

## ***Police v Baker* [2015] SASC 110 (30 July 2015) – Supreme Court of South Australia**

‘Appeal’ – ‘Appeal against acquittal’ – ‘Assault’ – ‘Consent’ – ‘Evidence’ – ‘People living in regional, rural and remote communities’ – ‘Physical violence and harm’ – ‘Victim’

Charge/s: Assault.

Appeal type: Prosecution appeal against acquittal.

Facts: The respondent allegedly slapped his female companion in the face. This was witnessed by a police officer, whose evidence formed the basis of the prosecution case. The companion did not give evidence and at the time of the incident was not distressed. She informed the police officer that it was ‘OK’. According to the officer, at the time of the incident, the companion did not want the respondent to be arrested. During the hearing, the Magistrate invited submissions as to whether the prosecution evidence was sufficient to ground consent or ‘otherwise of having received force from the defendant’ (see at [3]). The respondent was acquitted of the charge, with the Magistrate concluding that the prosecution’s evidence was so lacking in weight or reliability that no reasonable tribunal of fact could safely convict (an *R v Prasad* (1979) 23 SASR 161; (1979) 2 A Crim R 45) direction). The Magistrate found a reasonable doubt about the ‘lack of consent’ element in the offence of assault. He noted that the prosecution’s case was ‘hampered’ by the victim’s failure to give evidence (See at [13]).

Issue/s: Whether the Magistrate erred in finding that the prosecution’s evidence lacked in weight or reliability and whether the Magistrate erred in finding a reasonable doubt as to the ‘lack of consent’ element.

Decision and Reasoning: The Court firstly noted the hesitance of appellate courts to interfere with Magistrates’ decision to acquit. The appeal was dismissed for this reason but Nicholson J accepted the appellant’s submissions relating to the trial process.

The Court accepted that there was a prima facie case to answer. The Magistrate gave no reasons regarding how he concluded that lack of consent could not be inferred beyond reasonable doubt. The appellant submitted that a reasonable tribunal of fact would not be able to ignore the inherent unlikelihood that a person would consent to being hit with the force as described by the police officer. Nicholson J accepted this submission, finding that the *Prasad* direction should not have been made and the case should have proceeded. The victim's lack of complaint, lack of cooperation with the police and her request that the respondent not be charged were evidentiary matters which may assist in determining whether she had consented to the slap. In fact, they were consistent with a finding that the victim was prepared to submit to the conduct. Importantly, Nicholson J noted at [24] – 'Submission and failure to complain are not the same as consent' and at [27] – 'Whilst each case will turn on its own facts, the mere fact that an alleged victim does not give evidence, will not necessarily mean that lack of consent cannot be proved beyond reasonable doubt.' However, while there were errors in the Magistrate's approach, there were no 'clear and compelling circumstances' ([27]) to interfere with the acquittal in this case.