UNREVIEWABLE POLICE POWERS?
THE RELIANCE ON PAST POLICING EXPERIENCE IN PRIOR v MOLE

by Julian R Murphy

INTRODUCTION

Picture this: An Aboriginal man drinking on a suburban street in Darwin has his alcohol poured out by police and then is arrested because the police believe that the man is likely to procure more alcohol and commit a further public drinking offence. The arresting police officer claims that his belief that the Aboriginal man was likely to continue drinking is based, in part, on his past policing experience. This is a common occurrence in Darwin, indeed in towns across the Northern Territory. In *Prior v Mole*,[1] the arrest of an Aboriginal man for public drinking became a-typical because in the subsequent criminal proceedings against him, the lawfulness of the arrest was put in issue by the defence. What level of detail must the police officer provide before a court can accept that the past experience constituted a reasonable ground for the belief that the Aboriginal man was likely to continue drinking? This is the question that split the High Court in *Prior v Mole*.

Police powers, particularly powers of arrest and apprehension,[2] have long been a preeminent subject of legal controversy in Australia.[3] As a general rule, courts have been careful to subject the exercise of such powers to close scrutiny before finding them to be lawful. Such an approach is an expression of the traditional concern of the judicature to protect individuals from arbitrary interferences with their liberty.[4] Yet the High Court's recent decision in *Prior* appears, at least at first blush, to illustrate an attenuation of that traditional concern. On one view, the majority judgments would permit police officers to shield their powers from effective judicial review by simply testifying that the arrest was based on their unparticularised and unexaminable past policing experience.[5] Read in this way, the decision suggests a disinterest in the factors that *actually*, rather than *theoretically*, motivate police to arrest Aboriginal people at a disproportionate rate. The extent to which racial bias affects policing in Australia is a contentious topic beyond the scope of this case note,[6] but what is not contentious is that, where it exists, racial bias should be able to be called out and sanctioned by the courts. If police were permitted to justify arrests by simply saying that the decision to arrest was based on past policing experience there would be a real danger that arrests made on the basis of racial profiling would go undetected by the courts.[7] A dramatic example might be, in an area with a high Indigenous population and a high youth crime rate, where a police officer stopped and searched an Aboriginal youth for no apparent reason, the police officer could justify the search on the basis of past policing experience. Yet the decision in *Prior* ought not be read to allow police to so easily veil the true motivations for their actions.

A more considered reading of *Prior* reveals that the *ratio decidendi* is much more limited. Namely, that where a police officer's power is premised on the officer holding a reasonable belief in the existence of a certain thing (for example, a belief that a person is likely to commit an offence), a court may have regard to the police officer's past policing experience to assess the reasonableness of the belief, but only if two preconditions are made out. First, the police officer's past experience *actually* informed the police officer's belief on the occasion in question. Secondly, there must be *sufficient information* about the police officer's past experience to allow the court to assess the rationality of the police officer's reliance on that experience.

So understood, the majority judgments in *Prior* are entirely orthodox in their enunciation of legal principles and the only surprise lies in the application of those principles to the facts of the case. It is at this point, the application of legal principles to the body of evidence adduce in the case, that Justice Gageler's dissent is most powerful and, arguably, to be preferred to the majority's reasoning.

BACKGROUND TO THE HIGH COURT APPEAL

The general outline of the facts in Mr Prior's case will be all too familiar to any reader who has spent time in the Northern Territory. The events occurred in the mid-afternoon of New Year's Eve, 2013, when Mr Prior was drinking with two other Aboriginal men on the footpath of a suburban shopping strip in Darwin. A police car drove past and, as it did so, Mr Prior extended his middle finger in the

universal gesture of dislike. When the police then confronted Mr Prior about his actions they realised he was consuming alcohol in a regulated place.[8] They drained his alcohol, arrested him and placed him in the back of a caged police vehicle. Mr Prior predictably took umbrage at this interference with his New Year's Eve activities and he behaved in a somewhat belligerent manner throughout the interaction with police before finally spitting through the cage grill onto one of the police officers. He was subsequently charged with assaulting a police officer (by spitting) and two other offences.

Mr Prior pled not guilty to the charges. His defence was, relevantly, based on the contention that his arrest had been unlawful because the arresting officer had not had reasonable grounds for his belief that Mr Prior was likely to commit an offence, as was required by s 128(1) of the *Police Administration Act 1978* (NT), which relevantly provides:

> A member [of the police force] may, without warrant, apprehend a person and take the person into custody if the member has *reasonable grounds for believing* … [that] the person … *is likely to commit an offence* (emphasis added).

The arresting police officer testified that he had arrested Mr Prior because he believed, based in part on his prior policing experience, that Mr Prior would likely have committed a further offence of drinking in a regulated place. The Magistrate at first instance accepted the reasonableness of the police officer's belief and ultimately found Mr Prior guilty of two of the offences (Mr Prior was acquitted of the third offence). Mr Prior appealed against his convictions to a single judge of the Supreme Court who upheld the appeal and acquitted Mr Prior of the two offences. The Northern Territory government appealed to the Court of Appeal. The Court of Appeal expressed a concern that there had in fact been some 'highly undesirable' 'stereotyping' at play in the arrest.[9] However, the Court of Appeal were satisfied that the arrest was proper.[10] Mr Prior appealed to the High Court. The central question for the High Court was whether there had been sufficient evidence presented to the Magistrate to establish, beyond reasonable doubt, that the arresting officer had had *reasonable grounds to believe* that Mr Prior was likely to commit the offence of drinking in a regulated place.

THE LEGAL PRINCIPLES—'REASONABLE GROUNDS TO BELIEVE'

All five members of the bench in the High Court appear to have largely been in agreement as to the proper approach to the statutory criterion of 'reasonable grounds to believe'. Those principles derive, in large part, from the Court's earlier decision in *George v Rockett*[11], which decision was cited by all members of the Court in *Prior*[12]. Justice Gageler lucidly describes the inquiry mandated by the words 'reasonable grounds to believe':

- What was the police officer's belief?
- What were the objective circumstances by reference to which they formed that belief?
- Did those objective circumstances provide a sufficient foundation for a reasonable person to form the requisite state of mind?[13]

As was the case in *Prior*, the third question is often the most contentious.

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APPLICATION OF THE PRINCIPLES TO THE FACTS —THE RELEVANCE OF PAST POLICING EXPERIENCE

THE MAJORITY

All members of the majority found that, in combination with other matters, the officer's testimony that he had relied on 'experience as a police officer' was sufficient to satisfy them that the police officer had reasonable grounds for his belief.[14] It is immediately worth emphasising that such a conclusion is case-specific, namely that on the evidence adduced *in this case* the police officer's experience was capable of forming part of the foundation for a reasonably grounded belief. This is not to say that past policing experience will *always*, or even often, be relevant to the assessment of the particular situation confronting a police officer. To illustrate the limited scope of the majority's comments it is necessary to refer briefly to the judgments.

Although the arresting police officer did not provide any explicit detail of his experience in his testimony, Justices Kiefel and Bell were prepared to infer, 'in the circumstances of *this* case', that the police officer was relying on his experience of intoxicated persons who were, by reason of their intoxication, behaving in an aggressive and abusive way.[15] Thus Justices Kiefel and Bell were satisfied that the police officer's experience had been sufficiently described to permit the Court to scrutinise the rationality of the connection between that experience and the belief held on the part of the officer in the instant case. Their Honours held that it was open to find that the experience so described, in combination with the other matters relied upon by the police officer, was sufficient to ground a reasonable belief. It is well to note, however, the qualification that their Honours registered: '[t]he assessment is one about which reasonable minds may differ'.[16]

Similarly, Justice Nettle was prepared to draw inferences from the bare words of the police officer's testimony so as to more fulsomely summarise the thrust of his evidence:

> …he had 12 years of experience of the patterns of behaviour of people found drinking liquor in public places in close proximity to licensed premises, displaying aggressive and abusive behaviour indicative of intoxication and consequent lack of judgment. His experience was that, despite being directed to stop, such persons would continue to consume liquor[17]

So summarised, Justice Nettle held that the police officer had provided a sufficient outline of his past experience for the purposes of the Court's assessment of his evidence.[18] Before reaching this finding, however, Justice Nettle cautioned that '[p]rejudice is irrational and does not afford reasonable grounds for decision-making'.[19] Instead, Justice Nettle held, what is needed is a 'logical'[20], 'empirical'[21] or 'rational'[22] connection between the experience and the anticipated offending. The imperative that may be extracted from Justice Nettle's judgment is that a police officer's experience must be sufficiently detailed to allow a court to be satisfied that the police officer relied upon that experience in a logical and rational manner. So much is essential to establishing a belief on reasonable grounds.

When police officers rely on their past policing experience to inform a requisite belief, that belief will only be reasonable where there is *sufficient information* about the past experience to allow the Court to find that the experience provided a logical or rational basis for the belief.

Justice Gordon reached a similar conclusion in fewer words. Her Honour rejected '[t]he contention that there was an absence of particulars of the [police officer's] experience to provide any basis for relying on that experience'.[23] It should be noted, however, that her Honour was careful to point out that the past policing experience was only *a*, not *the*, ground for the requisite belief in this case. It thus remains undecided whether past policing experience could ever, by itself, provide reasonable grounds for a statutorily prescribed belief.

JUSTICE GAGELER

Justice Gageler's powerful dissenting judgment opens with a characteristically pithy statement of general principle:

> Personal liberty is 'the most elementary and important of all common law rights.' Critical to its preservation is that 'the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable'[24]

Justice Gageler was the only member of the Court who made detailed reference to the actual words of the police officer's testimony.[25] To Justice Gageler's mind, the past policing experience purportedly relied upon did not disclose 'any relevant patterns of behaviour'.[26] Justice Gageler went so far as to suggest that the police officer's testimony essentially created a self-fulfilling test for reasonable grounds, whereby the police officer could simply say 'I formed my belief as a policeman' and that belief would be found to be reasonably grounded.[27]

IMPLICATIONS AND CONCLUSION

The requirement for reasonable grounds for a belief is a 'widely used'[28] statutory precondition for the lawful exercise of police powers in Australia.[29] Indeed, Australia's laws are replete with references to reasonably grounded beliefs, not all of them conditioning police powers.[30] The decision in *Prior* is thus likely to be applied in areas of law beyond the scrutiny of police powers. Yet, the decision's significance should not be overstated because, in the end, it turned on its facts.

Hasty readers of the decision might well have concluded that the case stands for the broader, and distinctly unattractive, proposition that police officers are entitled to rely on unspecified and unassailable past policing experience to justify the exercise of their powers. A better reading of the majority judgments reveals a narrower ratio decidendi: when police officers rely on their past policing experience to inform a requisite belief, that belief will only be reasonable where there is *sufficient information* about the past experience to allow the Court to find that the experience provided a logical or rational basis for the belief.[31] That is the principle for which this case stands; Justice Gageler and the majority were in agreement about this basic requirement for sufficient information. Justice Gageler was perhaps most eloquent in his summation of the principle and the role of the Court:

> … the court must assess the identified circumstances for itself … this is not an occasion on which a court can be justified in giving weight to the opinion of the repository whose exercise of power is the subject of judicial review. 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[32]

This is necessarily a question that must be determined on a case-by-case basis. It is also one about which 'reasonable minds may differ', as was acknowledged by Justices Kiefel and Bell.[33] In the present case, the majority found that the police officer had sufficiently described his past experience. Justice Gageler, to the contrary, found that for the police officer simply to testify in the terms of '[m]y experience as a police officer tells me' did not adequately describe the experience. For the sake of people like Mr Prior, who find themselves subjected to intrusive police powers of arrest and detention, it might be hoped that Justice Gageler's more demanding approach commends itself to future courts.

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1 (2017) 91 ALJR 441.

2 Whilst there is an important, albeit technical, difference between powers of arrest and other powers of apprehension this case note will use 'arrest' as an umbrella term to cover both concepts.

3 See, eg, *Nolan v Clifford* (1904) 1 CLR 429.

4 *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Williams v The Queen* (1986) 161 CLR 278 at 292.

5 See the concerns expressed by Gageler J, in dissent, (2017) 91 ALJR 441, 451 [42]–452 [47].

6 See, eg, Christine Feerick, 'Policing Indigenous Australians: Arrest as a Means of Oppression' (2004) 29(4) *Alternative Law Journal* 188; Chris Cuneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin 2001).

7 See and compare, eg, *Floyd v The City of New York* 959 F Supp 2d 540 (SDNY 2013); Peter Seidel and Tamar Hopkins, 'African-Australians Win Case Against Police On Racial Profiling', *The Sydney Morning Herald* (online), 19 February 2013 <http://www.smh.com.au/comment/no-one-should-be-stopped-by-police-just-because-theyre-black-20130218-2end5.html>.

8 Contrary to the *Liquor Act 1978* (NT), s 101U.

9 (2016) 36 NTLR 171, 187 [53].

10 Ibid, 188 [56].

11 *George v Rockett* (1990) 170 CLR 104, 116.

12 (2017) 91 ALJR 441, 445 [4] (Kiefel and Bell JJ), 449 [23]–[24], 450 [27] (Gageler J), 457 [73] (Nettle J), 461 [98]–[100], 464 [127] (Gordon J).

13 Ibid, 449 [25]–[26].

14 Ibid, 448 [18]–[19] (Kiefel and Bell JJ), 457 [72] (Nettle J), 463 [118] (Gordon J).

15 Ibid, 448 [18]–[19] (emphasis added).

16 Ibid, 448 [19].

17 Ibid, 457 [72].

18 Ibid.

19 Ibid, 456 [71].

20 Ibid, 456 [69].

21 Ibid, 456 [71].

22 Ibid.

23 Ibid, 463 [118].

24 Ibid, 449 [22].

25 Ibid, 451 [41].

26 Ibid, 451 [42].

27 Ibid, 452 [43]. See and compare *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 429 [10] (Gleeson CJ and Kirby J).

28 (2017) 91 ALJR 441, 449 [23] (Gageler J).

29 In the Northern Territory see, eg, *Police Administration Act 1978* (NT), s 116F, 116J, 117, 119, 120BA, 120BC, 120C, 121, 123, 125, 126, 128, 133B, 134 etc.

30 See, eg, *Personal Properties Securities Act 2009* (Cth), s 151; *Australian Securities and Investments Act 2001* (Cth), s 19, 49; *Defence Force Discipline Act 1982* (Cth), s 101Q.

31 The requirement for a certain amount of detail about the past policing experience mirrors, in a way, the law's treatment of expert opinion evidence. In that context, the lack of an adduced basis will reduce the weight of the opinion. See Australian Law Reform Commission, Uniform Evidence Law Report, Report No 102 (2006) Australian Law Reform Commission, 296–297 [9.64–9.67]; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549, 554 [16] (Branson J).

32 (2017) 91 ALJR 441, 450 [27].

33 Ibid, 448 [19].