehended the appellant, purportedly under s 128(1) of that Act; or, alternatively

  (b) if the precondition in s 128(1) of that Act was met, Constable Blansjaar's apprehension of the appellant nevertheless exceeded the limits of the discretion conferred by s 128(1).