CITATION:	*Mark John Dobson v Northern Territory of Australia* \ [2002] NTMC 006
PARTIES:	MARK JOHN DOBSON
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	LOCAL COURT (NT)
JURISDICTION:	*Crimes (Victims Assistance) Act*
FILE NO(s):	20104130
DELIVERED ON:	21 February 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	1 February 2002
DECISION OF:	Mr V M Luppino SM

CATCHWORDS:

Crimes Victims Assistance – Whether applicant for compensation failed to assist police in the investigation or prosecution of the offence - Meaning of "assist".

Crimes (Victims Assistance) Act ss 4, 9, 12, 17
Geiszler v Northern Territory (1996) Court of Appeal Northern Territory 3 April 1996
Woodroffe v Northern Territory Of Australia (2000) 10 NTLR 52

REPRESENTATION:

Counsel:

Applicant	Miss Farmer
Respondent	Mr Johnson

Solicitors:

Applicant:	Withnall Maley & Co.
Respondent:	Priestleys

Judgment category classification:	B
Judgment ID number:	[2002] NTMC 006
Number of paragraphs:	32

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20104130

BETWEEN:

MARK JOHN DOBSON
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR DECISION

(Delivered 21 February 2002)

Mr V M LUPPINO SM:

1. This is an application for assistance pursuant to the *Crimes (Victims Assistance) Act* ("the Act"). The claim is based on injuries claimed to result from an assault alleged to have occurred on 11 December 1999.

2. The applicant claims that he fell asleep in the lounge room of the home of friends. His next recollection is being awoken in the early hours of the following morning to be confronted by two men wearing balaclavas who then set upon him thereby inflicting significant injuries.

3. The applicant gave evidence that he did not know who the assailants were. The perpetrators of the alleged assault have never been apprehended, hence there is no second respondent in the proceedings.

4. The absence of a second respondent is not decisive. An assistance certificate can still issue to the applicant notwithstanding that no one has

been convicted of the alleged offence provided that he establishes that he is a "victim" within the meaning of section 4 of the Act. This in turn requires the applicant to establish that he was injured as a result of the commission of an offence. The terms "injury" and "offence" are defined in section 4 of the Act. Injury is defined to mean both physical and mental injury and an offence is defined as an offence, whether indictable or not, committed by one person and which results in an injury to another person, in this case the applicant.

5. The respondent opposed the applicant's entitlement to the issue of an assistance certificate. Although the respondent did not concede that the applicant suffered an injury (whether physical or mental), the main thrust of the opposition by the respondent appears to be in relation to the disentitling factors in section 12 of the Act which I will deal with below.

6. The applicant claimed to have suffered significant physical and mental injury. The evidence before me consisted of the affidavit of the applicant sworn for the purposes of the application and various documents of a medical nature. These medical documents comprised the medical records of the applicant from the Royal Darwin Hospital, medical records of the applicant held at the medical centre at the Berrimah Prison and a medico legal report of Dr N. McLaren, Psychiatrist dated 28 March, 2001.

7. The applicant also gave evidence before me. The respondent did not call any evidence. Central to my findings in the matter is my assessment of the applicant as a witness. For the reasons I outline below, in my view the applicant's evidence was unreliable and lacked credibility and I am not prepared to accept the evidence of the applicant except where it is supported by objective evidence or evidence.

8. The applicant's evidence was littered with claims throughout that he could no longer recall events. It was suggested that this was a disability resulting

from the assault. The report and opinions of Dr McLaren confirm that the applicant attributes his problem of recall to the assault.

9. However I consider that the applicant is not genuine in his claim of impaired recall. The selective nature of his impaired recall and the inconsistencies of that claim are indicative of that fact. I formed the view that the applicant was hiding behind a feigned claim of impaired recall to avoid difficult questions. At times in his evidence the applicant appeared quite evasive and coy when claiming a lack of recall. In contrast there were times (coinciding with situations when an answer was apparently in support of his case) when the applicant answered some questions with such spontaneity and recall which was inconsistent with the impaired recall claimed on other occasions. I also thought it was very telling that on one occasion he claimed a lack of recall when asked to describe his injuries by counsel for the respondent, yet the applicant had previously answered the same line of questioning spontaneously, and without any apparent difficulty when questioned in chief by his own counsel. As another example, the applicant claimed a lack of recall of some relatively unique one-off type events. In my view, having regard to the types of matters which he seemed untroubled to recall, the applicant must have had some recall of those events. The example I refer to is his claim to not recalling having been taken to hospital once by ambulance and on that same visit having discharged himself against medical advice. I thought that the applicant perceived that an unfavourable answer to that line of questioning was against interest and I think that his claimed lack of recall was a result of that. As a comparison when counsel for the respondent was attempting to make a point regarding the applicant's periods of incarceration, the applicant had no difficulty in spontaneously describing the number, extent and purposes of his incarceration, in the latter case volunteering that he had only ever been held on remand.

10. I am generally reluctant, except in the most obvious cases, to rely on demeanour in court on its own as a basis for rejecting evidence. However in

this case the applicant's demeanour namely, his apparent hostility towards counsel for the respondent, when coupled to the other factors mentioned above lead me inescapably to the conclusion that the applicant's evidence was unreliable and ought to be rejected in the absence of some other objective evidence.

11. In particular, the applicant was evasive when purportedly answering questions firstly regarding his consumption of "speed" and secondly in relation to his claimed disabilities, particularly his claimed symptoms of dizziness and headaches. In the case of the claimed symptoms of dizziness, although he insisted that he had only ever suffered a dizzy spell post the assault (and I query how he could be so definite about this having regard to his claimed impaired recall), medical records of the Berrimah Prison indicate that he had suffered dizziness before the assault in question, a matter which the applicant, too conveniently I thought, could not concede because of his impaired recall.

12. Having regard to the selective and inconsistent nature of his claim to impaired recall, in my view some medical evidence supporting that claim of impairment would be required to give credibility to that claim. The only possible evidence in that regard was the opinion of Dr McLaren which I will comment on in more detail below. For the present, although Dr McLaren supports the applicant's claim to impaired recall by finding a degree of cognitive impairment, I note that none of the tests usually performed to determine cognitive impairment were undertaken. As such it would appear that Dr McLaren's opinion could only be based on the history given to him by the applicant. As I reject the applicant's version of events, consequently I likewise reject the opinion expressed by Dr McLaren.

13. The hostility I previously referred to which was shown by the applicant to counsel for the respondent was evident in relation to the applicant's failure to concede what he obviously should have conceded. At times the applicant

was intent on directing questions back at counsel rather than simply answering the very proper questions put to him. So unwilling was the applicant to concede obvious matters that when Mr Johnson put to the applicant that he personally had not reported the assault to the police, the proposition had to be put numerous times, at least four by my recollection, before the obviously correct answer of "no" was finally given. That confirmed my impression that the applicant was consciously attempting to tailor his answers to further his interest.

14. For the reasons aforesaid, I reject the evidence of the applicant on any point in issue in the absence of supporting objective evidence. In the context of whether the opinion of Dr McLaren satisfies me in that regard, I note that his opinions have been expressed on an acceptance without question of the history given to him by the applicant. Clearly Dr McLaren accepted the genuineness of the applicant's claim to impaired recall as true. Furthermore it is clear given the independent medical records of the Berrimah Prison that the applicant had suffered some type of episode of dizziness before the assault. This may well have been associated with the applicant's considerable amphetamine abuse. However, in any event it is clear that Dr McLaren was told and accepted without question that the applicant's symptoms of dizziness first resulted after the assault. That is clearly wrong. Psychiatry being an imprecise science and being reliant on reliable history, the history upon which Dr McLaren's opinion were based being solely the inaccurate information given him by the applicant which I have rejected in evidence, I cannot accept those opinions to that extent. He was not called to give evidence and hence cannot take the matter any further. For those reasons, I reject the opinion of Dr McLaren. That in turn has some effect on issues of assessment of an award certificate which I will deal with below.

15. I turn therefore to consider the objective evidence. I think the evidence is clear that an assault did occur. There seems to be many questions unanswered regarding the background to the assault and the motives of the

assailants. However, it is quite clear that the assault did occur. There is no evidence, apart from apparent police suspicion regarding the veracity of the information provided to them by the occupants of the premises where the assault occurred, of any provocation or conduct on the part of the applicant which might require some reduction pursuant to section 10(2) of the Act. The cause or extent of the injuries were not conceded by the respondent, however I have little trouble in making formal findings in that regard. I find that the applicant sustained the physical injuries described by him and which are also recorded in the medical records of the Royal Darwin Hospital (Exhibit A1). These are recorded as lacerations to the right forehead, the left ear and the right mid to lower leg. The laceration of the ear in fact split the pinna of the ear. The applicant was admitted to Royal Darwin Hospital on 11 December 1999 and underwent surgery to debride and close the lacerations. The hospital notes show that the laceration above the right forehead was four centimetres in length and the laceration on the right shin was two centimetres in length. The laceration to the left ear was a full thickness laceration of two centimetres completely through the pinna. He was discharged on 13 December 1999 still requiring community nursing for changing of dressings and removal of stitches.

16. The applicant also claims to have sustained significant bruising in described areas. Although that was not observed on his admission to Royal Darwin Hospital, that is conceivably possible given his immediate admission. Notwithstanding however that there is no objective observation in support, I am prepared to accept that given that I can infer that any blows sufficient to inflict the objectively apparent lacerations described in the Royal Darwin Hospital notes would ultimately have resulted in bruising and some subsequent discomfort.

17. I will assess an assistance certificate based on these injuries unless the applicant is disentitled by section 12 of the Act. That section provides as follows:

"ASSISTANCE CERTIFICATE NOT TO BE ISSUED IN CERTAIN CIRCUMSTANCES

The Court shall not issue an assistance certificate –

(a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this act;

(b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;

(c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;

(d) where it is satisfied that the applicant has made the application in collusion with the offender; or

(e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code."

Of the foregoing, only paragraphs (b) and (c) can be relevant.

18. Although the burden of proof is on the applicant to establish that the offence occurred on the balance of probabilities (section 17 of the Act), in relation to the burden relevant to the disentitling factors in section 12, I have regard to the comments of Mildren J in Geiszler v Northern Territory of Australia, Court of Appeal, 3 April 1996 ("Geiszler") where at pages 15-16, his Honour said:

> "In my opinion the wording of s12 does not clearly make a proof of that matter a condition precedent to the issuing of a certificate. It is equally open to the interpretation that it is a matter, which if raised by a respondent to the application, places the burden on that respondent; and if the applicant asserts that the court ought to be satisfied that the circumstances existed which prevented the reporting

> of the commission of the offence, the burden of proof in respect of that matter then rests with the applicant… I consider that the correct conclusion is that the burden of proving that the offence was not reported within a reasonable time rested with the first respondent."

19. As such the respondent bears the onus of establishing that the offence was not reported or not reported within a reasonable time or that the applicant failed to assist the police. The proviso to paragraph (b) is not in issue and has no application on the facts.

20. The respondent argues that section 12 is to be interpreted in light of the clear policy of the Act. I agree that that is relevant. In this regard it was said that the purpose was, per Mildren J in Geiszler at page 16, to:-

> "…assist in the early investigation of claims so that false claims may be rejected, and any contributing conduct on the part of the victim, which, by s 10(2), is to be taken into account, may be investigated. A relevant circumstance would be, therefore, whether or not the police investigation into the alleged offence had been prejudiced to such a degree that the matter in some relevant respect was not able to be properly investigated."

21. Having said that the authorities are clear that a report for the purposes of section 12(b) does not have to be made by the victim (Geiszler). Any person can make the report and the evidence in this case clearly shows that a report was made by some person, albeit not the applicant.

22. The second disentitling factor in section 12 relevant to this case is that found in paragraph (c) which disentitles the applicant if it is found that the applicant has failed to assist the police in the investigation and prosecution of the offence.

23. It is of note that paragraph (c) refers only to the applicant having to provide assistance. The Act does not go as far as to require the applicant to take a pro-active role. Much was said by counsel for the respondent that the applicant's failure to make enquiries of the police (even accepting the applicant's evidence that he made some passing comment about it and

sought to speak to the investigating officer on a few occasions) can amount to failure to assist in the investigation. The evidence of the applicant, was to the effect that he had inquired about his case on a few occasions while reporting to police as part of bail conditions. His evidence was that he was told he had to speak to the investigating officer, was given the name of that officer (which incidentally he claims he could not recall), he attempted to contact that officer but that through no fault of his own, contact was not made. Although this was the subject of cross-examination by counsel for the respondent, it was not the subject of any contradictory evidence led by the respondent.

24. Counsel for the applicant argues that the police incident report, which is annexed to the affidavit material before me, clearly indicates that the police have not investigated the matter apparently because of suspicions regarding the conflicting version of events given. It is argued therefore that as the police have not investigated the matter then it cannot be said that the applicant has failed to assist the police in the investigation.

25. In my view the determination of this issue depends on the meaning of the word "assist" in paragraph (c). As far as I am aware there are no authorities directly on point nor was I referred to any. The various dictionary meanings of the term "assist" and derivative terms show that the word contemplates a secondary role. The Macquarie Dictionary defines the word as meaning "to give support, help, or aid to in some undertaking or effort…". The Collins English Dictionary stipulates that the word means "to give help or support to…".

26. In my view the interpretation proposed by counsel for the respondent cannot be maintained. That interpretation takes the suggested role of the applicant beyond mere assistance and would effectively require a proactive role on the part of the applicant. An interpretation which has regard to a role secondary to the police could only go as far as to require the applicant to provide

assistance as requested by the police. Without attempting to provide an exhaustive list of what this provides, I think that in the circumstances of the current case, this would at least require the applicant, if requested, to provide a statement and in doing so, to answer questions truthfully and to provide all relevant information known to him. No such request was made of the applicant. In my view however the police must at least make some approach to the applicant to indicate that some assistance is required.

27. As I said earlier, the burden of proof on this issue is on the respondent. The respondent did not call any evidence and based its submissions on the point on the material tendered by the applicant and on the cross-examination of the applicant. On the evidence before me I cannot see how it can be said that the applicant has failed to assist police in their investigations (or for that matter, in the prosecution) if no request for assistance has been made by the police i.e. if he is ignorant of any need for assistance. The evidence before me indicates that the applicant knew that a report had been to the police, the applicant had inquired in relation to that investigation, the applicant had attempted to contact the investigating officer but the investigating officer did not consider it necessary to contact the applicant in response. I iterate that all of this was uncontradicted by evidence from the respondent. The respondent has therefore not satisfied the burden of proof.

28. In the circumstances I formally find that as required by section 12(b) of the Act a report of the offence was made to the police. The police having attended at the scene before the applicant was taken by ambulance to hospital, there can be no issue that the offence was not reported within a reasonable time after the commission of the offence.

29. No assistance was sought of the applicant by the police in relation to the investigation and prosecution and indeed no prosecution was ever commenced. I find that the applicant has not failed to assist the police within the meaning of that term in section 12(c).

30. Accordingly the applicant is entitled to the issue of an assistance certificate in relation to those injuries sustained which I have found proven. Having regard to my assessment of the evidence of the applicant my assessment of his injuries is, I iterate, in relation solely to physical injuries independently recorded as well as consequent bruising and ancillary discomfort. On that basis I award the applicant an assistance certificate in the sum of $10,000.00. That is essentially to cover the matter specified in section 9(1)(e) and (g) of the Act. There was evidence contained within the report of Dr McLaren which, were I to accept it, would warrant an award under section 9(1)(a) in the sum of $2000.00 on account of future medical expenses. I reject that evidence for the same reasons that I reject overall the findings and opinions of Dr McLaren and I make no award in relation to that head.

31. In summary I order the issue of an assistance certificate in favour of the applicant in the sum of $10,000.00.

32. I will hear the parties in relation to any ancillary order.

Dated this 21st day of February 2002.

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V. M. LUPPINO
STIPENDIARY MAGISTRATE