

MAGISTRATES COURT OF SOUTH AUSTRALIA

(Criminal)

POLICE v COLPO

Ex Tempore Judgment of Magistrate K. Kossiauelos

26 June 2018

Informant: SOUTH AUSTRALIA POLICE
Prosecution: MR M. MILBURN
Defendant: ANTHONY COLPO
Counsel: MR A. MOFFA

Hearing Date/s: 25/06/2018; 26/06/2018
File No/s: AMC-17-12523

Police v Colpo

Magistrate K. Kossiavelos Criminal

- 1 By Information dated 19 October 2017, Anthony Colpo (the defendant) has been charged with the following offences:

On 29 February 2016 at Wattle Park, in the said State, he assaulted Harley David Johnstone.

Section 20(3) of the Criminal Law Consolidation Act, 1935. This is a basic offence. This is a summary offence.

On 29 February 2016 at Wattle Park, in the said State, without lawful excuse and being recklessly indifferent as to whether property was damaged, he damaged a bicycle the property of Harley David Johnstone, such damage amounting to more than \$2,500 but not more than \$20,000.

Section 85(3) of the Criminal Law Consolidation Act, 1935. This is a minor indictable offence.

Compensation sought \$6,651.95 for damage and \$136.70 for medical costs.

- 2 According to the prosecution case, at about 6.50 p.m. on 29 February 2016 Mr Johnstone was riding his bicycle at a cycling event on the summit of Kensington Road. He was punched to the mouth once by the defendant, and following that impact Mr Johnstone fell backwards onto the road, and in the process damaged his bike. Mr Johnstone at that stage had completed numerous circuits up and down Kensington Road and was undertaking what was known as 'the Everesting Attempt'. He was riding at the relevant time with his friend Mr Joey Armstrong and Mr Gruffudd Pugh-Jones. He saw a male who was unknown to him at the time walking his dog. That male approached him and punched him once to the face, causing him to fall backwards onto the road. Mr Johnstone, according to the prosecution case, asked that male why he had hit him and his explanation was due to what had been said by that male of Mr Johnstone on the internet. Mr Joey Armstrong is said to have stepped in between the defendant and Mr Johnstone. At 7.25 p.m. Senior Constable Petraccaro attended the scene. At that stage the defendant was nominated as the male who had hit Mr Johnstone. Senior Constable Petraccaro took a statement from Mr Johnstone at the scene and his notebook entry has been tendered as Exhibit P4. Senior Constable Petraccaro observed no obvious injury to Mr Johnstone, but noted that Mr Johnstone complained of soreness to his front teeth. Furthermore, he made some observations of what damage he could see to the bike at the time. The defendant was apprehended by police some time later in relation to a traffic matter and was arrested on 9 September 2017. It is submitted by prosecution that the damage to the bike was extensive and that the bike was valued at \$10,000.

- 3 The defendant is presumed innocent of the offences. The prosecution bears the onus of proving every element of the offence beyond reasonable doubt. If after consideration of all the evidence there remains a reasonable possibility that the defendant has not committed the offences as alleged, then he is entitled to an acquittal.

The defendant has pleaded not guilty to both charges. The prosecution bears the onus of proving the elements of the charges.

4 The prosecution prior to opening sought three applications:

- 1 The first application was to admit the statement of a witness Mr Gruffudd Pugh-Jones without calling him to give evidence as he was permanently out of Australia. That was denied for the reasons given during the trial hearing.
- 2 The second application was to allow a videotape taken by Mr Pugh-Jones showing the aftermath of the subject incident. As identity was not an issue and the video did not show the subject incident, nor was the video provided to police immediately but some days later on a USB stick, the tendering of that video was also disallowed for the reasons given during the trial hearing.
- 3 The third application related to photographs provided by the alleged victim Mr Johnstone to prosecution on Friday and Sunday prior to the trial hearing. Previous orders had been made by the court that disclosure of all relevant material was to be provided to defence no later than seven days after the last pre-trial conference. On that basis the late disclosure of the photographs was disallowed.

5 The prosecution called one witness. That was Mr Harley Johnstone, the alleged victim. His oral evidence was supplemented by four exhibits, including the statement of Senior Constable Petraccaro (P1), the statement of Constable Thomas (P2), the statement of Constable Osborne (P3) and the notes of Senior Constable Petraccaro from his notebook (P4). Defence did not call any evidence but tendered one exhibit as a business record of the alleged victim Mr Johnstone, namely a video posted on YouTube on 7 March 2016 by Mr Harley Johnstone.

6 At the conclusion of the prosecution case, defence counsel made a Prasad application on the basis that Mr Johnstone's evidence is so lacking in weight and reliability, as identified by former Chief Justice King in *Q v Prasad*, that no reasonable tribunal could safely convict on it, and without demonstrating all of the nuances or lack thereof of his evidence it was submitted that the evidence furnished by Mr Johnstone was so unreliable that it would be unsafe to convict the defendant.

7 A Prasad direction is used sparingly and only where the presiding judicial officer considers that the evidence is insufficiently cogent to justify a verdict of guilty. It is given in instances where the prosecution witnesses have been patently unsatisfactory. In an appropriate case, a Magistrate may act on the Prasad principle and acquit without hearing the defence case. However, this is only where no reasonable tribunal could safely convict in light of the evidentiary deficiencies in the prosecution case. Having heard all the evidence that the prosecution intends to present to prove each offence, a Magistrate is entitled to say that the prosecution has not proved its case beyond reasonable doubt.

8 Having considered the evidence of Mr Harley Johnstone and all the exhibits, I
am of the view that the principle in Prasad is applicable to this case.

9 The evidence of the prosecution was lacking for the following reasons:

- 1 No witnesses were called to corroborate the alleged offending even though the
Everesting Attempt on 29 February 2016 entailed 50 or more persons following
the cyclists that day. Even if not all persons were present at the relevant time,
according to the evidence of Mr Johnstone there were two other persons other
than Mr Pugh-Jones (who is overseas) that could have been called, including Mr
Johnstone's ex-girlfriend and Mr Joey Armstrong. Neither have been called nor
has a statement been provided in these proceedings.
- 2 There is no video evidence of the incident although Mr Johnstone suggested in
his evidence that this did exist and furthermore confirmed its existence in the
YouTube video, being Exhibit D1.
- 3 There is no report from the treating dentist to substantiate the alleged injuries
although Mr Johnstone had asserted in his evidence that he had a tooth missing
from the subject incident and consulted a dentist after the subject incident.
- 4 There is no proof of damage to Mr Johnstone's bike. In his evidence he
suggested that he had the damage assessed by the company Giant. One would
have expected a detailed assessment which should have been produced to the
court as evidence in that regard.

10 The evidence of Mr Johnstone lacked weight and reliability throughout.

11 He selected whatever evidence he gave. He avoided direct answers during cross-
examination and even in examination-in-chief.

12 He provided answers that were not even asked of him. He did not answer the
questions put to him, even in examination-in-chief.

13 His avoidance of providing answers to questions was highlighted at its best when
the YouTube video (D1) was presented to him twice in court and he still did not
answer questions asked of matters raised in that video. By way of example, he
suggested that he did not know what a pit bull terrier looked like when cross-
examined on this topic, and yet in the YouTube video he had included clippings of pit
bull terriers.

14 Another example was on the topic of the road gradient. There was variance in
his evidence-in-chief about the gradient on the road as being 25% as compared to
what he said in the YouTube video of 15%. He continued being evasive about this
issue even after the YouTube video was played in court.

15 His injuries as described to Senior Constable Petraccaro were not consistent with
what he said in evidence. He described in evidence a bloodied mouth, swollen lips

and the loss of a tooth. This was not observed by Senior Constable Petraccaro soon after the alleged assault nor did Mr Johnstone tell Senior Constable Petraccaro of these injuries at the time.

16 Mr Johnstone's suggestion that he finished the cycling event five hours after the alleged assault had occurred with a replacement bike was a recent invention not previously raised in his examination-in-chief or his statement to police.

17 In summary, I find that Mr Johnstone was not a witness of truth. He mastered the art of manipulation as a witness. He made insinuations against the defendant without proof. It appeared he had an axe to grind with the defendant over alleged remarks made by the defendant about him on the internet some time ago, namely in 2012, and he made sweeping remarks about the adverse effects this had caused him financially. Once again without corroborative evidence. I detected a hostility towards the defendant by Mr Johnstone as a result of alleged previous grievances.

18 Mr Johnstone at the end of his cross-examination alerted to a brain injury that he has suffered from. No further information was provided by way of re-examination on that issue nor am I able to assess this further. In any case, if a potential brain injury has contributed to the quality of Mr Johnstone's evidence, that does not detract from the fundamental issue, and that is that his evidence was unreliable and lacking in weight.

19 I consider the evidence of Mr Johnstone to be patently unsatisfactory. In view of the state of the evidence and that the prosecution case is lacking in evidence as previously outlined, I consider that the Prasad principle is enlivened and I acquit the defendant of the charges without hearing the defence case. In the circumstances, the defendant is acquitted of both charges.

