CITATION: *Police v Frank* [2008] NTMC 081

PARTIES:	POLICE
	v
	GABAI CHARLIE FRANK
TITLE OF COURT:	COURT OF SUMMARY JURISDICATION
JURISDICTION:	Criminal
FILE NO(s):	20728938
DELIVERED ON:	29 December 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	20 May 2008 and 10 December 2008
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Police Powers - Protective Custody- Public place

Police Administration Act s 128

Bunning v Cross (1978) 141 CLR 54
Hardman v DPP [2003] NSWCA 130
Doolan v Edgington [1999] NTSC 130
Knox v Anderson (1983) 76 Cr.App.R 56

REPRESENTATION:

Counsel:

Plaintiff:	Mr Ledek
Defendant:	Ms McAlister & Mr Morton

Solicitors:

Plaintiff:	ODPP
Defendant:	NAAJA

Judgment category classification:	A
Judgment ID number:	[2008] NTMC 081
Number of paragraphs:	30

IN THE COURT OF SUMMARY JURISDICATION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20728938

[2008] NTMC 081

BETWEEN:

POLICE
Plaintiff

AND:

GABAI CHARLIE FRANK
Defendant

REASONS FOR DECISION

(Delivered 29 December 2008)

Ms Sue Oliver SM:

1. The defendant is charged with six counts of assaulting a member of the Police force in the execution of his/her duty on 27 October 2007. He is further charged with two counts of resisting police in the execution of their duty on the same day. The offences allege assaults on four different officers; two of the Officers alleged to have been assaulted twice.

2. The assaults are alleged to have occurred both inside and outside of the unit at which the defendant resides with his partner at around 7.30am. The evidence of Officers Christopher O'Connell and Daniel Craske was that they received a request from police communications, shortly after coming on duty at 7.00am, to attend a domestic disturbance at a unit in Cornwallis Circuit.

3. When they arrived, they found the defendant's partner Ms Kelly and two other males sitting on chairs on the patio area at the front of the unit and the defendant close by his vehicle. At least some of the group were drinking alcohol. The windscreen of the vehicle was damaged. Ms Kelly gave

evidence that she had earlier hit and damaged the windscreen of the defendant's vehicle in an argument with him.

4. The defendant was not seated with the others and was near his vehicle with loud music playing from the car stereo. One of the officers asked him to turn it down so they could speak. The defendant turned the music up. There was an approach by Officer O'Connell to the vehicle and the defendant then reached in and turned the music down. The officers said they observed him to be extremely intoxicated. His level of intoxication is not in dispute and conceded to have been high.

5. A decision was made to take him into protective custody and remove him from the scene. The defendant, according to Officer Craske, was about 3-4 metres from the door of his unit to the rear of his vehicle. Officer Craske said he was in the car park area approaching them. The officers each took hold of an arm to escort him to the paddy wagon. A violent struggle occurred. They ended up on the ground. The defendant was throwing punches at Officer O'Connell's face. Officer Craske received a kick to the groin. Officer O'Connell said he was bitten on the finger. The defendant was warned to stop resisting or he would be sprayed. He did not stop and was sprayed in his face with capsicum spray to subdue him. The officers got off him and he picked up a lump of wood and came towards the officers saying he would kill them. He was told to drop the wood and they would decontaminate his eyes. He dropped the wood and went to an outside tap to wash his eyes. From the beginning he was yelling obscenities at the officers, telling them to leave.

6. The defendant then went inside his unit. Running water could be heard. The back up unit that had been requested by the officers arrived and an attempt was made by one of those officers to get him to come out by speaking to him through the open sliding door. It was slammed shut, narrowly missing Officer Wilson's hand. All four officers entered the unit with Officers Craske and Wilson going to the laundry where they physically apprehended him, getting

one cuff of a set of handcuffs on his hand. The area was small and there was a further struggle out into the lounge area where he was finally fully cuffed. During the struggle Officer O'Connell was grabbed on the testicles. He drove his fingers into the defendant's shoulder area to get him to let go. Once cuffed, he spat blood on Officer O'Connell's boot.

7. He was taken outside to the van and placed in it. Officers Wilson and Craske said that as they approached the van the defendant kicked out at Officer O'Neill who had gone ahead to open the cage door. She said she was not struck. He continued shouting obscenities and was spitting out the back and through the sides. The defendant then said he needed money to get the bus back from the Watchhouse. Officer Wilson spoke to Ms Kelly who said the defendant had his wallet in his pocket. Officer Wilson went back to tell him this and then went to the driver side window of the vehicle to tell Officer Craske that the defendant had his wallet. While he was standing there the defendant spat on Officer Wilson's face. Spittle also went onto his shirt. Photographs [Exhibit P4] show what has the appearance of bloodstained spittle on the door of the vehicle and a blood spot on a police shirt.

8. The officers' accounts of the physical events were not challenged and were consistent of the events and their chronology. Ms Kelly gave a similar description of the events and chronology, though in my view, she tended to downplay both what had occurred between them that had resulted in someone calling police and each of the defendant's acts that she saw, including giving her view that the defendant would not have intentionally spat on Officer Wilson.

9. At the start of the hearing, the defendant's counsel advised that at the conclusion of the prosecution evidence she would make an application that all evidence of matters occurring subsequent to the initial apprehension of the defendant by two of the officers should be excluded and if that application were successful a no case submission would follow. The initial apprehension

of the defendant is challenged on the basis that it was unlawful because it was outside the power contained in s 128 of the *Police Administration Act* to take into custody a seriously intoxicated person under what is commonly referred to as the protective custody power.

10. Section 128 provides:

> *Where a member has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that that person is in a public place or trespassing on private property the member may, without warrant, apprehend and take that person into custody.*

11. The substance of the application is that when apprehended by Police, the defendant was not in a public place and that his apprehension was not therefore a lawful one and all evidence of what followed should be excluded in an exercise of the *Bunning v Cross* discretion. The discretion is not automatically exercised on such a finding but then falls for consideration in terms of the criteria referred to in that case whether on balance the evidence should be excluded.[1] It is not in dispute that the defendant was intoxicated within the meaning of that section[2].

12. Additionally, the charges are all ones that require as an element of the offence that the officer in question was acting in the execution of his or her duty. The onus is on the prosecution to prove that element beyond a reasonable doubt. If I were to find that the initial apprehension of the defendant was not a lawful one it would follow that the prosecution had failed in the proof of that element.

13. The application in respect of s128 is in my view somewhat misdirected. The provision does not require the place of apprehension to be a public one but rather that the apprehending officer has reasonable grounds for that belief. In my view this is clear from the grammatical use of two "that(s)" ("and that that

[1] Bunning v Cross (1978) 141 CLR 54
[2] Section 127A defines intoxicated as meaning "seriously affected apparently by alcohol or a drug".

person is in a public place"). If only one "that" was used it would stand alone as a separate requirement unrelated to the officer's belief. The second "that" refers the circumstance "in a public place" back to the question of belief.

14. The issue then is whether it was reasonable for the apprehending officers to believe that the defendant was in a public place at the time of his apprehension.

15. The *Police Administration Act* does not provide a definition of "public place". That is unsurprising. The authorities abound with examples of what is or is not a public place and no precise defining feature emerges from those cases. It has been observed many times that it is a matter for determination in an individual case as to whether a "place" is a "public" one by considering the purpose and intent of the statute in question. The expression is not to be considered in isolation from the statute as a whole but is to be construed in order to give effect to the object and purpose of the statute. In Hardman v DPP [2003] NSWCA 130 the majority of the Court of Appeal expressed the position in these terms:

> "…it is necessary to construe the Section so that it is consistent with the language and purpose of all the provisions of the statute and to proceed on the assumption that its provisions are intended to give effect to harmonious goals."

16. As noted above the term protective custody is not used in the *Police Administration Act*. In *Doolan v Edgington* [1999] NTSC 130 the court said that the power of the police to take into custody a person in the circumstances provided pointed "to the concern of the legislature that an intoxicated person may cause harm to himself and to enable the police specifically to act to reduce that prospect".

17. The restriction that the person must be believed to be in a public place or trespassing on private property, in my view, points equally to a legislative concern that a seriously intoxicated person might pose either a risk to other

persons or at the very least create a situation where the public or persons on their private property are seriously inconvenienced by the presence of a seriously intoxicated person in their midst. In a practical sense, rather than charging a person with summary offences of disorderly conduct or disrupting privacy (see s 47 *Summary Offences Act*), police may use the protective custody power to remove the intoxicated person, the power therefore being protective of both the individual (from self harm or exposure to harm from others and also from facing criminal charges for his or her intoxicated conduct) and is protective of individuals who might be affected by that conduct. It is in that context that the meaning of "public place" is to be construed to give "harmonious effect" to that goal.

18. The initial apprehension of the defendant occurred in an area of the block of units which can be broadly described as a car park and driveway area for the units as a whole. It is an area that would generally be understood as not belonging to any individual unit or unit holder but able to be used by all. It can be seen quite clearly from photographs tendered without objection by the defence. The units, including that including the defendant's residence, stand along both sides of a deep block of land and there is some separation of one block from another. Open double car parking spaces areas are provided in front of each unit. There is no perimeter fencing around the units to create a private space. There is a very small patio area in front of each unit, which might rightly be considered to be private to the individual unit holder. Other than that there is no delineation of individual units other than the parking spaces that I have described directly in front.

19. There is a very wide driveway area allowing access into and out of the property. There is no gate and only a low brick structure along a small part of the front perimeter that provides for letter boxes rather than acting as any barrier to the property. There is no appearance of any sign restricting entrance to the property nor was any evidence of such restriction given.

20. Any person wanting to access or exit the units would either walk through or drive a vehicle through the driveway area described. It is unlikely in my view that a person visiting the property would consider their access to be barred, indeed given what appears to be the depth of the property, persons visiting or delivering goods would almost certainly, in my view drive into the property particularly if they were going to rear units.

21. Accepting the evidence of Officers Craske and O'Connell it was this area that the defendant had moved to when he moved to the rear of his vehicle and they attempted to place him under protective custody.

22. In *Knox v Anderton* (1983) 76 Cr. App. R. 156 the court held that in determining whether a place is a "public place" to which at the material time, the public have access, Justices were entitled to find that premises where there are no barriers or notices restricting access such as the upper landing of a block of flats that could be entered by members of the public without hindrance, are a public place within the meaning of the Prevention of Crime Act. The offence in question related to possession of an offensive weapon in a public place. The defendant had been found on a landing giving access to flats on that floor with a raised claw hammer in his hand.

23. In my view the situation here is similar. There is no barrier to access nor any notice restricting access to the property. Members of the public may access the driveway area in order to reach individual units, whether they be as visitors of specific residents, persons delivering goods or proselytisers. Other unit residents can, and must transit that area past the defendant's residence to go to their units and to leave the property. In my view this access and use is sufficient for the area to be viewed as a public one for the purposes of the *Police Administration Act.*

24. The evidence of Officers O'Connell and Craske was that they came upon a situation, in response to a police communication regarding a domestic disturbance complaint, of a seriously intoxicated man. There was recent

damage to his vehicle. He was uncooperative and belligerent. Others including his partner were in the immediate vicinity. They formed the view that he was in a public place when he moved to the rear of his vehicle and decided to take him into protective custody. Given my observations about the physical layout of that area and the use of that area by persons entering and leaving the property their, belief was a reasonable one. They might reasonably have formed a view that in that place he presented either a danger to himself because he was in an area that traffic traversed or that he presented a danger to others including his partner if they were to leave him there. They had not had the opportunity to discover who had damaged the vehicle. I am satisfied that the attempted apprehension of the defendant was a lawful one pursuant to s128 of the *Police Administration Act* and that the officers, and each of them, were therefore acting in the execution of their duty.

25. Count 2 is an alleged assault on Constable Craske said to be constituted by the kick to the groin area. It was not contended that Constable Craske was not kicked to the groin. It was submitted that I could not be satisfied that the defendant intended to kick Constable Craske to the groin. They were in a violent struggle. However the prosecution need only prove the intent in the application of force, not that the site of the force was intended. I am satisfied beyond a reasonable doubt that in struggling as he did, throwing punches and kicking out, that the defendant intended to apply force to one or other or both of the officers attempting to apprehend him. It was Constable Craske who was struck. I find him guilty of Count 2.

26. Counts 3 and 4 allege a further assault on Constable Craske and an assault on Constable O'Connell. This is alleged to be constituted by picking up the lump of wood and coming towards them yelling that he would kill them. That evidence was not contested and I find him guilty of each of those offences.

27. Count 6 is a further alleged assault on Constable O'Connell said to be constituted by the defendant grabbing him on the testicles. Unlike the kick to

the groin on Constable Craske, I am satisfied that the evidence of this is entirely consistent with a deliberate act to grab the Constable in this manner. It required force to be applied to the defendant to get him to let go. I am satisfied beyond a reasonable doubt that the defendant intentionally grabbed Constable O'Connell on the testicles and find him guilty of count 5.

28. Count 7 is an alleged assault on Constable O'Neill by a kick in her direction when she stood to the side after opening the cage door of the wagon for the defendant to be placed in it. Again there was no contest to the evidence given by officers that the defendant kicked in her direction. Constable O'Neill would have been directly in the defendant's view. The evidence of the kick is not of a general struggle but of an aimed blow in the direction of Constable O'Neill. I am satisfied that the defendant attempted to strike out at her and that at the least he intended this to be a threat of force to her person. I find him guilty of count 7.

29. Count 8 is a further allegation of assault on Constable Wilson constituted by his being spat on whilst at the door of the police vehicle speaking to Constable Craske. The evidence of the act was not contested. In my view I can be satisfied beyond a reasonable doubt on the evidence that the spitting on Constable Wilson was intentional. Constable Wilson had just spoken to the defendant about his wallet and he went to the driver side window to pass on the same information to Constable Craske. I do not think that there can be any doubt that the defendant knew where Constable Wilson was. If he could spit through the opening at the front of the vehicle then he could likewise see through it. I find him guilty of count 8.

30. There was no contest to the prosecution evidence regarding the defendant's resistance to his apprehension either at the initial attempt to take him into protective custody nor to the subsequent apprehension in the unit. On the evidence the struggling was constituted by more acts than those specific ones which constitute the assaults. Outside he threw punches in the direction of

Constable O'Connell and tried to pull away from the officers. Inside he struggled with the two officers in the laundry and even after being cuffed continued to struggle in the lounge area until forced across the lounge and fully cuffed. On that evidence I am satisfied beyond a reasonable doubt also that he resisted officers in the execution of their duty on those two occasions. I find him guilty of counts 1 and 5.

Dated this 29th day of December 2008.

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Sue Oliver
STIPENDIARY MAGISTRATE