

Restraints on Police Power Affirmed

Caitlin Akthar reports on *The Queen v Rolfe* [2021] HCA 38; 95 ALJR 975

Background

Constable Zachary Rolfe was on duty and attended the remote Aboriginal community of Yuendumu, 300km northwest of Alice Springs, on 9 November, 2019. He and another police officer entered a house in the community in search of a man, Kumanjaji Walker, who was wanted on an outstanding warrant and charges.

After the officers entered the house, Walker struck Rolfe to the shoulder with a pair of scissors. Rolfe then shot Walker once in the back as he wrestled with the other officer. This shot was not the subject of a charge.

What occurred next was the subject of determination by a jury of twelve in the Supreme Court of the Northern Territory. It is not in dispute that Zachary Rolfe shot Kumanjaji Walker two further times in the torso, no more than 5cm from Mr Walker's body, as Walker lay on a mattress under the other officer. One of these two shots was fatal.

Rolfe was tried for murder, manslaughter in the alternative, and in the further alternative, engaging in a violent act which caused the death of a person. He defended all charges on the basis of self-defence.

Additionally, he defended the charges on the basis that he acted in good faith in the exercise of a power or performance of a function under section 148B of the *Police Administration Act 1978* (NT) (PA Act). This 'good faith' defence is a complete defence to each charge. There is no equivalent defence for police officers in NSW.

(On Friday 11 March 2022, Rolfe was acquitted of murder, and of two lesser charges in a unanimous decision of the jury.)

The defence of 'good faith'

Shortly before the trial was due to commence in August 2021, the trial judge referred four questions to the Full Court of the Supreme Court of the Northern Territory (the Full Court).

These questions related to s 148B(1) of the *Police Administration Act 1978* (NT), which relevantly provides that a person is 'not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.'

Question 3 was directed at the parameters of the 'good faith' defence: it asked whether



the accused could rely on this defence for any act done as a police officer. Or, was the accused limited to relying on only acts done in exercising particular powers or functions?

The Full Court decided a redrafted version of the third question. The court held that it would be open to the jury to find that the respondent was acting in the exercise, or purported exercise, of a power or function of the PA Act. In particular, the Full Court determined that the functions of a police *officer* included the functions of the police *force* in s 5 of the PA Act. These functions include the protection of life and the prevention of offences. Accordingly, the Full Court held that the defence would be available to the accused whether he was exercising his power of arrest, or acting to protect life or prevent further offences.

The Crown sought special leave to appeal the Full Court's answer to this question to the High Court.

The High Court's decision

The High Court reformulated Question 3 to state: 'Does a 'function' under s 148B

of the *Police Administration Act 1978* (NT) include the functions listed in s 5(2) of the *Police Administration Act 1978* (NT)?' and answered as follows:

(b) The answer to question 3 is: 'No, the relevant powers and functions to which s 148B of the *Police Administration Act 1978* (NT) applies are those of the common law, which s 25 of the Act confers, and the power of arrest in s 124 of the Act.'

The High Court held that 'the evident purpose of s 148B is to provide protection from liability, including for a criminal act, provided that the person committing the act does so 'in the exercise of a power or performance of a function (or the purported exercise or performance of a power or function) under the [Police Administration] Act and does so in good faith' (at [17]).

However, the High Court considered that the good faith defence in s 148B of the PA Act did not incorporate the functions of the police force in s 5 of the PA Act. Further, the High Court affirmed (at [22]) that 'the exercise of the common law powers, like the statutory powers, is subject to constraints, such as doing only that which is reasonable and necessary.'

The High Court did not make explicit what powers and functions the common law affords police officers. To that extent, the parameters of the 'good faith' defence are not clearly defined by the High Court's judgment. However, the clear statement by the High Court that all of the powers are attended by 'constraints, such as only doing that which is reasonable and necessary', is a significant limit on the 'good faith' defence. **BN**



Supreme Court of the Northern Territory building in Darwin