

CITATION: Rigby v Shane Ross [2023] NTLC 1

PARTIES: Kerry Rigby

v

Shane Ross

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22134038

DELIVERED ON: 6 February 2023

DELIVERED AT: Darwin

HEARING DATE(s): 29 & 30 August 2022 and 20 January 2023

DECISION OF: Greg Macdonald

**CATCHWORDS:**

*Public and Environmental Health Act 2011 (NT) – ss 4, 7, 52, 53, 56, 79, 80 and 84 - “force that is necessary and reasonable” - Police Administration Act 1978 (NT) – s123, 127, 134, 158 - Criminal Code Act 1983 (NT) – ss 26, 27, 29, 43BU, 65 and 189A - “reasonable excuse” - Onus - Summary Offences Act 1923 (NT) – s 47 - Interpretation Act 1978 (NT) – ss 4, 17 and 51 - “provided by the law”.*

*Public and Environmental Health Act 2011*  
*Criminal Code Act 1983*  
*Summary Offences Act 1923*  
*Police Administration Act 1978*  
*Evidence (National Uniform Legislation) Act 2011*  
*Interpretation Act 1978*  
*Local Court (Criminal Procedure) Act 1928*

*Woolmington v DPP (1935) AC 462*  
*Australian Capital Television Pty Ltd v the Commonwealth (1992) 177 CLR 106*  
*Lange v ABC (1997) 189 CLR 520*  
*Coleman v Power (2004) 220 CLR 1*  
*George v Rockett (1990) 170 CLR 104*  
*The Queen v Gehan [2019] NTSC 91*  
*DPP v Kaba [2014] VSC 52*  
*R v Buddee [2016] NSWDC 422*  
*The King v Amital [2022] NTSC 74*  
*Re Bolton; Ex Parte Beane (1987) 162 CLR 514*  
*Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476*  
*Al-Kateb v Godwin (2004) 219 CLR 562*  
*Momcilovic v The Queen (2011) 245 CLR 1*  
*Babui v The Queen [2020] NTSC 50*  
*Queensland Bacon Pty Ltd v Rees (1996) 115 CLR 266*

*Mangurra v Rigby* [2021] NTSC 6  
*Cintana v Burgoyne* [2003] NTSC 106  
*Burkhart v Bradley* [2013] NTCA 05  
*Thyer v Whittington* [2017] NTSC 66  
*Christie v Leachinsky* [1947] AC 573  
*Adams v Kennedy* [2000] NSWCA 152  
*Majindi v Balchin* [2011] NTSC 40  
*Ashley v Millar* [2015] NTSC 63  
*Jenkins v Todd* [2016] NTSC 4  
*Dowling v Bowie* (1952) 86 CLR 136  
*Hammond v Lavender* (1976) 50 ALJR 728  
*Taikato v The Queen* (1996) 186 CLR 454  
*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249  
*Talbot v Malogorski* [2014] NTSC 54  
*Azzopardi v The Queen* (2001) 205 CLR 50  
*Whitehorn v The Queen* (1983) 152 CLR 657  
*R v Apostilides* (1984) 154 CLR 563  
*The Queen v Cook & Ors* [1994] QCA 227  
*Watson v Trenerry* [1998] NTCCA 22  
*Barrington v Austin* [1939] SASR 130

**REPRESENTATION:**

*Counsel:*

Complainant: Ms K Ranjith

Defendant: Ms S Robson SC

*Solicitors:*

Complainant: DPP brief

Defendant: Direct brief

Decision category classification: B

Decision ID number: 2023 NTLC 1

Number of paragraphs: 59

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 22134038

BETWEEN:

Kerry Rigby

Complainant

AND:

Shane Ross

Defendant

REASONS FOR DECISION

(Delivered 6 February 2023)

JUDGE MACDONALD

**The Charges**

1. On 29 August 2022 Shane Ross (the Defendant) pled not guilty to 5 criminal charges alleged by NT Police following an incident which took place on 6 November 2021 in Darwin on the footpath contiguous with East point Road.
2. The charges were, firstly, contravention of an emergency declaration, then take part in a riot, assault a member of police, disorderly behaviour and, fifthly, resist police in the execution of duty. The charges are alleged to be contraventions of s 56 of the *Public and Environmental Health Act 2011* (NT) (PEHA), s 65 and s 189A of the *Criminal Code Act 1983* (NT) (Code), s 47(a) of the *Summary Offences Act 1923* (NT) (SOA) and s 158 of the *Police Administration Act 1978* (NT) (PAA), respectively.
3. All charges had their genesis in members of NT Police forming a cordon to halt or interrupt the passage of a group of protesters who were walking along the footpath parallel to East Point Road near Darwin Middle School on Bullocky Point. That impediment imposed by NT Police, which was described by the Defendant as a “blockade”, was in purported enforcement of directions given by the Chief Health Officer (CHO) on 5 November 2021 in relation to a perceived public health threat posed by Covid-19 (C19). It was the establishment of the police cordon which precipitated all counts, such that the lawfulness or otherwise of the cordon and NT Police actions which flowed from that are a seminal focal point from which the charge alleging contravention of s 56 of the PEHA and other charges must be considered.
4. Prior to the evidence at hearing commencing, counsel informed the court by consent that the particulars alleged by the prosecution in relation to the charge of contravening a direction, was failure to wear a mask. Further, in relation to the charge of assault police;

that the Defendant alone physically manhandled or wrestled with Sgt Kirkby, including him punching and/or elbowing Sgt Kirkby, with the “harm” being constituted by pain experienced by that officer. In relation to the charge of riot, the same conduct as alleged for assault, being the physical altercation or interaction between the Defendant and Sgt Kirkby.

5. It bears repeating that a defendant to criminal charge is innocent until proven guilty, with the Crown bearing the onus of proof from beginning to end, to the standard of beyond reasonable doubt.<sup>1</sup> That position is subject to legislated exceptions, and the position in relation to defences is discussed below.
6. Findings concerning the facts and circumstances which arose on 6 October 2021 are set out below. Those findings, when considered in light of various Territory laws, give rise to four principal issues for determination, namely;
  - (i) Were members of NT Police empowered to establish a cordon on the footpath at Bullocky Point?
  - (ii) If so, did NT Police authority extend to preventing or halting protesting pedestrians’ passage at the point of the cordon?
  - (iii) If so, did members of NT Police act within or without their powers in interacting with the Defendant?
  - (iv) Did the Defendant contravene any of the alleged provisions of the PEHA, Code, SOA or PAA in acting as he did?
7. Various subsidiary issues for consideration and decision arise within the four principal issues. Those are also set out in the discussion below.

### **The Evidence and facts found**

8. On 18 March 2020 the CHO declared a “*public health emergency*” (the Declaration) under the PEHA.<sup>2</sup> On 5 November 2021 the CHO gave or made C19 Directions No. 67 of 2021 (Directions) under s 52 of the Act, in writing.<sup>3</sup> The parties agreed that the court should take judicial notice under s143 of the *Evidence (National Uniform Legislation) Act 2011* (ENULA) of the Declaration and the Directions.
9. The Directions sought to put in place what was referred to as a “lockout” for the Darwin area, including the “*local government area*” described as “*City of Darwin*”, with various features of the lockout prescribing restrictive public health measures intended to contain or limit the spread of C19. The effect of the Directions may be simply described as requiring;

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<sup>1</sup> *Woolmington v DPP* (1935) AC 462 at 481. That onus is logically associated with the right to silence.

<sup>2</sup> Presumably under s48 of the PEHA; see the Preface to C19 Directions (No. 67) 2021, which became exhibit P8. Although the Declaration was not tendered into evidence, s143 of the *Evidence (National Uniform Legislation) Act 2011* provides for judicial notice to be taken of such instruments.

<sup>3</sup> Section 52 empowers the CHO to take “*actions*” they consider “*necessary, appropriate or desirable to alleviate the public health emergency stated in the declaration*”, including “*oral or written directions*”.

- (i) any person who had not received two doses of an approved C19 vaccine (“unvaccinated person”) was prohibited from leaving their residence (except for various reasons which are irrelevant to the proceeding);
  - (ii) all persons were to wear a face mask except at their residence or when in a private vehicle (but subject to some other exceptions discussed below); and
  - (iii) no unvaccinated person could arrange to meet or attend a gathering with any other person(s) anywhere other than their residence.
10. In addition to the Directions, an instrument of direction entitled “*Assistance of Police Officers*” issued or made by the CHO on 22 March 2020 was also tendered and became Exhibit P10 (direction).<sup>4</sup> That direction relevantly provided that police officers “*must assist me in exercising my powers under Part 5, Division 2 [of the PEHA] including to ensure, by means I consider necessary, appropriate or desirable, compliance with any directions made by me under that Division...*”. As is now common, the direction then proceeded to provide examples of the assistance contemplated. Those included “*closing a place*” and “*preventing entry to a place or exit from a place*”.
11. In addition to the instruments referred to, the evidence at hearing included oral evidence from various members of NT Police present at the scene of the incident of 6 November 2021, together with body worn footage (BWF) from some members’ devices, and some footage recorded by protesters then downloaded from Facebook by investigating members.<sup>5</sup>
12. It is the evidence of Sgt Paul Kirkby, being the officer who first physically engaged with the Defendant, which is determinative of many of the issues in dispute. His evidence was, in some respects, ambiguous, confused and contradictory. Ascertaining the true situation would have been assisted if BWF from any device worn by Sgt Kirkby had been available in evidence. Nonetheless, Sgt. Kirkby’s evidence included that he did not say anything to the Defendant prior to laying hands on him, and that in doing so he was not exercising his power of arrest, each of which I accept. I find that immediately following the Defendant breaching the cordon by walking between two officers, Sgt Kirkby moved in front the Defendant to block his passage, said nothing, then laid hands on him, followed by placing an arm around his neck. That coercive force was apparently in the context of the Defendant being noncompliant with what on any objective view was a requirement of him (and other protesters) to stop and be spoken to. The engagement quickly led to a tussle in which Sgt Kirkby was the protagonist, resulting in both men going to ground.
13. The situation was not assisted by actions of other noncompliant, unruly and aggressive protesters in the immediate vicinity. However, I also find no acceptable evidence to the necessary standard that the Defendant punched or elbowed Sgt Kirkby.
14. I do note that the evidence of the two most senior officers in command on 6 November 2021 at Bullocky Point, being Supt Shean and Sgt Kirkby, included that NT Police’s

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<sup>4</sup> C19 Directions (No 5) 2020

<sup>5</sup> Oral evidence from Supt Daniel Shean, Sgts Paul Kirkby and Wayne Miller, and S Consts Ben Davies and Nathan Mayo, but no BWF of either officers Shean or Kirkby.

objective was to target and “*disrupt*” the protest. The officers also appeared to have held a uniform view on 6 November that the protest was illegal.<sup>6</sup> There is no doubt that some of the protesters were not complying with the Directions (particularly by being mask-less in public). In my view, members of NT Police would, with proper enquiry, have readily established sufficient “*reasonable grounds to believe*” that one or more of the protesters were “*committing an offence*”.<sup>7</sup> If so, the power of arrest conferred by s 123 of the PAA would have, on its face, been available in relation to such a protester.<sup>8</sup> However, as should be expected, at least a proportion of the protesters were complying with the Directions, cooperative with officers at the point of the cordon, and were permitted to pass through the cordon following substantiating their situation.

15. The phrase or operational strategy described as “*disrupt*” is often appropriately used by law enforcement bodies in relation to organised crime. However, in the context of execution of duty by members of NT Police in relation to protesters, it has a flavour of the “*ulterior purpose*” discussed in *R v Gehan*.<sup>9</sup> Similarly, various rights recognised at international law may also have been relevant to the situation which arose on 6 November 2021, and evidence adduced at hearing.<sup>10</sup> However, the Defendant did not seek to raise s 138 of the ENULA or submit that the court should exercise its discretion to exclude evidence in reliance on that provision. Although the Defendant did not elect to give evidence at hearing, as is his right, he sought to deal fully and frankly with the entirety of the evidence adduced by the prosecution.
16. The Defendant’s written submissions described the police perspective informing their actions at the cordon as one of “*us versus them*”.<sup>11</sup> That characterisation is equally apt to many of the protesters’ perspectives. However, each protester was entitled to individual consideration, and to be treated according to law, including with their rights in mind.
17. In addition to the findings of fact set out above, I also find that on 6 November 2021, upon Sgt Kirkby stepping into the path of the Defendant towards halting his passage (noting that Sgt Kirkby did not say anything to the Defendant), he did not stop. Rather, he determined to continue on his journey by seeking to push past Sgt Kirkby. I also find the Defendant was well aware that members of NT Police were expecting and requiring him and other protesters to stop and engage.
18. It was at that point that Sgt Kirkby laid hands on the Defendant then placed his arm around the Defendant’s neck in what may be described as a headlock. Lastly, I accept the evidence given by Sgt Kirby that protesters were free to leave the area, but not by

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<sup>6</sup> Which may ignore the right implied through s 92 of The Constitution and authorities such as *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106, *Lange v ABC* (1997) 189 CLR 520 and *Coleman v Power* (2004) 220 CLR 1.

<sup>7</sup> *George v Rockett* (1990) 170 CLR 104 at 115

<sup>8</sup> Noting that arrest is a last resort, and that NT Police generally consider various factors prior to exercise of the power, including whether a Summons or Notice to Appear is the course most appropriate to the circumstances. Section 56 is also an offence for which an Infringement Notice may be issued under the *Public and Environmental Health Regulations 2014*.

<sup>9</sup> *The Queen v Gehan* [2019] NTSC 91 at [11].

<sup>10</sup> Section 138(3)(f) of the ENULA includes consideration of any behaviour which is inconsistent with or contrary to rights recognised by the *International Covenant on Civil and Political Rights 1980*. See *DPP v Kaba* [2014] VSC 52, *R v Buddee* [2016] NSWDC 422 and *The King v Amital* [2022] NTSC 74 at [87] and [116] for example.

<sup>11</sup> Submissions dated 28 August 2022 at [28].

proceeding through the cordon unless they satisfied the mask and vaccination conditions provided by the Directions.<sup>12</sup>

## The Legislation and Directions

19. The relevant offence provision created by s 56 of the PEHA provides;

### **56 Contravention of emergency declaration or direction**

(1) A person commits an offence if:

- (a) the CHO takes an action under section 52(1) that involves giving a direction, whether oral or written and whether specified in section 52(3) or otherwise; and
- (b) the person engages in conduct that results in a contravention of the direction.

Fault elements:

The person:

- (a) intentionally engages in the conduct; and
- (b) is reckless as to whether the conduct would result in a contravention of the declaration or direction.

Maximum penalty: 400 penalty units.

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant establishes a reasonable excuse.

20. As can be seen, potential criminal liability is expressed to include recklessness, with the commonly found defence of “reasonable excuse” being available.<sup>13</sup>

21. The Defendant contended on various bases that he could not be found to have contravened s 56. Much turned on the proper construction and application of the PEHA, the Directions and the direction to the circumstances of the Defendant’s interaction with Sgt Kirkby. In addition to the authorities relied on by the Defendant concerning infringements on personal liberty, in my view the principle of legality must apply in the construction and application of provisions of the PEHA.<sup>14</sup> That application must also extend to statutory instruments made under a relevant Act, so the Directions and direction in this case.

22. In considering the allegation of the offence created by s 56, various other provisions of the PEHA are relevant to the Defendant’s situation and determination of the charges alleged. Namely, the definition of “place” in s 4, together with ss 52, 53, 76, 79, 80 and 84.<sup>15</sup> Those sections relevantly provide;

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<sup>12</sup> So the officers were “preventing entry to a place”; Exhibit P10.

<sup>13</sup> As are the ‘authorisation, justification and excuse’ provisions of Part II of the Code.

<sup>14</sup> The Defendant relied on *Re Bolton; Ex parte Beane* [1987] 162 CLR 514 at 528. See *Plaintiff S 157/2002 v Commonwealth* (2003) 211 CLR 476 at [30], *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19], *Momcilovic v The Queen* (2011) 245 CLR 1 at [43], *Babui v The Queen* [2020] NTSC 50 and *The King v Amital* [2022] NTSC 74 at [78] and [87].

<sup>15</sup> The particulars of charge referred only to the “mask” aspect of the Directions, so vaccination status through s 85 of the PEHA was irrelevant, and no allegation of failure to comply with s 86 existed. I also consider ss 70 to 74 only apply to an authorised officer who is “appointed”, so irrelevant to the situation the subject of the charges.

## 52 CHO's emergency powers

(1) If an emergency declaration is in force, the CHO may take the actions (including giving oral or written directions) the CHO considers necessary, appropriate or desirable to alleviate the public health emergency stated in the declaration.

(2) The actions the CHO may take include any of the following:

...

(e) preventing persons accessing or entering into an area or a particular place;

(f) controlling the movement of vehicles within an area.

(3) The directions the CHO may give include directions requiring any of the following:

....

(b) a stated person to remain in, or move to or from, a stated area or place immediately or within a stated period;

....

(d) a stated person to provide oral or written information relating to the emergency.

## 53 Appointment and powers of authorised officer during public health emergency

....

(2) An authorised officer assisting the CHO may use the force that is necessary and reasonable to do any of the following:

....

(b) prevent entry into or close off an area or place;

(c) remove a person from an area or place;

....

(3) An authorised officer taking action to assist the CHO:

(a) may take the action at any time of the day; and

(b) is not required to give notice to any person of the officer's intention to take the action; and

(c) is not required to obtain consent to take the action from any person concerned or the owner or occupier of any area or place concerned; and

...

23. Enforcement of any CHO directions made under the PEHA falls to an "authorised officer". Section 76 of the PEHA confers that office on each of the CHO, Chief Executive Officer of any "enforcement agency" and every "police officer exercising or purporting to exercise the powers, or performing or purporting to perform the functions, of an authorised officer". Unlike with other persons appointed as an "authorised officer", those conferrals are not conditioned on any qualifications, knowledge, skills or experience approved by the CHO.<sup>16</sup> Similarly, any police officer in uniform is not required to carry the identity card prescribed by s 78 of the PEHA.

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<sup>16</sup> The CHO or any "enforcement agency" have power to appoint any person to the office of "authorised officer" under s 76 and 74 respectively, however those appointments are conditioned on criteria.

24. The functions and powers of an authorised officer are provided by s 79 of the PEHA relevantly as follows;

**79 Functions and powers**

- (1) *An authorised officer has the following functions:*
- (a) *to ensure this Act is being complied with;*
  - (b) *the other functions imposed on the officer by this or another Act.*
- .....
- (3) *The CHO may impose conditions and limitations on the exercise of powers, or the performance of functions, by an authorised officer or a class of authorised officers.*
- (4) *When exercising a power or performing a function, an authorised officer is:*
- (c) *if a police officer – subject to the directions of the Commissioner of Police.*

25. Sections 80 and 84 of the PEHA then furnish detail to those functions and powers, relevantly as follows;

**Division 4 Powers of entry, inspection, seizure**

**80 Entry, inspection and seizure**

- ...
- (2) *For the performance of an authorised officer's functions under this Act, an authorised officer may enter a place ... other than residential premises at any reasonable time*
- ....
- (3) *An authorised officer who enters a place under subsection (2) may do any of the following:*
- (c) *require a person who is at the place to state the person's name and address;*
  - (f) *require production of any registration or exemption that relates to the owner or occupier of the place;*
  - (g) *require a person at the place to answer questions, produce a document or thing kept there under the person's control or give any other assistance the officer requires to carry out the inspection;*
- ...
- (l) *seal or close off the place;*

....

(4) *The officer may not do anything authorised by this section unless the officer reasonably believes doing so may disclose evidence of, or otherwise relates to, an offence against this Act or is otherwise necessary for this Act.*

(5) *The officer may exercise powers under subsection (2) or (3):*

- (a) *with the force that is necessary and reasonable; and*
- (b) *either alone or with the number of persons to assist the officer that is necessary and reasonable.*

...

26. Section 84 then confers more specific powers, directed to authorising enquiries to be made of any person the subject of their exercise;<sup>17</sup>

#### **84 Requirement to provide information**

*For performing an authorised officer's functions under this Act, the officer may stop a person and require the person to do any of the following:*

- (a) *give the person's full name and residential or business address;*
- (b) *give details of any authorisation to do an activity or exemption under this Act;*

...

- (d) *provide any other information relating to public health reasonably required for this Act.*

27. Sgt Kirkby was an “*authorised officer*” for the purpose of the PEHA and the Directions.<sup>18</sup> The PEHA confers broad legislated powers on an “*authorised officer*”, however s 79(3) expressly enables the CHO to limit, circumscribe or condition those powers or functions as she or he sees fit. It may be noticed that the Directions made 5 November 2021 are narrower in their terms than the legislated provisions, and I consider that may have been the product of such an exercise. Nonetheless, holding the office of “*authorised officer*” does not remove the sworn powers and obligations of a member of NT Police.<sup>19</sup>

#### **Application of the law to the issues**

28. The court had the benefit of written and oral submissions of counsel.<sup>20</sup> The Defendant contended that members of NT Police had no sufficient authority to establish the cordon across the footpath at Bullocky Point. That proposition is closely associated with the second issue for determination, but is readily addressed. Paragraph 2(b) of Schedule 1 to the Directions prescribed any “*employee*” of “*police services*” to be “*essential workers*”, so they were entitled to go about their duties. It was also common ground that the footpath on Bullocky Point was a public place and thoroughfare, which status gave rise to the Defendant’s position in relation to the second issue. Regardless of the breadth of the

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<sup>17</sup> It may be noticed that the Defendant was not charged with any contravention of either ss 86 or 87 of the PEHA. Further, that the information provided by the prosecution in particularisation of the charge of contravening s 56 extended simply to a failure to wear a mask. Consequently, no issue concerning s 85 or the Defendant’s vaccination status arose.

<sup>18</sup> And the direction which became Ext P10. Section 79(1) (f) of the PEHA effectively deems a member of NT Police to be an “*authorised officer*” where purporting to exercise powers or functions under that Act, such that no “*appointment*” is necessary.

<sup>19</sup> Which conclusion is consistent with s 79(1) (b) of the PEHA, noting that the Directions do not expressly call up the entirety of powers conferred by Division 4 of Part 6 of the PEHA.

<sup>20</sup> From the Defendant dated 29 August and 21 September 2022, and the Prosecution dated 20 September 2022.

definition of “*place*” in the PEHA, in my view no reliance on the authority provided by s 80(2) of the PEHA to enter onto and establish a cordon at Bullocky Point was necessary.<sup>21</sup>

29. I also consider that the attending members of NT Police on 6 November 2021 retained the powers and obligations conferred by the PAA and other Territory legislation (and at common law), despite that the execution of their duty on the day was specifically referable to the PEHA, the Directions and the direction which became Exhibit P10. Both s 79(1)(b) of the PEHA and a member of NT Police’s fundamental duty through the oath provided by the Schedule to the PAA support this position. This conclusion is particularly relevant to the Defendant’s position concerning the actions of the members forming the cordon, so determination of the second issue.
30. Associated with the first issue, the Defendant’s submissions included; “*Nothing in s 84 empowers the police, as authorised officers, to close off a public street and purport to stop and detain hundreds of people until such time as they can get around to checking each individual’s Covid-19 bona fides*”. It is accepted that the power conferred by s 84, when read in conjunction with the Directions, is *in personam*. However, the analysis advanced by the Defendant ignores s 24 of the *Interpretation Act* and that more than one officer sought, in some fashion, to engage with the Defendant. That analysis also, studiously or otherwise, ignored that s 4 of the PEHA relevantly defines “*place*” to include “*vacant land*” and “*a part of a place*”, and the possible application of the direction which became Exhibit 10, and the breadth of ss 52(2) and (3), 53(2), 79(1), and 80(3) and (5) of the PEHA, to the circumstances on 6 November 2021.<sup>22</sup>
31. Despite that s 84 expressly empowers an officer to “*stop*” a person, I also consider that in any circumstance where an officer has power to require a question or enquiry to be answered, there will generally be an implicit requirement that the subject stop or stand in order to satisfy that purpose.<sup>23</sup>
32. However, the officers’ use of the cordon to halt the protestors bears close consideration. Firstly, I consider that the ‘principle of legality’ must apply to both the PEHA, the Directions and the direction comprising Exhibit P10.<sup>24</sup> Second, on one view the relevant Directions are the product of the CHO imposing limitations through s 79(3) of the PEHA on the exercise of powers by an authorised officer, which the members of NT Police were at the time. The Directions do not expressly authorise either an authorised officer or a member of NT Police to stop or impede any person for the purpose of investigation of contravention or enforcement of the Directions. On their face, the powers provided by s 52(2) and (3), 53(2), 79(1), 80(3) and (5) and 84 of the PEHA would provide clear authority to members of NT Police to halt the protestors and prevent their passage beyond the point of the cordon, including unless and until any precondition consistent with the Directions were met. However, the Directions do not expressly go so far.

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<sup>21</sup> Section 4 of the PEHA relevantly defines “*place*” to include “*vacant land*” and “*a part of a place*”.

<sup>22</sup> Section 7 of the PEHA provides that Part IIAA of the Code applies to offences against that Act, with other provisions providing a range of powers and authority.

<sup>23</sup> A separate example is in the exercise of and compliance with the s 134 ‘name and address’ power.

<sup>24</sup> The authorities at footnote 14 refer.

33. Nonetheless, on a strict reading the direction made 22 March 2020 provided authority to members of NT Police to prevent any person's "entry to a place or exit from a place".<sup>25</sup> I consider that instrument, when read in conjunction with the relevant sections of the PEHA and the definition of "place", provided lawful authority to members of NT Police to effectively close a public thoroughfare. In this case, by cordon of Bullocky Point and stopping the protesters and preventing their progress, albeit only until they satisfied relevant conditions prescribed by the Directions. Although it is not my conclusion that the officers' actions amounted to effecting 'temporary detention', in my view a "clear statutory mandate" existed through the direction and the PEHA to establish the cordon and to prevent or halt the protestors for the purpose of ensuring compliance with the PEHA and Directions.<sup>26</sup>
34. Part of the Defendant's contention was that, even if a lawful power to stop and enquire existed in relation to a person, the breadth of NT Police's blanket action in cordoning Bullocky Point and halting the whole of the protest was unlawful. In particular, that it was impossible for both NT Police and the protestors to comply with the process put in place by NT Police's actions in any realistic, reasonable or practical fashion. It is noted that early on in the events giving rise to the charges, various compliant protestors were permitted to pass through the cordon, but that within a very short period of time physical conflict arose between officers and protestors. The situation which quickly arose prevented any evidence against which the Defendant's contention might be considered or tested.
35. If the conclusion in relation to the direction comprising Exhibit P10 were incorrect, it would be necessary to then consider other powers of members of NT Police.<sup>27</sup>
36. The third issue for determination concerns Sgt Kirkby's actions in relation to the Defendant. The facts found in relation to the essential actions of both the Defendant and Sgt Kirkby are set out above. The preceding discussion of the Directions, and sections of the PEHA together with Exhibit P10, are also relevant.
37. Paragraph 17 of the Directions provided that all persons in the "lockout area" must wear a mask unless one of the exceptions prescribed by paragraph 19 applied. It was plain that the Defendant presented at the cordon not wearing a mask, so Sgt Kirkby had good reason to conclude that the Defendant may have been in breach of the Directions and therefore contravening s 56 of the PEHA.
38. It was also irresistibly clear in my view that upon reaching the cordon, protesters were required to stand and engage with the members of NT Police. I have already found that the officers had lawful authority to establish the cordon and prevent the passage of protesters, even if only pending the satisfaction of prescribed conditions. It is apparent from the evidence that many of the protesters had a different view.

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<sup>25</sup> Exhibit P10.

<sup>26</sup> Paragraphs 11 and 12 of the Defendant's written submissions. The requirements of *Re Bolton; Ex parte Beane* [1987] 162 CLR 514 were satisfied, including because ss 52 and 53 are contained in Division 2 of Part 5 of the PEHA, to which the direction expressly applies.

<sup>27</sup> Section 79(3) of the PEHA preserves functions imposed on an "authorised officer", which Sgt Kirkby as a member of NT Police was, "by another Act".

39. Although the evidence before the court may not record the word 'stop' being used in relation to the Defendant (or others), he and a young man wearing an orange T-shirt were first told by members forming the cordon and seeking to prevent their passage, that "you need to be wearing a mask".<sup>28</sup> Although that was an incomplete proposition, the Defendant was aware of the general requirement.
40. Section 79 of the PEHA includes "to ensure this Act is being complied with" in an officer's functions. Regardless of what protestors considered NT Police were lawfully entitled to do, Sgt Kirkby had an obligation in the proper execution of his duty to seek to ascertain whether the Defendant was not wearing a mask in contravention of the Directions. That entailed making enquiry of the Defendant under one of various provisions of the PEHA and/or paragraph 20 of the Directions.<sup>29</sup> The power to 'request and require' provided by paragraph 20 is couched in permissive terms, however Sgt Kirkby could not have reasonable grounds to *believe* any offence against the PEHA was being committed unless and until that enquiry was made.<sup>30</sup> In any event, Sgt Kirkby's evidence was that at the time his physical tussle with the Defendant commenced (by laying hands on and then wrapping his arm around the Defendant's neck), he was not seeking to exercise his power of arrest. In my view that was the true situation.<sup>31</sup>
41. It is accepted that the Defendant's recalcitrant behaviour, and the aggressive and violent behaviour of other protesters in close proximity, rendered Sgt Kirkby's task in making immediate enquiry under the Directions very difficult. However, the found facts are that he said nothing to the Defendant, then proceeded to physically engage him as described, with the interaction then escalating.<sup>32</sup> Some communication was necessary, even to the extent of a direct warning to stop or risk arrest.<sup>33</sup>
42. Sections 52(2) and 80(5) of the PEHA empower an officer to use "*force that is necessary and reasonable*" in the exercise of various powers and functions under the Act. The Directions do not expressly refer to any such coercive power, however assuming 'necessary and reasonable' force to be permitted in their enforcement, in my view the force used by Sgt Kirkby at the beginning of his physical interaction with the Defendant was neither necessary nor reasonable in the circumstances.<sup>34</sup> Likewise, the court could not be satisfied to the necessary standard that, from the point at which Sgt Kirkby laid hands on then placed his arm around the Defendant's neck, he was acting in the

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<sup>28</sup> Exhibit 1 - Body Worn Footage of Constable Syed.

<sup>29</sup> Sections 52(3) (d), 80(3)(g), 80(b) and (d), and paragraph 20 of the Directions all empower an officer to request and require information concerning failure to wear a mask in compliance with the Directions. The circumstances also invited a request under s 134 of the PAA for the Defendant's name and address.

<sup>30</sup> See *Queensland Bacon Pty Ltd v Rees* (1996) 115 CLR 266 at 303 and *George v Rockett* (1990) 170 CLR 104 at 115 concerning the distinction between "*suspect*" and "*believe*".

<sup>31</sup> Both the common law requirement to inform a person that they are under arrest and the requirement of s 127 of the PAA to inform the arrestee of the offence for which they are arrested would need to have been complied with in the circumstances.

<sup>32</sup> As noted previously, BWF from any device operated by Sgt Kirkby could have been of significant assistance.

<sup>33</sup> The powers and obligations conferred by s 127 (in conjunction with s 123) and 134 of the PAA are legislated examples of conduct expected and required of members of NT Police.

<sup>34</sup> Namely, where Sgt Kirkby said nothing to make clear the Defendant's obligation, or that he would be arrested.

execution of his duty.<sup>35</sup> It follows that none of ss 26, 27 or 29 of the Code could apply to Sgt Kirkby's actions.<sup>36</sup>

43. Immediately prior to Sgt Kirkby's application of force, the Defendant had sought to push past Sgt Kirkby. That was in circumstances where Sgt Kirkby had said nothing to him, although the Defendant was aware of a general requirement to stop and engage. Had Sgt Kirkby first given the Defendant an instruction then exercised his power of arrest, my conclusion concerning the initial application of force may well have been different.<sup>37</sup> However, in the absence of that exercise, the apprehension was unlawful until an arrest was effected following the tussle.<sup>38</sup> Although I consider any arrest for contravention of s 56 of the PEHA would have been unlawful, reasonable grounds to believe that the Defendant had contravened s 158 or 159 of the PAA existed, albeit at a relatively low level. That is, by the Defendant seeking to push past Sgt Kirkby towards continuing on his journey.<sup>39</sup>
44. In the circumstances, including having regard to the acceptable evidence concerning his actions in relation to Sgt Kirkby, the Defendant is not guilty of Count 3 alleging a contravention of s 189A of the Code.
45. It remains to be considered whether the Defendant contravened any of the provisions under which the remaining 4 charges were brought. As previously observed, all charges had their genesis in NT Police's response to the protest, in forming a cordon at Bullocky Point. The first of the 5 charges was contravening s 56 of the PEHA by failing to wear a mask.
46. The Defendant contended that to prove a contravention of s 56 of the PEHA, the prosecution bore an onus from beginning to end to prove beyond reasonable doubt that none of the exceptions prescribed by paragraph 19 of the Directions applied to the Defendant. Those exceptions relevantly included situations where the person "*has a physical or mental health illness or condition, or disability which makes wearing a face mask unsuitable*".<sup>40</sup> In support of that position the Defendant pointed to an officer's power under paragraph 20 of the Directions to "*request a person who is not wearing a mask as required by these Directions to state the person's reason for not doing so*".
47. Counsel's written submissions also provided a range of authorities, none of which are determinative in the prosecution (or defence) of the alleged contravention of s56 of the

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<sup>35</sup> See *Mangurra v Rigby* [2021] NTSC 6 for a recent discussion of the authorities.

<sup>36</sup> *Cintana v Burgoyne* [2003] NTSC 106, *Burkhart v Bradley* [2013] NTCA 05 and *Thyer v Whittington* [2017] NTSC 66, and authorities cited therein.

<sup>37</sup> In relation to ss 158 or 159 of the PAA, requiring consideration of authority such as *Christie v Leachinsky* [1947] AC 573 through to *Adams v Kennedy* [2000] NSWCA 152.

<sup>38</sup> *Majindi v Balchin* [2011] NTSC 40, *Ashley v Millar* [2015] NTSC 63, *Jenkins v Todd* [2016] NTSC 4 and *Mangurra v Rigby* [2021] NTSC 6.

<sup>39</sup> Sgt Kirkby's designation as an "*authorised officer*" did not obviate his duties and powers under the PAA or other Territory legislation (or at common law), despite that it provided the starting point in consideration of his execution of duty on the day. Section 79(1) (b) of the PEHA seeks to confirm this position.

<sup>40</sup> None of the other prescribed exceptions, including whether the person "*is engaged in vigorous exercise*" would appear to have any potential application.

PEHA.<sup>41</sup> That is particularly due to Part IIAA of the Code prescribing criminal responsibility for contraventions of the PEHA.<sup>42</sup>

48. Section 56(2) of the PEHA provides that; “It is a defence to a prosecution for an offence against subsection (1) if **the defendant establishes a reasonable excuse**” (emphasis added). Section 7 of the PEHA provides; “Part IIAA of the Code applies to an offence against this Act”.
49. Section 43BU of Part IIAA provides “A defendant who wishes to rely on any **exception, exemption, excuse, qualification or justification provided by the law creating an offence ... bears an evidential burden in relation to the matter**” (emphasis added).<sup>43</sup> Unlike as first appeared in *Chugg v Pacific Dunlop Ltd* (supra), I consider s 43BU constitutes clear legislative intent that a defendant bears the onus to bring themselves within any “exception, exemption or excuse”.<sup>44</sup> That is only to the standard of an evidentiary threshold, following which the prosecution would then bear a legal burden of disproof to the standard of beyond reasonable doubt.<sup>45</sup>
50. At hearing on 29 and 30 August 2022 the Defendant gave no evidence, as is his right.<sup>46</sup> However, in those circumstances and in the absence of any other evidence adduced in compliance with prosecutorial duties,<sup>47</sup> no evidential burden of proof could be satisfied by the Defendant. That is despite the officer’s power to enquire (which was not exercised), and in circumstances where no objective observation would reveal any basis within the Directions for the Defendant’s failure to wear a mask.
51. Associated with these issues,<sup>48</sup> I consider a material and substantive difference exists between the situation of a person being subjected to the requirements of the PEHA and statutory instruments as occurred on 6 November 2021, compared with that of a defendant to a prosecution in a contested hearing in the Local Court. Just as the ‘right to silence’ does not apply to an exercise of an officer’s power under s 134 of the PAA, it may be assumed that no such right exists in relation to an officer’s request under paragraph 20 of the Directions. Conversely, the ‘right to silence’ in the Local Court is, subject to any legislated modification, absolute. That is, unless and until a defendant

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<sup>41</sup> Dated 29 August, 20 September and 21 September 2022. *Dowling v Bowie* (1952) 86 CLR 136 and *Hammond v Lavender* (1976) 50 ALJR 728, being examples of application of strict compliance with legislated prescription, and *Taikato v The Queen* (1996) 186 CLR 454, which simply goes to exercise of curial judgment following evidence of “reasonable excuse” being adduced. *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 is instructive on the conclusion reached here, and I do accept that s56 of the *Local Court (Criminal Procedure) Act* simply deals with acceptable drafting of Complaints by the Crown.

<sup>42</sup> Section 7 of the PEHA makes clear that Part IIAA of the Code applies.

<sup>43</sup> Although the concept of “a direction” provided by s 56 of the PEHA is particularly broad (including “oral”), I take the Directions (and the direction) to be a “statutory instrument” within the meaning of s 17 of the *Interpretation Act 1978* (NT), such that their content, through ss 4, 17 and 51 of that Act, amounts to “provided by the law”.

<sup>44</sup> This is consistent with and reinforced by the phrase “defendant establishes” in s 56(2) of the PEHA. A recent Territory example on broader considerations is *Talbot v Malogorski* [2014] NTSC 54 at [3].

<sup>45</sup> Due to s 43BW, it could be concluded that the evidential burden on a defendant may be less than balance of probability, following which ss 43BR and 43BS would operate.

<sup>46</sup> *Azzopardi v The Queen* (2001) 205 CLR 50 at 70.

<sup>47</sup> *Whitehorn v The Queen* (1983) 152 CLR 657 at 663 and *R v Apostilides* (1984) 154 CLR 563 at [11].

<sup>48</sup> Paragraphs [6] to [14] of the Defendant’s Supplementary Submissions dated 21 September 2021.

elects to give evidence, the right does not rely on the potential for any answer to incriminate.

52. On the basis of the evidence adduced and facts found, the physical and fault elements essential to any finding of guilt on the charge of contravening s 56 of the PEHA have been proven beyond reasonable doubt. That is at least to the extent that the Defendant was reckless.
53. In relation to count 2, 'taking part in a riot', for the reasons contended by the Defendant's written submissions, I find him not guilty of that charge.<sup>49</sup>
54. Count 3, 'assault police', has already been dealt with.
55. In relation to count 4, 'disorderly behaviour', I do not accept the Defendant's submission that; "*Plainly, if the defendant is acquitted or found guilty of the assault or riot charges he cannot be prosecuted, convicted and punished for an offence of disorderly behaviour. The same conduct forms the basis for the defendant's criminality in each case.*" For example, it is conceivable that the Defendant could have engaged in disorderly conduct prior to or during his initial interaction with the NT Police cordon, so before breaching that line and encountering Sgt Kirkby. Proof of the three offences referred to also involve some difference in essential elements.
56. It may also be accepted that proving any contravention of s 47 of the SOA involves nuances, particularly where the exercise of rights in the form of protest or demonstration is involved.<sup>50</sup> Obviously "*disorderly*" is not simply an antonym for 'orderly', and one consideration is whether a defendant's behaviour was "*sufficiently serious to warrant the interference of the criminal law*" or "*warranted the sanctions of the criminal law*".<sup>51</sup>
57. Most relevantly, whether any particular conduct amounts to "*disorderly*" is a question of fact and degree in all the circumstances. I note the Defendant's presentation on the BWF prior to and immediately before his interaction with Sgt Kirkby. He was obdurate, single-minded and determined to continue on his journey, despite the presence of the cordon, but was not yelling, threatening or unruly. On the basis of the available evidence, the Defendant's behaviour was not disorderly to the extent that it warrants the interference of the criminal law, even at the point of contact with Sgt Kirkby.
58. The Defendant's behaviour was, however, physically resistant against Sgt Kirkby in the execution of that officer's duty. As previously found, the officer was empowered to ensure the PEHA (and Directions made under it) was "*being complied with*", and to "*stop*" any person for that purpose, and to use "*force that is necessary and reasonable*" to effect those objectives. Sgt Kirkby's purpose in stepping into the Defendant's path was to stop him, and was both lawful and in the execution of duty. The Defendant sought to push past Sgt Kirkby and, in doing so, there is no reasonable doubt he contravened s 158 of the PAA, so is guilty of count 5.

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<sup>49</sup> Paragraph [39] of submissions dated 29 August 2022, including *The Queen v Cook & Ors* [1994] QCA 227.

<sup>50</sup> *Watson v Trenerry* [1998] NTCCA 22 per Angel and Mildren JJ.

<sup>51</sup> *Watson v Trenerry* (supra) per Angel J and Mildren J at pages 7 and 32 respectively, relying on *Barrington v Austin* [1939] SASR 130.

59. On 20 January 2023 formal findings on counts 1 to 5 inclusive were given *ex tempore*, with written reasons to be published. These are those reasons. The findings on 20 January were;
- (i) Having regard to the definition of “*place*” provided by s 4 of the PEHA, each of sections 53, 79, 80 and 84 of the PEHA (when read with the Directions and direction) provided authority to the officers to form a cordon and halt the pedestrian passage of the Defendant on 6 November 2021.
  - (ii) Section 7 of the PEHA provides that Part IIAA of the Code applies in the prosecution of any alleged contravention of section 56 of the PEHA.
  - (iii) At hearing, the Defendant bore an evidential burden of proof through s43BU of the Code in relation to any matter not within the knowledge or observation of an officer. That burden was not discharged in any sense.
  - (iv) The Defendant is guilty of contravening section 56 of the PEHA, in that he was not wearing a mask at the relevant time and place in compliance with the Directions.
  - (v) The Defendant is not guilty of taking part in a riot, or of assaulting a member of police, or of disorderly behaviour. None of those charges have been proven beyond reasonable doubt.
  - (vi) Lastly, the Defendant is guilty beyond reasonable doubt of resisting an officer in the execution of their duty. In particular, by seeking to continue on his journey in circumstances where an officer was clearly and lawfully requiring the Defendant to stop, and he did not do so. That finding does not extend to the physical exchange which then ensued following the officer seeking to restrain the Defendant, and taking him to ground.