

CITATION: *Police v Rocky Cosmo Manu* [2004] NTMC 047

PARTIES: ROBERT ROLAND BURGOYNE

v

ROCKY COSMO MANU

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction – Alice Springs

FILE NO(s): 20401614

DELIVERED ON: 12 May 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 23 and 28 April 2004

JUDGMENT OF: M Little

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Prosecutor: K Winzar  
Defendant: R Goldflam

*Solicitors:*

Prosecutor: Police Prosecution  
Defendant: NTLAC

Judgment category classification:

Judgment ID number: [2004] NTMC 047

Number of paragraphs: 31

IN THE COURT OF SUMMARY JURISDICTION  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20401614

BETWEEN:

**ROBERT HOLAND BURGOYNE**  
Police

AND:

**ROCKY COSMO MANU**  
Defendant

REASONS FOR JUDGMENT

(Delivered 12 May 2004)

Ms M LITTLE SM:

1. The defendant has pleaded not guilty to one count of unlawfully assaulting David Waite on the 16<sup>th</sup> January 2004 as Alice Springs. The charge is aggravated in that it is alleged David Waite suffered bodily harm. The defendant has entered a plea of not guilty to that charge. I remind myself that the prosecution bears the onus of proving and every element of the offence beyond reasonable doubt.
2. Prosecution did not call the alleged victim David Waite. The evidence proceeded in a somewhat unusual fashion in that there was video of an incident between two persons and that video was tendered, without the victim of the assault being called. There is no evidence before the Court as to why the victim was not called.
3. The first witness called was Constable Wayne Burnett from the Alice Springs Police Force. On the 16<sup>th</sup> of January 2004 he was tasked to Lasseters Casino and he received a video. He looked at the video, went to the Alice Springs Hospital and spoke to a man in hospital at approximately 9.00am lying in the accident and emergency area of the hospital. He said that he was able to identify the person in hospital as one of the persons he saw on the tape which he had taken from Lasseters Casino. He said the person was wearing a light shirt and shorts, in his

mid twenties. He described him as having short hair, Caucasian, with light brown hair and no facial hair. He was not able to see any visible injuries.

4. He then re-attended at the Casino and spoke to security officers, where he was given a copy of another security tape. The two tapes were played and became exhibits P1 and P2. P1 is the tape which starts at 3.02.52 minutes and stops at 3.06 am on the 16<sup>th</sup> of January 2004. The witness said he was able to identify one person that he saw in the video as the person he saw at the hospital. That identification was objected to. Given the dangers inherent in identification evidence in these circumstances, I do not give that identification any weight.
5. He also identified the defendant, Rocky Manu, as a person in the video. I do give this identification some weight. The witness said that he knew Rocky Manu through the defendant's role as security at the Yeperenye Centre and that he was able to identify the defendant on the video.
6. The second tape, which became P2, is the recording of the time on the 16<sup>th</sup> of January 2004 from 3.01.52 to 3.06. The second tape relates to further footage inside Limerick's Bar Casino area and some duplication with P1. The witness said he was able to identify the defendant in that video.
7. After speaking to security again on the 16<sup>th</sup> of January 2004, he then returned to the hospital and spoke to the same person once again. That person then attended at the police station and gave a statement to Constable Burnett. That was a written statement which Constable Burnett typed up and the statement was then signed by the man.
8. Further inquiries were made with security and the police media office placed an advertisement in the paper looking for witnesses with respect to incident. Constable Burnett spoke to the defendant on the 17<sup>th</sup> of January 2004 after the defendant contacted the station. The defendant came in and he was spoken to at 1pm on the 17<sup>th</sup> of January 2004. There was then a full electronically recorded record of interview. He was not arrested and he had voluntarily attended at the police station.

9. There was then a voir dire conducted as to the admissibility of this first audio tape which was recorded at 13.05am on the 17<sup>th</sup> of January 2004. I was told admissions were made. I declined to admit into evidence the first tape which was inaccurately defined as a s.140 tape but in any event was a tape of a conversation between Constable Burnett and the defendant as the defendant was watching the video tape of Lasseters Casino from the night before. I have already ruled on that matter and declined to admit into evidence anything that was said which amounts to admissions. The reasons for that decision have already been provided.
10. Constable Burnett then produced an audio electronic record of interview which was played and became exhibit P3. This was admitted by consent. I have been provided with an aide memoir of that record of interview, being fourteen typed pages. I rely on the words on the tape as to the final evidence of what was said as between the defendant and Constable Burnett. Nevertheless I do indicate that references will be made to the aide memoir by way of page numbers. Constable Burnett was an honest and reliable witness.
11. Prosecutions then sought to re-agitate a question which I had decided at the first day of the hearing of the matter, namely whether Constable Burnett could give evidence of the name of the person who had given the statement to him at the police station by him giving evidence as to the name he was able to read on the signature. There was objection to the naming of the person and secondly the re-agitation of the matter. I have formed the view that I have made a ruling on that question and is not appropriate for me to reconsider the issue.
12. A discussion then ensued as to whether a charge of unlawful assault could proceed on the basis that the person was unnamed. That is a matter which I will address later in my reasons.
13. Hayden Collins was then called to give evidence. He was a security officer at Lasseters Casino on the 16<sup>th</sup> of January 2004. At about 2.30am he was in Limerick's Bar as they were closing the bar. At approximately 3am there was an incident. He said an intoxicated male was trying to re-enter the bar. The witness said he told the male the bar was shut and to go into a taxi. He said he did not know him at the time. He said he was from the United Kingdom – Ireland or

Scotland – he was of average height, white clothing and when he spoke to him he clearly had an accent. He said there was also another male and a female there as part of the group. He said one male was known to him and that was the defendant Rocky.

14. He said he saw Rocky and the person from the United Kingdom together. They were looking at hopping into a cab. He said that the other male was very intoxicated and he was certainly not in a position to stay in a bar area. He said that he would say that Rocky had been drinking, but he was not as intoxicated as the other gentleman who was severely intoxicated and had impaired ability. He said Rocky had an arm around the man as they were going towards a cab. He didn't hear any words said. He said he saw the man again. On that occasion the man was unconscious by the stair area. I accept this witness's evidence on this point. He had ample time to see the man on both occasions. He later saw Rocky at the front door area, at the reception area of the Casino at approximately 100 metres away.
15. In cross-examination he agreed that Rocky had an arm around the man going towards the cab. He said the man tried to get back in several times and that he left by the front door. He heard Rocky say words to the effect the bar is closed, we need to get a cab. I formed a view that this witness was an honest and reliable witness. I accept his evidence as to the intoxication levels of the defendant and the male who ended up unconscious.
16. That was the close of the prosecution case. There was a no case submission made. I reserved a ruling on the no case submission and, following discussions with the parties, proceeded with final submissions. Mr Goldflam indicated that if I found there was a case to answer, there would be no evidence by the defence. I accept that this is a somewhat unorthodox approach. The proposal that the matter proceed this way was at the suggestion of the parties and I was minded to accede to that request in order that submissions could be made on the day. In future I propose making a ruling before proceeding on. Even given the pressures of a busy Court of Summary Jurisdiction this is the usual practice and should be adhered to.

17. The no case submissions focused on the question of the identity of the individual, who was said to have been assaulted and also on the question of bodily harm. I find there is no case to answer on the aggravating circumstance namely that David Waite suffered bodily harm. I record a finding of not guilty on the aggravating circumstance. We then moved onto final submissions and submissions related to various matters of law. As stated in submissions there are numerous issues of law, canvassed in this matter, which need to be addressed in the decision.
18. The first issue which arises relates to the naming of David Waite as the person who was assaulted on this occasion. There is no evidence before the Court that the person who was the subject of the blow by the defendant, which he has admitted in the record of interview and which can be clearly seen on the video evidence, is the person David Waite. Had there not been the combination of the videotape evidence and the record of interview in this case it may well have arguable that it would be unjust to amend the information pursuant to s.183 of the Justices Act. Given the evidence before the Court, I do not find it would be unjust to amend the information. Section 183 of the Justices Act can be invoked at any time. An investigation proceeded in the normal fashion. The defendant knew of the allegations and indeed attended at the police station voluntarily. There is nothing necessarily crucial about a name on a charge such as this. A person could give a false name, a person may be mistaken as to the name of the victim, a person's name could change through marriage, adoption or deed poll. A child may be lost and unknown but the victim of an assault. Police may incorrectly record the name or the spelling of a name of a complainant. Experience may reveal other cases where it is proven that the name on a charge sheet may be incorrect or unknown. That does not mean the charge can not go ahead. The defendant does need to know of the particulars of a charge, to establish what is alleged. The circumstances of a case will determine whether a name is crucial to a charge.
19. In the circumstances of this case I will amend the information to delete the words David Waite from the information (such amendment does not relate to the circumstance of aggravation as I have already recorded a verdict of not guilty) and insert the words "an unknown male person at approximately 3am outside Limerick's Bar, Lasseters Casino" following the words unlawfully assaulted.

Accordingly the charge now reads that on the 16<sup>th</sup> of January 2004 at Alice Springs, in the Northern Territory the defendant unlawfully assaulted an unknown male person at approximately 3am outside Limerick's Bar, Lasseters Casino.

20. I find that there is a case to answer on the amended charge.
21. The next issue relates to the question of the identity of the person. As the charge presently reads there is no necessity to ascertain the name of the person who was assaulted. The charge is pursuant to s.188 of the Criminal Code and that section reads that any person who unlawfully assaults another, that is another person, is guilty of an offence.
22. On the evidence of Hayden Collins I find that the person seen with the defendant at and around the bar area was the same person who ended up unconscious by the stairs. The witness Collins did not witness how the person came to be unconscious by the stairs. Video evidence shows he was dealt a blow to the head and he fell to the ground. There is no doubt as to the identity of the person who inflicted the blow which caused the man to be unconscious by the stairs. I find that the person who inflicted the blow was the defendant. I base this finding upon the evidence before me, and in particular the video evidence and the record of interview.
23. The next issue relates to the definition of assault. Section 187 of the Code sets out that an assault means "the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representation as the nature or the act of personation".
24. Clearly there is evidence of direct application of force by the defendant to a person in this case. The question to be addressed is whether it can be inferred from the video evidence before the Court that the direct application of force by the defendant was without the consent of the unknown male person. I have viewed the relevant portion of the video and have formed the view that, irrespective of whether the unknown male person had been planning to go outside and have a consensual fight with the defendant, that the unknown male person had no intention of having a consensual fight with the defendant at the time he was subjected to the direct application of force. There is video evidence of the

unknown male person seeking to shake hands with the defendant after he was outside the night club area. The movements of the unknown male person and the defendant after the attempted shaking of the hands are not consistent with two persons who are about to involve themselves in a consensual fight. The defendant has one arm around the male person as they walked together and they are walking in the same direction in a slow fashion. The defendant does not shake hands with the man. This may imply that the defendant still wanted to fight but does not affect the man's offer to him. After the pair walked down the small set of stairs the defendant turns around and inflicts a blow to the head area of the unknown person in an unexpected fashion. It is a significant blow and causes the man to fall immediately to the ground.

25. I have formed the view that I am able to draw an inference from the video material that the unknown male person did not consent to this direct application of force to his person. The defendant applied the force to the male person. The defendant has committed an act of assault upon another person. The question to be decided is whether it is an unlawful assault. Unlawful is defined to mean without authorisation, justification or excuse (s1 Criminal Code).
26. The excuse of provocation is raised by the defendant in his record of interview. Once raised, prosecution bears the onus of negating the excuse of provocation. Section 34 of the Code sets out various matters which must be negated by prosecutions. The evidence before the Court on this issue is to the record of interview and to a lesser extent the video evidence. The prosecution case is somewhat weakened by the lack of evidence from the unknown male with respect to this aspect of the case. I am not in a position to hear the unknown male's account of this aspect of the case. Of course, we know that he was extremely intoxicated and it may be that he can not recall the incident due to his level of intoxication, or the blow to his head, or a combination of both. It can be seen in the video evidence that the man tried to shake hands with the defendant just before the blow by the defendant and that this was rejected by the defendant.
27. The video evidence does not exclude the possibility that the male person said something to the defendant immediately prior to the assault. The defendant said in his record of interview that the man threatened to stab him in the back (see page 7



of the aide memoir). The defendant said that he intended to hit the man “that instant when he said the knife bit yeah I did and when I reacted” (page 9 of the aide memoir). He said he felt that he was provoked.

28. It is possible that the male person may have denied he threatened the defendant with words relating to a knife. But speculation can not take the place of evidence. As the evidence stands, there is no contradiction of the defendant’s account. There is no evidence to explain why the victim of the assault did not give evidence. Depending upon the explanation, I may have been prepared to consider further the record of interview and in particular some of the inconsistencies in the record of interview, for example at page 9.5 where in answer to the question by Constable Burnett “what was your intention when you hit him?” the defendant answered “teach him a lesson so he knows he won’t be allowed to threaten me or try and get a knife or something”. However the victim was not called and I have no evidence as to why he was not called. The burden of proof rests with the prosecutor.
29. I do not accept that an ordinary person similarly circumstanced would have acted in the same or similar way. The blow was a very significant one and given the size of the male relative to the defendant and the state of intoxication of the male, the defendant’s response was disproportionate to the actual threat. In making this finding I also rely upon the fact that there is no evidence of any knife being on the male person and indeed in the record of interview (at page 7 of the aide memoir) the defendant said that the male had said he would go and get the knife from the car.
30. On the evidence before me prosecution has not negated any of the other provisions in s.34 of the Criminal Code.
31. I record a finding of not guilty on the amended charge.

Dated this 12<sup>th</sup> day of May 2004.

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**M Little**  
STIPENDIARY MAGISTRATE

