



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

THE QUEEN
Applicant

and

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ZACHARY ROLFE
Respondent

**RESPONDENT'S SUBMISSIONS IN RELATION TO QUESTIONS ASKED BY
THE COURT**

Part I: The questions

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1. On Monday 18 October 2021, the parties were asked two questions by the Court in relation to this appeal, and in particular, apropos the application for special leave. Those two questions are as follows:

- 1.1 The first concerns whether the Court is being asked to provide an advisory opinion, which may be outside the scope of s 73 of the Constitution (*Saffron v The Queen* (1953) 88 CLR 523, 527-528; but see *Mellifont v AG (Qld)* (1991) 173 CLR 289, 301-306).

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- 1.2 More particularly there may be a question about the hypothetical nature of the exercise which the Court is being asked to undertake in advance of the trial, given that the Court is being asked to entertain an appeal on the basis of assumptions as to the facts to be found by the jury; assumptions which may be reasonable but are about facts not yet found.

Part II: Concise answer to the questions

2. In relation to the first question, the answer is, yes. The respondent contends that the Court is being asked to give an advisory opinion because the answers turn on facts which are not the subject of any evidence and can be assumed only.
3. In relation to the second question, any decision of this Court is in the abstract and an advisory opinion because the answers to the special leave application do not finally determine the rights of the parties nor resolve any material conflict.

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Part III: Submissions

4. Mellifont v AG (Qld) (1991) 173 CLR 289 ("*Mellifont*") decided contrary to Saffron v The Queen (1953) 88 CLR 523 ("*Saffron*") that there was section 73 jurisdiction from such proceedings. *Mellifont* preserved the rule against advisory opinions. The conceded possible application of section 148B of the *Police Administration Act 1978* (NT) ("the PA Act) at the pending trial means that everything turns on factual questions. The matter could not proceed beyond assumptions factually in the Full Court. In terms of special leave to appeal, it appears there is no longer to be a legal question about 148B of the PA Act, so the possibility of its application is presently hypothetical depending on evidence yet to be given. It is in the nature of an advisory opinion.¹

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Proceedings in the Full Court of the Supreme Court NT

5. In this case, Mildren J referred four questions to the Full Court of the Supreme Court in the Northern Territory pursuant to section 21 of the *Supreme Court Act* (NT).

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Division 3 Full Court

21 Full Court

- (1) The Judge hearing a proceeding, not being a proceeding in the Court of Appeal in which the jurisdiction of the Court is exercisable by one Judge, or, if the hearing of such a

¹ see *Bass and Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [49]

proceeding has not commenced, any Judge, may refer that proceeding or part of that proceeding to the Full Court.

- (2) The Full Court may:
- (a) accept;
 - (b) decline to accept; or
 - (c) accept in part only,

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a reference made under subsection (1) and, in any event, may make such orders and give such directions as it thinks proper in relation to, and to the procedure to be followed in, the further conduct of the proceedings or part, as the case may be, including, in a case where evidence was received before the reference, orders and directions in relation to the use, if any, to be made of that evidence.

6. Of relevance to this application, the Full Court were asked to consider the following (revised) question 3 (of four questions):²

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Based upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, would it be open to the jury to find that the accused was acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act*, such that s 148B of the Act arises for the jury's consideration?

7. Their Honours Southwood ACJ and Mildren J answered that question, "yes,"³ and the plurality comprising Kelly, Blokland and Hiley JJ provided an analysis of when the section 148B defence will be available but can otherwise also be characterised as, "yes."⁴

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8. It is important as a matter of context however to examine what the Full Court was asked to answer in question 3, and secondly, what the Full Court said in answering question 3 in the affirmative. Fundamentally, the Full Court were simply asked to consider whether the defence is open to the jury to consider on assumed facts, to which their Honours Southwood ACJ and Mildren J observed:⁵

² J[99] (CAB 162)

³ J[127], Southwood ACJ and Mildren J (CAB 174)

⁴ J[204] Kelly, Blokland JJ and Hiley AJ (CAB 207-208)

⁵ J[126] Southwood ACJ and Mildren J (CAB 173-174)

"In our opinion, these principles apply to this case and, on the "Assumed Facts", it is open to the jury to find that the defendant honestly engaged in a course of action that falls within the defendant's powers, functions and duties under the *Police Administration Act*."

9. The plurality answered the question in this way:⁶

Answer:

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- (a) The protection from criminal and civil liability conferred by s 148B of the PAA extends to acts done (or omitted) in the performance or purported performance of functions in s 5 of that Act.
- (b) On the assumed facts it would be open to the jury to find that at the time he did the acts which are the subject of the charge (ie firing the second and third shots) the accused was performing or purporting to perform the function of preventing the commission of an offence by the deceased (ie the stabbing of Constable Eberl) and/ or the function of protecting life (that of Constable Eberl) and/ or that he was exercising or purporting to exercise a power under the PAA (the power to arrest the deceased under PAA s 124).
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- (c) The question whether the accused was in fact acting in the exercise or purported exercise of a power, or the performance or purported performance of a function under the PAA is a question of fact for the jury to determine after they have heard all of the evidence.
- (d) The separate question of whether, at the time he performed the relevant acts, the accused was acting in good faith is likewise a question of fact for the jury to determine after they have heard all of the evidence.
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- (e) Once all of the evidence is in, it will be a matter for the trial judge to direct the jury on the matters they need to be satisfied of to determine whether, as a matter of fact, it is reasonably possible that:
- (i) the accused was performing or purporting to perform a function and/ or exercising or purporting to exercise a power under the PAA; and
 - (ii) the accused was doing so in good faith.

10. The final observation to be drawn from the Full Court judgment is that it is acknowledged that the contents of the assumed facts and annexures do not constitute concluded facts nor admissions from the parties.⁷ The Full Court also observed however that the issues of law raised by the referred questions are

⁶ J[204] Kelly, Blokland JJ and Hiley AJ (CAB 207 – 208)

⁷ J[6] Southwood ACJ and Mildren J (CAB 126)

concerned with how the law applies to the facts of this particular case and although the questions are contingent on yet to be established facts, the questions are not hypothetical nor academic.⁸

Mellifont and the case at bar

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11. It seems to be, that applying *Mellifont*, the decision of the Full Court is at least capable of being reviewed by this Court in the sense that it may be a judgment or order that section 73 of the Constitution contemplates. However, the respondent contends that it goes no further than that for two reasons:

- 14.1 The applicant's concession apropos controversy between parties;⁹ and
- 14.2 The abstract nature of the task before this Court.

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12. It is of some moment that the applicant has disavowed any suggestion that the section 148B defence is not available to the respondent, depending on the evidence led at trial.¹⁰ It is therefore of greater moment, that both the applicant accepts, and the Full Court held, that this is an issue to be decided by the jury after all of the evidence is in at trial. The trial is yet to commence with any evidence. The questions before this Court are not concerned with the admissibility of evidence, a point of law post acquittal which needs to be corrected, or an assertion that this trial, in one way or another, is dependent on the answers given by the Full Court. Once it is accepted that the fact that the section 148B defence will be left for a jury to decide on the actual facts led at trial, and not those which are of a hypothetical nature, it could hardly be said that this is actually any material 'controversy' of the kind to have this Court intervene.

Dated 25 October 2021

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⁸ J[6] Southwood ACJ and Mildren J (CAB 127)

⁹ CAB 274

¹⁰ Ibid CAB 274