CITATION:	*Police v Kenny Hayes* [2025] NTLC 10
PARTIES:	Police
	v
	Kenny John Hayes
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22341675
DELIVERED ON:	24 June 2025
DELIVERED AT:	Alice Springs
HEARING DATE(s):	22 May 2025
DECISION OF:	Judge Anthony Hopkins

CATCHWORDS:

EVIDENCE – Discretions – Exclusion of evidence – Criminal proceedings – Resist Arrest and Assault Police - Whether evidence obtained or as a consequence of impropriety or contravention of an Australian law – Defendant arrested for contravening a South Australian Domestic Violence Order that was not in force in the Northern Territory – Mistake of law – Whether reasonable grounds for belief that offence had been committed – *Police Administration Act* - Whether arrest unlawful – Application of *Evidence (National Uniform Legislation) Act*, s 138 to evidence of resisting police and assaulting police following unlawful arrest.

Criminal Code 1983 (NT) s 189A
Domestic and Family Violence Act 2007 (NT) s 120
Domestic and Family Violence (Recognition of Domestic Violence Orders) (National Uniform Law) Amendment Act 2017 (NT)
Police Administration Act 1978 (NT) ss 123, 158
Evidence (National Uniform Legislation) Act 2011 (NT) s 138
Migration Act 1958 (Cth)

International Covenant on Civil and Political Rights, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 3 September 1953).

Coleman v Power [2004] HCA 39; (2004) 220 CLR 1
DPP v Carr [2002] NSWSC 194; (2001) 127 A Crim R 151
DPP v Kaba [2014] VSC 52; (2014) 44 VR 526
Emde v State of New South Wales [2025] NSWCA 41
George v Rockett [1990] HCA 26; (1990) 170 CLR 104
Kadir v the Queen [2020] HCA 1; (2020) 267 CLR 109 [12]-[14]
Ostrowski v Palmer [2004] HCA 30; 218 CLR 493
Parker v Comptroller-General of Customs [2009] HCA 7; (2009) 252 ALR 619

Prior v Mole [2017] HCA 10; (2017) 261 CLR 265
R v Coulstock (1998) 99 A Crim R 143
Rigby v Mulhall [2019] NTSC 70
Robinson v Woolworths Ltd [2005] NSWCCA 426; 64 NSWLR 612
Ruddock v Taylor [2005] HCA 48; (2005) 222 CLR 612
Thoms v Commonwealth [2022] HCA 20; (2022) 276 CLR 466

REPRESENTATION:

Counsel:

Complainant:	Mr Aspin
Defendant:	Mr McCowan

Decision category classification:	B
Decision ID number:	[2025] NTLC 10
Number of paragraphs:	107

IN THE LOCAL COURT

AT ALICE SPRINGS IN THE NORTHERN

TERRITORY OF AUSTRALIA

No. 22341675

BETWEEN

POLICE
Applicant

v

KENNY JOHN HAYES
Defendant

REASONS FOR DECISION
(Delivered 24 June 2025)

JUDGE HOPKINS

Introduction

1. On 31 December 2023 the defendant was charged with three offences alleged to have been committed on 29 December 2023:

    i. That he engaged in conduct that contravened a Domestic Violence Order (DVO), contrary to s 120(1) *Domestic and Family Violence Act 2007* (NT) (*Domestic and Family Violence Act),*

    ii. That he did resist a member of the police force in the execution of his duty, contrary to s 158 *Police Administration Act 1978* (NT) (*Police Administration Act*), and

    iii. That he unlawfully assaulted a police officer whilst in the execution of her duty, in circumstances where that the officer suffered harm, contrary to s 189A *Criminal Code Act 1983* (NT) (*Criminal Code*).

2. On 30 January 2025, the charge of contravening a DVO was withdrawn and dismissed. This was because there was no DVO in force in the Northern Territory that could have been contravened by the conduct of the defendant.

3. The DVO that was originally alleged to have been contravened was issued in 2016 in South Australia. This proceeded the commencement of the national recognition scheme established by Part 3A.2 *Domestic and Family Violence Act*: see s 103E; see note 2; *Domestic and Family Violence (Recognition of Domestic Violence Orders) (National Uniform Law) Amendment Act 2017* (NT), commenced 25 November 2017.

4. On 22 May 2025, the defendant pleaded not guilty to the remaining two charges.

5. The defendant argued that his arrest was unlawful and that because it was unlawful, evidence of the alleged resistance to arrest and assault on a police officer should be excluded pursuant to s 138 *Evidence (National Uniform Legislation) Act 2011 (UEA)*.

6. He further argued that even if the evidence is not excluded in the exercise of the Court's discretion, unless the Court is satisfied beyond reasonable doubt that the arrest was lawful, he should be found not guilty. This is because each charge requires proof that the police officers were acting in the execution of their duty.

7. Both the application for exclusion of evidence and the primary defence argument for acquittal, in the event that evidence is not excluded, turn on the question of whether the defendant's arrest was lawful.

8. The objection having been taken, all evidence relevant to the application for exclusion and proof of the substantive charges was adduced at hearing with the question of admissibility to be determined at the close of the case.

Summary of evidence

9. Constable Libby Mapleston and Constable Watson-Petrovic gave evidence. Their statements were admitted into evidence and read to the Court. Footage captured on their body worn cameras was also admitted into evidence and played in Court. Both were subject to cross-examination. Both were impressive witnesses.

10. At the time of the incident, Constable Mapleston had been a serving police officer for under a year. Constable Watson-Petrovic had been a serving police officer for approximately two years. Both had completed training, including with respect to legislation and DVOs. Each confirmed that they were unable to count the number of times they had arrested people for breaching a DVO. For them, such arrests were routine.

11. Constables Mapleston and Watson-Petrovic came upon the defendant when they attended an unrelated job on Elliot St in Braitling, Alice Springs, at around 3.30 pm on 29 December 2023. The defendant was agitated and aggressive.

12. It was immediately apparent that the defendant has one arm. It was also apparent that he is an Aboriginal man.

13. After attending the unrelated job, Constables Mapleston and Watson-Petrovic became aware that a woman was sitting against a fence across the street from the defendant. This was Jessica Umula, the defendant's partner. At this time, reports were received from Police Communications of a domestic disturbance.

14. Constable Watson-Petrovic's statement records that he observed the defendant to display signs of intoxication: his speech was slurred, he was unsteady, he smelt of alcohol and his behaviour was belligerent.

15. Constables Mapleston and Watson-Petrovic spoke with the defendant for a time. From the body worn footage it is apparent that he was agitated and apparently mistrusting of police. At one point he said words to the effect "I am about this far from get Domestic Violence" … "because of the way she is acting". His behaviour reminded Constable Mapleston of other intoxicated people she had dealt with.

16. Constable Watson-Petrovic then walked over to speak with Ms Umula. Constable Mapleston remained with the defendant for a short period and then left to join Constable -Petrovic and Ms Umula due to the defendant's belligerence.

17. Ms Umula was upset and crying. She stated that she wanted the defendant taken away, that defendant had been drinking the night before, that they had had an argument and that he had pushed her. She did not provide a detailed account. She declined to give a statement.

18. At this time, Constable Mapleston received a further report of a domestic disturbance from police communications involving the defendant and Ms Umula with the possible involvement of a knife.

19. On the body worn footage, Ms Umula can be overheard repeatedly requesting that she be taken to the women's shelter. She tells police to leave the defendant and take her away. She also confirms that the house they had been in was the defendant's, not hers. Constable Watson-Petrovic asks if Ms Umula would like police to arrest the defendant and get a domestic violence order to protect her. She does not respond. When pressed, she denies that the defendant had a weapon and says that he pushed her. It is clear at this point her primary concern was to be taken to the women's shelter.

20. Whist this conversation took place, the defendant picked up a tree branch. He was a significant distance away, across the road and some way down the street. No estimate of distance was provided. My estimate from the body worn footage is that he was between 20 and 30 m away. The defendant walked slowly, a short distance towards Constables Mapleston and Watson-Petrovic and Ms Umula. He dropped the tree branch when commanded to do so by Constable Mapleston. He stopped approaching when commanded to do so by Constable Mapleston.

21. The defendant yelled abuse from his position across the street. This included threats to physically assault Constable Mapleston when he sees her at Coles or Woolworths supermarkets. The threats included derogatory and belittling language, with repeated reference to Constable Mapleston as a "little girl" and a "little kid". At this point, it was Constable Mapleston's evidence that she kept her eyes on the defendant without engaging and sought to de-escalate the situation

22. After making some final threats, the defendant turned and walked away, entering the yard of his home.

23. It is at this time that Constable Watson-Petrovic's checks of police records revealed what he then believed to be a current nationally recognised DVO in which the defendant was the respondent and Ms Umula was the protected person. In his statement dated 29 December 2023, Constable Watson-Petrovic records that he understood that the defendant was not allowed to be intoxicated with the protected person. He understood this order to be "active".

24. Body worn footage establishes that Constable Watson-Petrovic does not commence walking in the direction of the defendant until he has established the existence of the order.

25. According to Constable Mapleston, Constable Watson-Petrovic informed her that the defendant was the respondent to a DVO from South Australia and that "he can be

breached". This conversation can be overheard on body worn footage. It took place as the constables approach the front gated entry to the yard surrounding the defendant's home. Constable Watson-Petrovic can be overheard to explain to Constable Mapleston that the order has "non-intox conditions".

26. Constables Watson-Petrovic and Mapleston stop outside the gate and Constable Watson- Petrovic asks the defendant to come over. He complies but remains agitated and aggressive.

27. The defendant is then told that he is under arrest for breaching a domestic violence order with the Constables taking hold of his one arm. No other reason was given for the arrest.

28. There can be little doubt that the basis for arrest was a subjective belief that the defendant had breached a DVO which prohibited him from being in the company of the protected person whilst intoxicated.

29. In the case of Constable Watson-Petrovic, this belief was based upon his review of police records.

30. In cross-examination, Constable Watson-Petrovic confirmed that the decision to arrest was based on his belief that there had been a breach of a DVO. He gave evidence with respect to his search of the police databases on his police issued mobile device.

31. The Northern Territory database, SerPro, indicated there were no active orders. He recalled that there may have been expired orders from 2018 or 2019. Though it was not confirmed, the inference to be drawn is that these expired orders were ones in which the defendant was the respondent and Ms Umula was the protected person.

32. Constable Watson-Petrovic's search of the national database, NPRS, revealed the existence of a South Australian order dated 26 June 2016. A note next to the record of this order indicated that it was "active".

33. The fact that DVOs were subsequently obtained in the NT, presumably because the 2016 order did not provide protection for Ms Umula, did not, for Constable Watson-Petrovic, give rise to a concern that the South Australian Order was not in force in the Northern Territory. In cross-examination, he fairly conceded that, based on his understanding now, the existence of the expired orders should have given him cause for concern.

34. Constable Watson-Petrovic confirmed that he had received training on legislative requirements for arrest and Police General Orders. He agreed that exercising the power of arrest was a significant responsibility and an action of last resort. He agreed that it was important to ensure that a DVO was in force and to check the conditions of that order before making an arrest. He agreed that making an arrest based on an order that was not enforceable was a falling short of the standard expected of a police officer. He also agreed that Police General Orders make clear that if a mistaken arrest is made the person arrested will likely have a sense of grievance.

35. In his statement dated 3 February 2025, Constable Watson-Petrovic said:

    I wasn't aware that DVOs weren't nationally recognised unless there were in place from 2017 onwards. All the training I received led me to believe that Nationally Recognised DVOs referred to all orders … I later became aware that orders prior to 2017 weren't all

nationally recognised unless specific orders were made, this was due to my involvement in a similar matter where a supervisor picked up on the dates and provide [sic] me with guidance on this other matter.

36. In that same statement, Constable Watson-Petrovic conjectured about what he would have done if he had known the DVO was not enforceable. He maintained that he would "have arrested the defendant for the purposes of obtaining a DVO".

37. Similarly, in cross-examination, Constable Watson-Petrovic conjectured that if he had formed the view that there was no enforceable DVO he would have arrested the defendant based on his intoxication. He did not explain this further.

38. Whilst Constable Watson-Petrovic was an impressive and honest witness, I do not accept his post event justifications for the arrest as being operative in his mind at the time. The weight of the evidence, including real-time body worn camera footage, establishes that the arrest was based on a subjective belief that the defendant had breached a DVO. This was the reason communicated to the defendant.

39. The belief of Constable Mapleston that the defendant had contravened a DVO was based on the report of Constable Watson-Petrovic with respect to the existence of a DVO that had been breached. She took no personal steps to determine whether there was a DVO in existence or to identify the conditions of any such order. Whilst this may not be desirable, it is understandable that she would rely on the report of her partner in an operational context.

40. In cross-examination, Constable Mapleston confirmed her belief that the arrest was for a contravention of a DVO and that the defendant was advised that this was the reason for his arrest and that no other reason was communicated to him.

41. Constable Mapleston confirmed that she had received training on legislative requirements for arrest and Police General Orders. She agreed that exercising the power of arrest was a great responsibility and an action of last resort. She agreed that, though it can be done quickly, care needs to be taken to ensure that an enforceable DVO is in place and with respect to the conditions of that order. She agreed that failing to take these steps would be a significant falling short of the standard required of a police officer. She also agreed that Police General Orders make clear that if a mistaken arrest is made the person arrested will likely have a sense of grievance.

42. The belief held by the officers as to the existence of an enforceable DVO was mistaken. There was no DVO in force in the Northern Territory that could have been breached by the conduct of the defendant.

43. After his arrest, body worn footage establishes that the defendant is compliant as he is walked to the rear of the police vehicle. He denies "touching" Ms Umula. He then asks what the arrest is about. Constable Mapleston again informs him that he has been arrested for breach of a domestic violence order. The defendant can be heard to say, "I've got no DVO". Constable Mapleston responds "in SA". The defendant then sounds incredulous. He states that he has "already done this time". He goes on to say, "chuck me in the back, chuck me in the back".

44. As the defendant was being handcuffed, he yelled at police to handcuff his one hand to his foot. His single wrist was then handcuffed to a belt loop on his shorts after his belt was

removed. He became increasingly agitated, stating he was going to Court for this and that police were being racist. He repeatedly stated that he had done nothing wrong.

45. The defendant resisted efforts to get him into the back of the vehicle, swinging and jerking his body and pulling away. Because of this resistance, the defendant was "ground stabilised" and Constable Watson-Petrovic called for another police unit to attend and assist.

46. At this point, the defendant's sister came over in distress about the way her brother was being treated. She was filming the arrest and asked for each constable's name and identification. This was provided, along with the number of the police vehicle

47. Constables Mapleston and Watson-Petrovic then attempted to use a "modified easy chair carry" technique to get the defendant into the vehicle. Again, the defendant resisted, moving his body erratically.

48. It was Constable Mapleston's evidence that as she was bending down she "felt a hard push" to her chest region that caused her to trip over. She said that she saw Hayes run at her and jump on top of her. She felt another hard push to her body and made contact with the ground on her side. She felt immediate pain to her right shoulder as it hit the concrete. Photographs of bruising to her shoulder and hand were admitted into evidence.

49. In cross-examination, Constable Mapleston stated that it was hard to see how she was pushed and that she was not aware of what part of the defendant's body made contact with her. She was firm in her evidence that she saw him run towards her and jump on top of her. She did not agree the defendant's actions could be explained as resisting.

50. Constable Watson-Petrovic' evidence was that the defendant jerked his body, and kicked Constable Mapleston, causing her to fall to the ground. He said that the defendant "tried to thrash away from my grip and charge Constable Mapleston" but that he "managed to grab the defendant around his waist and throw him to the ground". In his statement dated 29 December 2023 he further records that "after the kick, causing her to fall he attempted to run back at her and grab her."

51. During his evidence in chief, when commenting on the arrest footage, Constable Watson- Petrovic said that as they lifted the defendant he started thrashing and rolling his body to the right onto Constable Mapleston, causing her to stumble back. He then grabbed the defendant by the waist and got on top of him. In cross-examination he did not agree that the contact made with Constable Mapleston could be explained as resistance rather than an intentional assault.

52. Constable Watson-Petrovic ground stabilised the defendant until other officers arrived.

53. The body worn footage in relation to the assault is inconclusive. From the time that the defendant is lifted to the time that he is ground stabilised is approximately 10 seconds. The footage is obscured and at close quarters. It is a distressing and chaotic scene. The body worn footage of Constable Mapleston appears to support the view that as the defendant is lifted up, he thrashes out with his leg, making contact with Constable Mapleston. It is then apparent that Constable Mapleston is on the ground and the defendant moves quickly towards her. His sister yells "Kenny don't" and he is quickly grabbed and ground stabilised by Constable Watson-Petrovic. It does not appear that the

defendant is on top of Constable Mapleston for any period, though the footage is consistent with him attempting to run back at her.

54. Two further police units arrived with an officer who clearly knew the defendant. He spoke to him on the ground saying "Kenny, it is Brendan". The defendant then settled and agreed to go with police. He continued to state that he had no DVO and that he had done nothing wrong.

55. At 4.11 pm the defendant was taken to the Alice Springs Watch House. While he was being processed, he apologised repeatedly to Constables Mapleston and Watson-Petrovic, saying 'I'm sorry sister" and "I'm sorry brother".

56. The defendant was never required to provide a sample of breath to determine whether he was in fact intoxicated or had been consuming alcohol.

57. No attempts were made to obtain a statement from Ms Umula or otherwise follow up with her.

Lawfulness of the arrest

58. The question of whether the arrest was lawful is to be answered by reference to s 123 *Police Administration Act 1978* (NT) which grants a member of the police force the power to arrest without warrant. That section provides as follows:

> 123 Arrest without warrant by members of Police Force
>
> A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

59. The evidence establishes that both Constables Watson-Petrovic and Mapleston subjectively believed that the defendant had committed the offence of breaching a DVO: *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 [8] (*George v Rockett*); *Prior v Mole* [2017] HCA 10; (2017) 261 CLR 265 [24] (Gageler J); [4] (Kiefel and Bell JJ) (*Prior v Mole*). This belief was mistaken.

60. Constable Watson-Petrovic believed that the DVO that was "active" in South Australia was in force in the Northern Territory. This was a mistake of law, not a mistake of fact: *Ostrowski v Palmer* [2004] HCA 30; 218 CLR 493 [6].

61. Constable Mapleston's belief was based on statements made by Constable Watson- Petrovic with respect to his belief. Her belief arose from his mistake. It was derivative.

62. The critical issue is whether Constable Watson-Petrovic had reasonable grounds for his belief, albeit mistaken.

63. As stated in *George v Rockett* at [8]:

> Where a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

64. As explained by Gageler J in *Prior v Mole* at [27] (footnotes omitted):

> …. The whole point of requiring "reasonable grounds" for the requisite belief is to ensure that the reasonableness of the belief appear to a court and not merely to the member. That the member, as an experienced member of the Police Force, might have thought that his belief was reasonable is not to the point. The member's belief in the reasonableness of his own belief is not relevant to the task of the court. The court must arrive at its own independent answer through its own independent assessment of the objective circumstances which the member took into account.

65. This raises a question of whether a mistake of law – which was undoubtably a foundation for the arrest - can be considered an objective circumstance for the purposes of determining whether a belief was based on reasonable grounds.

66. This is not a case in which the constable misconstrued a statute creating an offence. Instead, he mistakenly believed that a South Australian DVO was enforceable in the Northern Territory. No enactment in the Northern Territory recognised the enforceability of the South Australian DVO or created an offence by which that order could be contravened in the Northern Territory.

67. There is significant force in the proposition, as stated by McHugh J in *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at [140]; see [133]-[140] (Coleman v Power), that:

> It is not reasonable to believe or suspect that a law exists when it does not. Ignorance of the law is ordinarily not an excuse for what is otherwise unlawful conduct. Fictional though it may be, everyone is presumed to know the law.

68. However, the High Court has rejected the distinction between a mistake of law and mistake of fact in assessing whether there are reasonable grounds for a state of mind justifying detention under the *Migration Act 1958* (Cth). Instead, it was held that "what constitutes reasonable grounds … must be judged against what was known or reasonably capable of being known": *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 [41]-[47] (*Ruddock*); *Thoms v Commonwealth* [2022] HCA 20; (2022) 276 CLR 466 [40]-[41]; [45]-[46]; [84]; [87]-[88] (Thoms).

69. In *Emde v State of New South Wales* [2025] NSWCA 41 at [69]-[73] the New South Wales Court of Appeal considered, but found it unnecessary to decide, the application of *Ruddock* and *Thoms* to the police power of arrest without warrant pursuant to s 99 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

70. The decisions of *Ruddock* and *Thoms* are unequivocal with respect to the interpretation of reasonable grounds in the context of a power to detain. In the absence of a relevant constructional basis to distinguish the test with respect to the assessment of reasonable grounds under s 123 *Police Administration Act*, it is appropriate to interpret that test in accordance with those authorities.

71. Accordingly, regardless of whether the mistake made by Constable Watson-Petrovic was one of law or fact, the test of whether he had reasonable grounds for the belief is to be judged against what was known or reasonably capable of being known.

72. To find that the true state of the law with respect to the enforceability of interstate DVOs was not reasonably capable of being known by an officer routinely charged with making arrests for contravention of DVO would be perverse.

73. The fact that he did not know that the South Australian DVO was unenforceable in the Northern Territory points to a failure with respect to his training. It also points to a failure with respect to the way in which DVOs that are not nationally enforceable are flagged in the system of records available to police on their mobile devices.

74. It is readily apparent that a system generated warning would likely have prevented the error made by Constable Watson-Petrovic, ensuring he was not misled by the "active" flagging of the interstate order. There is little doubt that other officers have fallen into and will fall into the same error, resulting in mistaken arrests of innocent people. The risk of mistaken arrest will continue unless a systemic solution is found.

75. The fact that a systemic solution is available is relevant to the question of what was reasonably capable of being known.

76. In addition, Constable Watson-Petrovic was aware that subsequent DVOs were issued in the Northern Territory and had expired. The inference to be drawn from this fact is that those orders were required because the preceding interstate DVO was not enforceable in the Northern Territory.

77. Ultimately, Constable Watson-Petrovic accepted that arresting a person on the basis of an unenforceable DVO amounted to a falling short of the standard expected of a police officer. This frank and commendable concession can be understood as an admission that he should have known, or have been trained to know, or otherwise been alerted to the fact, that the DVO was not enforceable.

78. Judged against what was known and reasonably capable of being known, Constable Watson-Petrovic did not have reasonable grounds for the belief that the defendant had committed the offence of contravening a domestic violence order. For this reason, Constable Mapleston could not be said to have had reasonable grounds for the derivative belief that she held.

79. The requirements of s 123 *Police Administration Act* were not met. The arrest was unlawful: *Coleman v Power* [118]- [121]; *Prior v Mole* [84] (Gordon J); *Rigby v Mulhall* [2019] NTSC 70 [25].

Exclusion pursuant to s 138 *Evidence (National Uniform Legislation) Act 2011*

80. Section 138 of the UEA provides for the exclusion of improperly or illegally obtained evidence:

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

81. The provision requires a two-stage approach. First there is an onus on the party seeking exclusion to demonstrate, on balance of probabilities, that the evidence was improperly or illegally obtained. Second, it is for the party seeking admission of the evidence to persuade the Court that the evidence should nevertheless be admitted. It is a discretion to admit the evidence notwithstanding the impropriety or illegality: *R v Coulstock* (1998) 99 A Crim R 143 [33]; *Robinson v Woolworths Ltd* [2005] NSWCCA 426; 64 NSWLR 612 [33]; *Parker v Comptroller-General of Customs* [2009] HCA 7; (2009) 252 ALR 619 [28]; *Rigby v Mulhall* [2019] NTSC 70 [16].

82. The discretion to admit must be exercised having regard to matters set out in s 138(3), though not limited to those considerations. In criminal proceedings the discretion requires the court to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval to the illegal or improper conduct of those whose task is to enforce the law: see *Kadir v the Queen* [2020] HCA 1; (2020) 267 CLR 109 [12]-[14].

83. As to the first stage, having found that the arrest was unlawful, it follows that the arrest was in contravention of an Australian law. The evidence relating to the offences of resist police and assault police was obtained in consequence of this contravention of Australian law. The actions of the defendant were a direct response to that unlawful arrest and justified sense of grievance. In other words, there was a direct causal relationship between the arrest and the evidence of the subsequent offences: *DPP v Carr* [2002] NSWSC 194; (2001) 127 A Crim R 151 [50]-[70]. The alleged offending was not so disproportionate as to severe the causal link: *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526 [346].

84. Section 138(3) sets out the matters that must be considered in the exercise of the discretion. I will consider each in turn so far as they are relevant.

Probative value and importance of the evidence in the proceeding

85. The only evidence with respect to the alleged resist arrest and assault police offences was that provided by Constables Mapleston and Watson-Petrovic, which included evidence from their body worn cameras. This evidence established the fact that the defendant resisted the constables. It is less clear that the assault would be established to the relevant standard. Notwithstanding this, the probative value of the evidence is high as is its importance in the proceeding.

Nature of the relevant offence and subject-matter of proceeding

86. The offence of resisting police carries a maximum penalty of a fine of $1408 or 6 months imprisonment: s 158 *Police Administration Act*. The offence of assaulting a police officer in the execution of their duty carries a maximum penalty of 5 years imprisonment, which is increased to 7 years in a case where the officer suffers harm, as is alleged here.

87. The maximum penalties are a reflection of the importance of ensuring that those charged with enforcing the law receive the protection of the law.

88. The alleged facts constituting the act of resisting are largely unremarkable, except for the fact that the defendant has one arm. It cannot be said that it was a particularly grave example of resistance.

89. The alleged assault is constituted by the defendant making intentional contact with Constable Mapleston, by kicking or thrashing out at her, likely with the side or thigh area of his leg. This occurred whilst an attempt was being made to lift the defendant into the back of a caged police vehicle. This contact caused Constable Mapleston to suffer injury, including bruising to her shoulder occasioned when she fell to the ground.

90. The assault is continued by the defendant moving rapidly towards Constable Mapleston whilst she is on the ground. It is not clear on the evidence whether the defendant did in fact end up on top of Constable Mapleston. The conflict in evidence between Constable Mapleston and Constable Watson-Petrovic on this point, together with my observation of the body worn footage, would make it difficult to conclude beyond reasonable doubt that the defendant did in fact end up on top of Constable Mapleston. The assault was of relatively short duration. It was committed as part of the act of resistance. This is not to suggest that the incident did not cause apprehension or fear to Constable Mapleston, and concern for her partner.

Gravity of the contravention and whether the contravention was deliberate or reckless

91. The unlawful arrest of an innocent person is inherently grave. The historical and present- day relationship between police and Aboriginal people in the Northern Territory is fraught with tension. This was evident in the defendant's sister's response to the arrest of her brother and his treatment post-arrest, which she clearly thought was racist. It is clear from what the defendant said to police that he shared this view. I do not find that the actions of either Constable were animated by racism. There were no indicia to this effect. Indeed, Constable Mapleston clearly sought to facilitate any complaints process in her conversation with the defendant's sister. However, actions by police exceeding their power have the clear tendency to further strain relations and contribute to a justified sense of grievance on the part of members of the Aboriginal community. This contextual reality is a relevant consideration in assessing gravity

92. I do not find that the contravention of either constable was deliberate. Constable Watson- Petrovic held a genuine belief he was lawfully exercising the power of arrest. Though the believe of Constable Mapleston was derivative, it was nonetheless genuinely held.

93. For the same reason, I do not find that the contravention was reckless, in the advertent sense. That is, I do not find that either constable was subjectively aware of the possibility that they were acting unlawfully.

94. I do however find that the contravention was negligent.

95. As previously stated, the fact that Constable Watson-Petrovic did not know that the DVO was unenforceable points to a failure with respect to his training and a failure with respect to the way in which DVOs that are not nationally enforceable are flagged in the system of records available to police on their mobile devices. There is little doubt that other officers have fallen into and will fall into the same error, resulting in mistaken arrests of innocent people. As previously stated, the risk of mistaken arrest will continue unless a systemic solution is found.

96. In addition, Constable Watson-Petrovic's awareness that subsequent DVOs had been issued in the Northern Territory should have given him pause to consider that those orders

were required because the preceding interstate DVO was not enforceable in the Northern Territory.

97. There was a falling short of the standard expected of a police officer.

Whether the contravention was contrary to or inconsistent with a right recognised by the International Covenant on Civil and Political Rights

98. Article 9 of the ICCPR provides for the right to liberty and security of the person and that a person not be subject to arbitrary arrest or detention, except in accordance with procedures established by law. An unlawful arrest is inconsistent with this right.

Whether any other proceeding has been or is likely to be taken in relation to the contravention

99. No evidence was adduced of any remedial action being taken by the Northern Territory Police to ensure that deficiencies in education and record flagging have been, or are being, addressed.

100. Constable Watson-Petrovic came to learn of his mistake in an operational context when a supervisor identified his mistake before he could act upon it. This was a chance encounter with a supervisor who was aware of the issue.

101. In the absence of whole of force remedial education and reform to the flagging of "active" DVOs in records available on mobile devices, the risk of unlawful arrests occurring will remain significant.

102. The absence of evidence of remediation raises the risk that admission of the evidence will tacitly approve the status quo. This will almost inevitably result in future unlawful arrests. Such a state of affairs should receive curial disapproval, particularly in circumstances where potential remedial steps are readily apparent.

103. I am not persuaded that it is desirable to admit the evidence. The desirability of admitting the evidence does not outweigh the undesirability of admitting evidence.

104. I will exclude all of the evidence of Constables Watson-Petrovic and Mapleson, including the evidence taken from their body worn footage.

105. Given that there is no evidence that could support a finding of guilt against the defendant on the charges before the Court. The defendant will be found not guilty of both charges.

Whether acting in the execution of duty

106. It is strictly unnecessary to consider the outcome had the evidence of the alleged resist and assault police offences been admitted. However, it is appropriate to make the following observation. If the evidence had been admitted, I would nevertheless have acquitted the defendant on that basis that the prosecution had failed to prove an element of the offence, namely, that the officers were acting in the execution of their duty. It is uncontroversial that "[a]n officer who unlawfully arrests a person is not acting in the execution of his or her duty": *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 [118]; see also [118]- [121] (McHugh J); *Prior v Mole* [84] (Gordon J).

107. For these reasons, I find the defendant not guilty. The charges against him are dismissed and he is discharged from his bail obligations.