

**BINSARIS v NORTHERN TERRITORY OF AUSTRALIA (D11/2019)**  
**WEBSTER v NORTHERN TERRITORY OF AUSTRALIA (D12/2019)**  
**O'SHEA v NORTHERN TERRITORY OF AUSTRALIA (D13/2019)**  
**AUSTRAL v NORTHERN TERRITORY OF AUSTRALIA (D14/2019)**

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory  
[2019] NTCA 1

Date of judgment: 18 February 2019

Special leave granted: 16 August 2019

Each of the appellants sued the respondent for damages for assault and battery said to have occurred while they were detained at Don Dale Youth Detention Centre in Darwin in August 2014. At the trial, their claims for damages for battery arising out of the use of CS gas at Don Dale on the night in question were dismissed. The dismissal of those claims was upheld on appeal by the Court of Appeal of the Supreme Court of the Northern Territory. These four appeals are concerned with the proper construction of several statutes in force in the Northern Territory on 21 August 2014. The issues for determination are whether one or other of two statutory prohibitions was contravened by the use of CS gas at Don Dale on the night in question. The first prohibition prohibited the use of a prohibited weapon unless under an exemption or an approval. The second provision provided that 'enforced dosing with a medicine, drug or other substance' is not reasonably necessary force which the superintendent may use to maintain discipline. In 2014 the four appellants were youths serving sentences of detention at Don Dale. All of them were between 15 and 17 years of age and had lengthy criminal records including convictions for escaping lawful custody. Another detainee, JR, had also committed serious crimes of violence. On 21 August 2014 the appellants were housed in the "Behavioural Management Unit" (BMU) of Don Dale which comprised five cells adjacent to an enclosed exercise yard. They were housed there because they could not be held securely elsewhere in the detention centre, having all escaped from there on 2 August 2014 and having been recaptured by 6 August 2014.

On the evening in question JR escaped from his cell into the exercise yard, became very aggressive and destructive, damaged property and caused a disturbance. Although the other detainees remained confined in their cells, some of them also became agitated and damaged property in their cells.

As a result of communication between the Superintendent of Don Dale, the Director of Correctional Services and the Acting General Manager of Berrimah Correctional Centre, three prison officers at Berrimah who were members of the Immediate Action Team (IAT) arrived at the BMU at about 8.30pm. The members of the IAT were equipped with aerosol canisters of CS gas.

CS gas is a form of tear gas which is a prohibited weapon under the *Weapons Control Act 2001* (NT). The Act exempts a 'prescribed person' acting in the course of their duties...in respect of a prohibited weapon that is supplied to them by their employer for the performance of their duties as a prescribed person. An officer under the *Prisons (Correctional Services) Act 1980* (NT) is a prescribed person but not an officer under the *Youth Justice Act 2005* (NT).

On the night in question, the decision to deploy the CS gas was taken by the Director of Correctional Services. The gas was sprayed in the enclosed exercise yard in 3 short initial bursts followed by a further 6 short bursts by a member of the IAT using an article known as a 'fogger' which was a prohibited weapon under the *Weapons Control Act*. After the last burst JR fell to the ground at which point members of the IAT entered the BMU and removed him. Once JR was secured the cells in the BMU were unlocked and the other detainees including the appellants were removed. The detainees were handcuffed behind their backs and taken to the basketball courts adjacent to the exercise yard where they were hosed down to remove the residue of the CS gas. It is uncontroversial that the relevant safety data sheet for the CS fogger states that its use may cause 'acute eye, skin, digestive and respiratory system irritation' as well as other potential health effects including "difficulty breathing, possible feeling of suffocation", and "nausea, vomiting in higher concentrations", "60 seconds-total incapacitation may occur"....". The officers concerned all gave evidence that they believed the temporary discomfort to the other detainees in the BMU was necessary to temporarily incapacitate JR so he could be taken back into safe custody and accomplished this in a way that avoided the risk of serious injury to JR and/or to the prison officers.

The Court of Appeal determined first that the CS gas was deployed by a prison officer acting within the scope of the power granted of the superintendent under s 152(1) of the *Youth Justice Act*, and delegated to the prison officer under ss 157(2) of the Act; and second, that the officer was acting within the scope of his duties as a prison officer when he deployed the gas. Therefore the use of the prohibited weapon on the appellants was authorised. The appellants dispute the correctness of the legal conclusions embodied in those findings. The appellants argue that ss 153(2) is the only general provision of the *Youth Justice Act* authorising the use of force in the conduct of the youth detention centre. It is limited to force that is reasonably necessary in the circumstances. By ss 153(3), reasonable force does not include physical violence or enforced dosing with a medicine, drug or other substance. "On no view could the ancillary "necessary or convenient" power in ss 152(1) grant, by a side wind, a power to infringe the liberty of a subject, to use coercive force, and to dispense with the generally applicable penal law".

The grounds of appeal in each matter are:

- That the Court of Appeal erred in holding that the exemption in subsection 12(2) of the *Weapons Control Act 2001* (NT) applied to the deployment of CS gas by a prison officer at Don Dale Youth Detention Centre on 21 August 2014.
- That the Court of Appeal erred in holding that the power of the superintendent under subsection 152(1) of the *Youth Justice Act 2005* (NT) was not limited by subsection 153(3) of the Act.

The Respondent has sought an extension of time in which to file a Notice of Contention in each matter contending that the decision of the Court below should be affirmed but on the ground that the subject Prison Officer was acting in the course of his duties within the scope of his powers and privileges pursuant to ss 8(2) and 9 of the *Prisons (Correctional Services) Act 1980* (NT).