

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

THE QUEEN

APPLICANT

AND

ZACHARY ROLFE

RESPONDENT

The Queen v Rolfe
[2021] HCA 38
Date of Hearing: 2 November 2021
Date of Judgment: 10 November 2021
D2/2021

ORDER

1. *Special leave to appeal granted.*
2. *Appeal allowed.*
3. *Set aside order 3 of the orders of the Full Court of the Supreme Court of the Northern Territory of Australia made on 13 August 2021 and, in its place, order that:*
 - (a) *Question 3 is restated as follows: "Does a 'function' under s 148B of the Police Administration Act 1978 (NT) include the functions listed in s 5(2) of the Police Administration Act 1978 (NT)?"*
 - (b) *The answer to question 3 is: "No, the relevant powers and functions to which s 148B of the Police Administration Act 1978 (NT) applies are those of the common law, which s 25 of the Act confers, and the power of arrest in s 124 of the Act."*

On appeal from the Supreme Court of the Northern Territory

Representation

P M Strickland SC with S G Callan SC and S Palaniappan for the applicant
(instructed by Director of Public Prosecutions (NT))

B W Walker SC with J D Edwardson QC for the respondent (instructed by
Tindall Gask Bently)

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formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

The Queen v Rolfe

Criminal law – Defences – Where respondent member of Northern Territory Police Force – Where respondent alleged to have fatally shot deceased after being deployed to arrest – Where respondent charged with murder and alternative offences under *Criminal Code* (NT) – Where s 148B of *Police Administration Act 1978* (NT) ("Act") provides person "not civilly or criminally liable" for act done or omitted to be done "in good faith" in actual or purported "exercise of a power or performance of a function under" Act – Where s 5(2) of Act lists "core functions" of Police Force – Where s 25 of Act provides member of Police Force "shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on" member – Whether "function" under s 148B of Act includes core functions listed in s 5(2) of Act.

Criminal practice – Question of law arising before trial – Where trial judge referred four questions to Full Court of Supreme Court of Northern Territory of Australia – Where questions referred on basis of "assumed facts" – Where "assumed facts" not agreed and likely to be disputed at trial – Where Full Court reformulated third question – Whether third question hypothetical – Whether Full Court erred in reformulating third question.

Words and phrases – "assumed facts", "common law powers", "defence", "exercise of a power or performance of a function", "fragmenting the ordinary course of criminal proceedings", "hypothetical", "powers and functions of a police officer", "protection from liability".

Interpretation Act 1978 (NT), s 55.

Police Administration Act 1978 (NT), ss 5(2), 25, 124, 148B.

1 KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The respondent is a member of the Police Force of the Northern Territory with the rank of Constable. He has been charged with one count of murder¹; in the alternative, manslaughter²; and in the further alternative, engaging in a violent act which caused the death of a person³. He has pleaded not guilty.

2 On 9 November 2019 the respondent and a number of other police officers were deployed from Alice Springs to assist in the arrest of Charles Arnold (Kumanjayi) Walker ("the deceased"). A warrant had issued for his arrest for breaching a condition of an order for a suspended sentence. The respondent and another officer entered the house where the deceased was present. The respondent directed the deceased to put his hands behind his back. The deceased did not do so. He stabbed the respondent in the left shoulder with a pair of scissors which had been secreted. The respondent shot the deceased three times. Either or both of the second and third shots later proved to be fatal.

3 Prior to the commencement of the respondent's trial, the trial judge referred four questions to the Full Court of the Supreme Court of the Northern Territory ("the Full Court") under s 21 of the *Supreme Court Act 1979* (NT). The questions were referred on the basis of a set of "assumed facts". They were not agreed facts and there is likely to be some dispute at trial with respect to one or more aspects of them. It is not necessary to refer in any greater detail to the facts so assumed other than those referred to above.

4 It is the third question, as redrawn by the Full Court, and its answer which is the subject of the Crown's application for special leave to appeal from the decision of the Full Court. The application was referred to a Full Court of this Court for argument as on appeal.

1 *Criminal Code* (NT), s 156.

2 *Criminal Code* (NT), s 160.

3 *Criminal Code* (NT), s 161A(1).

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The third question

5 In the reference to the Full Court the third question was stated in these terms:

"Based upon the said assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, was he acting in the exercise or purported exercise of a power or the performance or purported performance of a function under the *Police Administration Act 1978*, such that s 148B of that Act arises for the jury's consideration?"

6 During the course of the hearing before the Full Court the parties were agreed that the question should be reformulated as:

"Does a 'function' under s 148B of the *Police Administration Act 1978* (NT) include the functions listed in s 5(2) of the *Police Administration Act 1978* (NT)?"

and advised the Full Court accordingly.

7 That was not the question which the Full Court dealt with. Question 3 was redrafted by the Full Court as:

"[B]ased upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, would it be open to the jury to find that the accused was acting in the exercise or the purported exercise of a power, or the performance or purported performance of a function under the *Police Administration Act*, such that section 148B of the Act arises for the jury's consideration?"

8 The answer given by the Full Court was "Yes".

9 In its application for special leave to appeal, the Crown submitted that Question 3 as posed by the Full Court should have been answered "no". Alternatively, this Court should answer the question as drafted by the parties "no".

The provisions of the *Police Administration Act 1978* (NT)

10 Section 148B, "Protection from liability", appears in Div 2 of Pt VIIA of the *Police Administration Act 1978* (NT) ("the PA Act"). It is in these terms:

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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- "(1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
- (3) In this section:

exercise, of a power, includes the purported exercise of the power.

performance, of a function, includes the purported performance of the function."

11 Section 124, "Arrest of person where warrant issued", appears in Div 3 of Pt VII, which Part is entitled "Police powers". It provides:

- "(1) A member of the Police Force may, without warrant, arrest and take into custody any person who the member has reasonable cause to believe is a person for whose apprehension or committal a warrant has been issued by any Supreme Court Judge, Local Court Judge or justice of the peace.
- (2) Where a member arrests a person under subsection (1), the member shall, as soon as reasonably practicable thereafter, produce or cause to be produced to the person the warrant authorising his apprehension or committal, where the person has been apprehended in pursuance of a warrant authorising his apprehension, and the person shall be charged with the offence specified in the warrant."

12 Part II of the PA Act is entitled "Police Force of the Northern Territory". Section 5 is located in Div 1 – "Establishment of Police Force" – of Pt II. It provides:

- "(1) There is established by this Act the Police Force of the Northern Territory.
- (2) The core functions of the Police Force are:
 - (a) to uphold the law and maintain social order; and

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- (b) to protect life and property; and
- (c) to prevent, detect, investigate and prosecute offences; and
- (d) to manage road safety education and enforcement measures; and
- (e) to manage the provision of services in emergencies."

13 Section 25, "Function of members", is in Div 3 of Pt II and provides:

"Subject to this Act, a member shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on him."

14 Section 26(1), which follows, relevantly provides that:

"A person shall not exercise or perform any of the powers, functions or duties conferred or imposed upon a member of the Police Force by a law of the Territory unless he or she has taken and subscribed an oath in the form in the Schedule."

The Full Court

15 At issue before the Full Court, as relevant to this application, was whether s 148B applied to and provided protection for the functions stated in s 5. Southwood J and Mildren A-J reasoned that, by virtue of the oath members of the Police Force take, and the fact that the Police Force can only act through its members, its members are under an obligation and have a duty to carry out the core functions stipulated in s 5 of the PA Act⁴. Section 25, in its reference to duties, obligations, powers and privileges conferred or imposed on police officers "by any law in force in the Territory", includes the common law and statutory law⁵, they

⁴ *R v Rolfe [No 5]* [2021] NTSCFC 6 at [107].

⁵ *R v Rolfe [No 5]* [2021] NTSCFC 6 at [108].

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observed. Their Honours concluded⁶ that s 5, when considered in the light of s 25 and the oath taken by a member of the Police Force, makes it part of a police officer's functions and duties to protect life and prevent offences. So understood, s 148B applies to those s 5 functions⁷.

16 Kelly and Blokland JJ and Hiley A-J reasoned likewise. Their Honours held that functions of the Police Force were functions of its members⁸. Whilst some of the core functions in s 5(2) would be performed at an organisational level, some can only be performed by individual members of the Police Force, including two of the most important functions: protecting life and property, and preventing offences. In their Honours' view the protection afforded by s 148B did extend to the performance of the functions in s 5 of the PA Act⁹.

The proper construction

17 The evident purpose of s 148B is to provide protection from liability, including for a criminal act, provided that the person committing the act does so "in the exercise of a power or performance of a function" (or in the purported exercise or performance) under the PA Act, and does so in good faith. It contemplates that the power exercised or function performed will be of a kind which may result in the commission of a crime or a civil wrong, which may be contrasted with powers or functions which are of a more general character and do not require any special authority¹⁰.

18 Section 124 confers a power of arrest upon warrant on a member of the Police Force. It appears in Pt VII of the PA Act, which is headed "Police powers",

6 *R v Rolfe [No 5]* [2021] NTSCFC 6 at [111].

7 *R v Rolfe [No 5]* [2021] NTSCFC 6 at [127].

8 *R v Rolfe [No 5]* [2021] NTSCFC 6 at [176].

9 *R v Rolfe [No 5]* [2021] NTSCFC 6 at [178], [180].

10 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 110 per Dixon CJ.

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which heading is to be read as part of the PA Act¹¹. Whilst the provisions of s 55 of the *Interpretation Act 1978* (NT) do not deal with the heading of a section in the same way¹², a modern approach to statutory construction often takes account of headings, much in the same way as use is made of extrinsic materials¹³. In this regard, s 25 is headed "Function of members".

19 In any event, s 25 clearly is concerned to confer powers and functions on members of the Police Force. It provides that a member of the Police Force is to perform the "duties and obligations" and have the "powers and privileges" that any law in force in the Territory confers or imposes on a member. It is to be read with s 26, which provides that a person shall not exercise or perform any of the "powers, functions or duties" conferred or imposed upon a member of the Police Force by a law of the Territory unless the prescribed oath is taken and subscribed.

20 Section 5 is not a provision of this kind. Its text and its location in Div 1 of Pt II, which is concerned with the establishment of the Police Force¹⁴, suggest that its purpose is to identify the principal functions of the Police Force, but not to confer any particular power or function on its members. Reading s 5 with s 25 does not alter this construction. The reference in s 25 to a law in force in the Territory is to a law which confers or imposes powers and s 5 is not of this character.

21 True it is that powers such as those of prevention of offences and the apprehension of persons suspected of offences are intrinsically within the powers and functions of a police officer, as the respondent submits, but that is to say no more than that the common law recognises this to be the case. It is correct, as the respondent points out, that s 5 reflects certain of the police powers recognised by the common law. Importantly though, s 5 does not confer those powers, whereas

11 *Interpretation Act 1978* (NT), s 55(1).

12 Except where the relevant Act is enacted, or the heading is amended or inserted, after 1 July 2006: see *Interpretation Act 1978* (NT), s 55(2).

13 *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at 539-543 [16.7]; *R v A2* (2019) 93 ALJR 1106 at 1118 [40]; 373 ALR 214 at 225.

14 See *Interpretation Act 1978* (NT), s 55(1) in relation to headings of Divisions.

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s 25 and s 124 do. That they do so tends against a construction that s 5 was intended to confer the same or similar powers or functions.

22 The reference in s 25 to "any law" encompasses both the common law and statutory law which applies in the Northern Territory. The common law powers include those to prevent the commission of a crime¹⁵; to apprehend a person suspected of having committed an offence¹⁶; and to prevent breaches of the peace¹⁷. The common law power to arrest without warrant notably has been replaced with a statutory power (s 123 of the PA Act). The exercise of the common law powers, like the statutory powers, is subject to constraints, such as doing only that which is reasonable and necessary¹⁸.

23 The text and legislative history of s 148B do not point to the application of s 148B to the performance by members of the Police Force of the core functions under s 5(2). When s 148B was introduced in 2005, it extended protection, from civil liability, to members of the Police Force. It provided¹⁹ that such a person was not civilly liable for an act done "in the performance or purported performance of duties" as a member. It was amended in 2016²⁰ to its present form, which notably replaces "member" with the more general reference to "person", and refers to the "exercise of a power or performance of a function" under the PA Act.

24 The 2016 amendments to s 148B coincided with the insertion of Div 7AA in Pt VII, which dealt with blood testing for infectious diseases. The Division was

15 *Binsaris v Northern Territory* (2020) 94 ALJR 664 at 670-671 [28] per Gageler J; 380 ALR 1 at 7; *Rice v Connolly* [1966] 2 QB 414 at 419.

16 *Binsaris v Northern Territory* (2020) 94 ALJR 664 at 683 [105] per Gordon and Edelman JJ; 380 ALR 1 at 24.

17 *Enever v The King* (1906) 3 CLR 969 at 975-976.

18 *R v Turner* [1962] VR 30 at 36; *Woodley v Boyd* [2001] NSWCA 35 at [37]; *Dowse v New South Wales* (2012) 226 A Crim R 36 at 51 [52].

19 *Police Administration Amendment (Powers and Liability) Act 2005* (NT), s 10.

20 *Police Administration Amendment Act 2016* (NT), s 7.

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concerned with the possible transmission of infectious diseases to members of the Police Force and provided that an "affected member" may apply to a "senior member" who may grant a "disease test approval" by which a blood sample was authorised to be taken from "the transferor", the person from whom it is suspected blood or another substance was transferred to the affected member²¹.

25 The taking of a blood sample involved persons such as doctors and nurses, who were now performing a special public duty. It was obviously thought necessary to protect them from civil or criminal liability which might arise from their actions²², hence the widening of the reference in s 148B to "person". The term "function" is now apt to refer to duties undertaken by members of the Police Force and these other persons. The term "power" remains appropriate to members of the Police Force.

The correct question

26 On the hearing of the application for special leave before the Full Court of this Court, the respondent argued that this matter was not appropriate for a grant of special leave because it depended upon facts which were not proved and had not been agreed. In that sense it is hypothetical. A concern that Question 3 might be hypothetical is evident in the discussion which occurred in the Full Court about the form of the question and the statement by Southwood J and Mildren A-J²³ that the answer to Question 3 did not involve "hypothetical matters".

27 The Crown relied on two decisions of this Court, *Bass v Permanent Trustee Co Ltd*²⁴ and *Director of Public Prosecutions (Cth) v JM*²⁵, which were said to support their Honours' view. In the former it was accepted that a question was not

21 See *Police Administration Act 1978* (NT), ss 147FA-147FF.

22 Northern Territory, Legislative Assembly, *Police Administration Amendment Bill 2016*, Explanatory Statement.

23 *R v Rolfe [No 5]* [2021] NTSCFC 6 at [25(3)], see also [6].

24 (1999) 198 CLR 334.

25 (2013) 250 CLR 135.

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<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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hypothetical where it proceeded on the basis of facts which were accepted to be true, as on a demurrer²⁶. In *JM*, the facts were not agreed, but it was held that it was sufficient that they be identified as those which the prosecution would seek to establish at trial²⁷.

28 The question in the present case does not depend on facts assumed to be correct. It does involve facts which the Crown undertakes to prove. The distinction which might be drawn with *JM* is that there the question was framed as one of law which could be applied to the facts as established by the prosecution²⁸. Here the assumed facts are bound up with the question of law so that the underlying question, whether a defence based on ss 5 and 148B is available to the respondent and may be put to the jury, may be answered.

29 It was no doubt to overcome this problem that the parties sought to redraw Question 3 before the Full Court. The question as redrafted identified the real controversy between the parties as whether s 148B applied to the functions in s 5(2), and it stated the question of law so that it and the answer to it could be applied as in *JM*. The Full Court should not have reformulated it, just as the appellate court in *JM* should not have²⁹.

30 The question which may properly be applied to the facts as they are found by the jury was correctly stated by the parties in the Full Court. The answer to it is "no", subject to qualifications necessary to make it plain where the powers relevant to this matter and to which s 148B applies reside.

Fragmentation of proceedings

31 The answer given by the Full Court to Question 3 as reformulated by it conveys that the exercise or performance of any police function is the subject of

26 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 358 [52].

27 (2013) 250 CLR 135 at 151 [24].

28 (2013) 250 CLR 135 at 153 [28].

29 See *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 158 [41]-[42].

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the protection given by s 148B, a construction which was overbroad and erroneous. It has been necessary for this Court to correct that error but it should not be assumed that this Court will do so in every case. To adopt what was said in *R v Iorlano*³⁰, "[t]he fact that the Court has expressed its conclusion on the substantive question at issue in the present case is not intended to encourage applications of this kind".

32 When this matter first came before this Court the respondent's trial had been scheduled shortly to commence. This Court has emphasised on many occasions how rare it is to make orders which would have the effect of fragmenting the ordinary course of criminal proceedings³¹. The reasons why it is highly undesirable to do so are obvious. They include delay and its effects³². That is why the hearing of this application was expedited.

Orders

33 There should be a grant of special leave to appeal. The appeal should be allowed and order 3 of the Full Court of the Supreme Court of the Northern Territory set aside. In lieu thereof, Question 3 should be restated as:

"Does a 'function' under s 148B of the *Police Administration Act 1978* (NT) include the functions listed in s 5(2) of the *Police Administration Act 1978* (NT)?"

and it should be answered:

"No, the relevant powers and functions to which s 148B of the *Police Administration Act 1978* (NT) applies are those of the common law, which s 25 of the Act confers, and the power of arrest in s 124 of the Act."

30 (1983) 151 CLR 678 at 680.

31 *Sankey v Whitlam* (1978) 142 CLR 1 at 25-26; *Yates v Wilson* (1989) 168 CLR 338 at 339; *R v Elliott* (1996) 185 CLR 250 at 257; *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 133 [23]; *Obeid v The Queen* (2016) 90 ALJR 447 at 450 [15]; 329 ALR 372 at 376.

32 *R v Elliott* (1996) 185 CLR 250 at 257.

