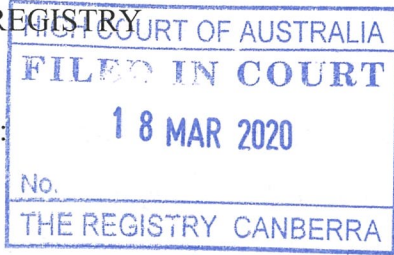


IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY



BETWEEN:

No D11 of 2019

JOSIAH BINSARIS

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

10 BETWEEN:

No D12 of 2019

KEIRAN WEBSTER

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

BETWEEN:

No D13 of 2019

LEROY O'SHEA

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

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BETWEEN:

No D14 of 2019

ETHAN AUSTRAL

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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PART I: INTERNET PUBLICATION

These submissions are in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1 – the prison officer exemption in s 12(2) of the *Weapons Control Act*

1. A prison officer attracts the exemption in s 12(2) of the *Weapons Control Act* if he/she possesses or uses a prohibited weapon in the course of his/her duties as a prison officer and the weapon is supplied for the performance of his/her duties. To attract that exemption, it is not necessary for there to be a further enactment, or even an authority in writing.
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2. The appellants contend that s 62(2) of the *Prisons (Correctional Services) Act (Prisons Act)* has the implied effect of confining the authority of prison officers to possess and use firearms, weapons and articles of restraint in the course of their duties, to possession and use in prisons. That construction cannot stand with the objects of ss 6, 8, 9¹, 11, 14, 60 and 61, which establish that prison officers' duties extend to dealing with prisoners outside of prisons.
3. The *Prisons Act* does not exhaustively prescribe the duties of a prison officer, much less the means by which those duties may be fulfilled. Subject to legislative limits and Ministerial control, the Director may assign duties to prison officers as he/she sees fit.
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4. By s 157(2) of the *Youth Justice Act (YJA)*, a prison officer's duty may include assisting the superintendent of a youth detention centre in an emergency situation. Whether a prison officer provides that assistance and how it is provided remains subject to the Director's direction.
5. In this case, the Director and his subordinate commanders directed the prison officers to assist the superintendent with an emergency and supplied them with a CS gas device as a means to fulfill that duty: CAB 238, [18], [19]; CAB 282 [111].
6. The power conferred by s 152(1) of the YJA includes a power to employ reasonable and necessary force to fulfill the duty in s 151(3)(c) to maintain order and safety:

¹ *Woodley v Boyd* [2001] NSWCA 35, [37] (Heydon JA).

Edwards v Tasker (2014) 34 NTLR 115, [32] – [35]; CAB 288, CA [118]; *Binse v Williams* [1998] 1 VR 381, 392 at .10. The use of a weapon is a means by which the force may be projected. The YJA does not prohibit the use of weapons for this purpose. The prison officer’s power to use force also arises from s 9 of the *Prisons Act*.

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7. The prison officer who deployed the CS gas did not commit the offence against s 6 of the *Weapons Control Act*, because while acting in the course of his duty to assist the superintendent with an emergency, he used a weapon that was issued to him for that purpose. Thus, he qualified for the exemption in s 12(2) of the *Weapons Control Act*.
 8. The appellants raise the principle of legality, the right being said to be “personal liberty”: AS [28], [31]. The presumption against interference is displaced, by the YJA - a statutory scheme that provides for the detention of offenders and a power to use force to maintain order and safety.
 9. Neither the primary judge nor the Court of Appeal held that the CS gas was justified because it was convenient. They each held it was reasonable and necessary. The textual difference between s 152(1) and 157(2) in relation to convenience is immaterial: cf AS [29].
 - 20 10. Neither the primary judge nor the Court of Appeal held that the executive was able to dispense with the penal provisions of the *Weapons Control Act*: cf AS [30].
 11. The power to use force in s 152(1) is not “ancillary” or “incidental”: cf AS [32]. It is the primary source of the superintendent’s power to fulfill the duty to maintain order and safety.

Ground 2 – prohibition against enforced dosing in s 153(3)(b) of the YJA

12. Prison officers exercising the delegated power of the superintendent pursuant to s 157(2) are conferred with the power to perform the function in s 151(3)(c); not the discipline function in s 153(1).

13. In statutes governing prison / detention environments, order and discipline are distinct concepts: CAB 293, CA [126]. Section 153 subs (1) – (3) does not limit the power under s 152(1) to maintain order and safety.
14. Section 153 subs (1) – (3) are concerned with prohibiting the superintendent from disciplining detainees in certain ways. The CS gas was not directed at the appellants and they were not being disciplined.
15. Textually, the words “other substance” in s 153(3)(b) mean something like a therapeutic medicine or drug designed to improve discipline. CS gas is not this.
16. CS gas is an irritant designed to drive a person away or hinder them from engaging
10 in violence. The unchallenged finding in this case was that the CS gas was reasonably deployed, so as to avoid the potential for serious physical violence between Mr Roper and the prison officers. It is not the object of s 153(3)(b) to limit the ways in which a police officer or prison officer might attempt to restore order and ensure the safety of everyone in the detention centre.

Notice of contention – s 9 of the *Prisons Act*

17. Police officers have the power to use any reasonable force to prevent the commission of a criminal offence anywhere in their jurisdiction. Thus, police officers acting as such, act in the course of their duties. When prison officers are performing their duties as prison officers, have the same power and privileges as police officers.
- 20 18. Sections 151 – 153 of the YJA concern the powers of the superintendent. When police officers and prison officer, acting in the course of their duties, take steps to prevent a youth detainee from committing a criminal offence, they do not cease to be police officers or prison officer and they do not cease to have the powers and privileges of that office.

18 March 2020

David McLure SC

Trevor Moses