



memo

To: COMMANDER DAVID PROCTOR

From: SUPERINTENDENT RICHARD BRYSON

Subject: OPINION FILES – ROLFE 21944804 & ZENDELI 21944805

PROMIS:

TRM file:

TRM doc:

Date: 23/12/2019

The above 2 files turned up at JOS last week as opinion files. As per as the usual process where the files involve serving members or complex or sensitive matters this office reviews the files. After that initial review, if the files are in order and if it is deemed warranted the files are forwarded to the DPP for formal opinion.

In relation to these particular files I make the following observations. The original incident occurs 11 January 2018. Statutory declarations were made by the members that same date. Whilst statutory declarations were clearly made contemporaneous to the incident in question, it also appears on the material before me that they were made in haste (*probably just prior to the end of their shift*) and without the opportunity to review the body worn footage which was the subject of much discussion during the subsequent criminal hearing.

When I read the statement of facts as currently drafted in the opinion files the investigating member is asking for an opinion in relation to 2 separate and specific offences pursuant to the Northern Territory Criminal Code being, Part IV Division 5 s96 perjury and Part IV Division 7 s118 make false statement.

The files that have been presented to me present as a gathering up of the material which was on the original prosecution brief along with the transcript of proceedings and subsequent decision of Local Court Judge Borchers where he criticises the members for the discrepancies in their evidence. The offence of perjury requires the prosecution to prove beyond a reasonable doubt the mental element of “knowledge” and the offence of making false statement requires “actual knowledge that the statement is false in a material particular”. There is no evidence on the files that assist the prosecution in that regard. On my reading of the statement of facts I cannot establish exactly what the false statements are that are being attributed to the members.

The members have not been spoken to or been given an opportunity to explain any perceived inconsistencies in their evidence, or what they knew or didn't know at the time of making their respective statements. I'm not sure on what basis the files are now put to this office for forwarding to the DPP for an opinion. In my view

it is unhelpful to present the files at their current standard. Anybody can find a prima facie case on most material in that it only requires some evidence of each element of the offence which may be no more no less than the defendant said "A" in the statutory declaration but the body worn footage shows "B". What is more important here is the member's knowledge and motivation for saying "A" in circumstances where the true situation appears to have been "B". We don't know anything about that knowledge or motivation because the members have never been asked since the incident in question almost 2 years ago. Whilst it is true that some of the issues were ventilated during the criminal hearing (which itself took place an extended period of time after the incident itself) by way of focused adversarial cross-examination which was more focused on the interests of that particular defendant and the defence obtaining a not guilty verdict rather than establishing the truth of the matters at hand.


Undue reliance appears to be being placed on the transcript and the findings of Local Court Judge Borchers. On my reading of the material whilst he may have been right to have not been satisfied as to the relevant elements of the offence to which was being heard to the requisite threshold that being "beyond a reasonable doubt" in my view there was no evidence before him to make findings that the members "lied" or "fabricated" their evidence. In order to do that there would need to be cogent independent evidence to be relied upon. In the absence of such evidence there are alternative hypothesis's consistent with explaining the discrepancies, that is that the members were mistaken, that is their interpretation and recollection of their personal observations was at odds with the interpretations and observations of others who were present etc but that does not amount to knowledge of falsehoods or intention to give false evidence in the proceedings.

My reading of the material on file more properly demonstrates that the members actions as being unprofessional, not criminal. The members at the time were extremely junior and inexperienced. I query if this was in fact the first time they had given evidence in a contested hearing. More properly the material demonstrates that the members don't know their powers, their evidence was poorly given and they do not appear to have been properly briefed by the prosecutor. All of which appears to have led to the inevitable outcome.

We prosecute people where there has been a full and proper investigation and applying all of the relevant DPP guidelines there can be said to be a reasonable prospect of conviction. The files as presented demonstrate little in the way of actual investigation and little in the way of cogent admissible evidence.

The resources of this office and that of the DPP to provide considered opinions are finite and should not be wasted reviewing material that clearly is short of the benchmark. Such factual circumstances need to be called out for what they are and not merely formalised into an opinion file for some sort of arm's-length consideration. Such arm's-length consideration is valuable and proper in some circumstances but these are not those.

I am not minded to forward the files for opinion at this time unless the investigation is furthered and some admissible and persuasive evidence is evident on the briefs.



Richard Bryson


Superintendent

Custody & Judicial Services Division

Acting Commander Dole .

As discussed, the files have been reviewed by Supt Bryson, and as clearly stated in the memo, some additional investigation is required to bring them to a standard for an opinion to be provided.

The files are returned for re-allocation.



24/12/19.