CITATION: *Sambono v Northern Territory of Australia and Hallett [2003] NTMC 035*

PARTIES:	VINCENT JOHN SAMBONO
	v
	NORTHERN TERRITORY OF AUSTRALIA
	&
	JOHN FRANCIS HALLETT
TITLE OF COURT:	LOCAL COURT AT DARWIN
JURISDICTION:	CRIMES COMPENSATION ACT
FILE NO(s):	20202227 and 20202234
DELIVERED ON:	8 July 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	18 June 2003
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

ALLEGED SEXUAL ASSAULTS 1985/1986 – DELAY IN COMPLAINT – DELAY IN PROSECUTION – RESULTING PREJUDICE TO 2ND RESPONDENT – ONUS OF PROOF OF ALL ALLEGATIONS

Crimes Compensation Act

REPRESENTATION:

Counsel:

Applicant:	Ms Spurr
1st Respondent:	Ms Farmer
2nd Respondent	Mr Hunter

Solicitors:

Applicant:	Halfpennys
1st Respondent:	Withnall Maley
2nd Respondent	Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 038
Number of paragraphs:	49

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

No. 202022227 and 20202234

BETWEEN:

VINCENT JOHN SAMBONO
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
1st Respondent

JOHN FRANCIS HALLET
2nd Respondent

DECISION

(Delivered 8 July 2003)

Mr David LOADMAN SM:

History

1. On 13 February 2002 two Applications for Compensation were filed in the Local Court at Darwin, together with applications for extension of time. The Applications for Compensation refer to alleged offences on 2 separate occasions against the Applicant by the second Respondent in or about 1985. These Applications for Compensation were allocated two file numbers 20202227 and 20202234.

2. The applications for extension of time were allowed and after various preliminary conferences, the matters proceeded to hearing on 18 June 2003. On that date the decision was reserved.

Preliminary

3. In matter 20202227 ("the first file") the application for compensation sets out in paragraph 3(d)

> *"Brother Hallett again had me masturbate him 2 days after the 1st incident at the beach".*

4. That first incident referred to in paragraph 3 is construed by the Court to be the incident described in matter 20202234 ("the second file") as illogical numerically as that seems to be. The second file obviously is in terms of numerical sequence subsequent to the first file.

5. In the event the more pertinent matter to highlight is that in paragraph 3(e) of the application in the first file:-

> *"This 2nd incident again occurred at the beach in the water and again he ejaculated".* [This Court's underlining]

6. In respect of the second file, the application dated 7 February 2002 in paragraph 3(d) of the application asserts:-

> *"On one occasion one month after I commenced year 6, Brother Hallett came into the water with my friends and I, and we masturbated him in the water to the point of ejaculation".* [This Court's underlining]

7. The Applicant has filed affidavits in support of his applications which in their terms are identical. Whilst it is noteworthy that the only temporal indice in either of the applications is derived from the second file, being "*one month after I commenced year 6"*, in the affidavits sworn by the application on 7 February 2002 in paragraph 2 the grounds of the applications are said to arise "*on 2 separate occasions in or about 1985*". During the ventilation of this matter and currently the Court continues to be amazed that neither the 2nd Respondent or those employing him and who unquestionably still have control of the school records have sought to

adduce any evidence as to what year official records indicate (assuming there are any) that the Applicant commenced year 6.

8. The Applicant is unable to throw any precise light on the matter and his own legal representatives have neither adduced any such evidence nor, apparently, taken any steps to subpoena such evidence. Bearing in mind that the issue in one sense is critical having regard to allegations of the 2nd Respondent in his affidavit material to which the Court will return, it also makes resolution of that issue that much more difficult to resolve.

9. In the Applicant's affidavit of 7 February 2002 in paragraph 5 the Applicant asserts that he provided a statement to police on 2 separate occasions. The first comprised an electronic record of interview of 16 November 1993. The second a written statement on 4 May 1994. Exhibit A1 at tab 6 contains a transcript of the said record of interview. The following relevant factual matters appear from that electronic record of interview ("EROI").

> [EROI at page 2] "*(Brother Hallett) used to strip in front of all the young kids and he used to sit down on the beach and used to – used to call out to the kids. They used to go up to him and sort of pay with him, waking him, some of the kids used to suck him off. And I was one of them. There was a lot of others kids too that sucked him off and wanked him".*
>
> [EROI at page 3] referring to the colloquial word "*he used to come lots of time*".
>
> [EROI at page 4] he was the first white man he had ever seen naked "*he used to just lay back and look at the kids doing it, laugh at them, smiling".* He asserted it occurred in "*Grade 4, 5 and 6 as far as I know. And I'm sure he must of done it earlier"*
>
> [EROI at page 6] Police: "would he get the kids to take their clothes off or ..." "*No he wouldn't do that but, he'd only strip. Take all his clothes off and walk on the beach and make everyone look at him and he'd just go and lay down on the beach and .."*
>
> [EROI at page 7] "*lay on the beach – no towel, no. Get little bit, few puddles around".* He describes the motor vehicle as a Toyota Hilux with a plastic canvas cover "*at the back".*

As participants in this "masturbatory" exercise, the Applicant provided to the police the names of Reginald Tipiloura "*his nickname is Astroboy*"*;* Marcellus Tipiloura; Stuart Tipiloura; Sylvanus Tipiloura; and in Court on 18 June 2003, the Applicant added another person whose nickname was "Stormboy". None of these individuals were called to give evidence nor was the failure to do so explained. That comment of course is of equal application to the 2nd Respondent, save naturally that until 18 June 2003 "Stormboy" would not have been an identity revealed nor had it been revealed would it have been of any utility without at least a proper name.

> [EROI at page 10] Police: *"from what you remember there was four or five times that you went down to Taruntippi* [Beach] *with Brother John, can you recall how many ties that you actually took place in the wanking of Brother John? "Its about three times out of five"*.
>
> [EROI at page 11] the last time he fixes at "*around '86, when I was in Year 6*". [This is the first mention this Court finds of 1986 or the fact that the Applicant believed he was a student in Year 6 in 1986].

10. Also as part of exhibit A1, at tab 7, there appears a transcript of evidence given by the Applicant in committal proceedings which it would appear took place on 26 May 1994 (the following references will be to transcript page numbers). Again it is only selected facts that are set out, being facts relevant and pertinent to this Court's decision.

> [Transcript at p1074] the vehicle utilised to transport the children was "*a Toyota ute with a cover at the back*". The cover it is stated was canvas but he was not able to recall the colour. It was a two door Toyota vehicle.
>
> [Transcript at p1075] in response to a question about the class he was in at the time of the alleged incident he said "*Grade 6. Grade 6 and 7 I think*" and later, in response to the years "*'85, '86, I think*" and "*... I'm not sure about what grade I was in, but I'm – I think it was in grade 6 or 7; it was either one of them"*. [This is the first mention of the incidents occurring in Grade 7]
>
> [Transcript at p1076] after describing how the boys would run into the water he said of the 2nd Respondent "*by the time we'd – on the beach swimming around he'd be on the sand naked ... sort of laying*

down. … He was sort of like sitting down but leaning back with his two arm on the sand. He was naked. … . (Sylvanas Tipiloura) He was playing with his (Brother John's) dick".

[Transcript at p1077] In response to a question about what he did *"Got out of the water, walked to where the boys were and joined in the group … Grabbed his dick and wanked him as well. (His dick) was up".* The number of children involved "*I'd say about five. … We was watching each other playing with Brother John's dick"*

[Transcript at p1078] "*Seen sperm coming out. … He was laying with his two elbows (inaudible) the sand, just watching us".*

He said he went to Tarrantippi Beach with the 2nd Respondent on three occasions. The above is descriptive of the first occasion.

"*The second time I was involved again, wanking his dick till he came."* He then describes an alleged second act of masturbation by Sylvanas Tipiloura alone masturbating to ejaculatory stage.

On this occasion it is pertinent to point out that in Court he did not recite the names that he had recited in the EROI.

[Transcript at p1080} It was on the second occasion after masturbating that he alleges the 2nd Respondent washed himself off in the water.

[Transcript at p1085] He was then cross-examined by Mr Mulholland, firstly regarding whether the years in question were 1985 or 1986 "*I think"*. The first, second and third incidents were only weeks apart from each other.

[Transcript at p1087] "*I'm sure it was the dry season because it – there wasn't any rain or it wasn't raining*". The relevant of this of course is to refute the submission of Ms Spurr that there is nothing in the light of the evidence of 2nd Respondent's movements in 1985 to exclude him having been involved in the alleged activities between the opening of the school year and the commencement of his taking up the duties he described in the middle of February 1985. This last piece of evidence of course puts to rest that submission.

[Transcript at p1090] After confirming the canvas covered back "*The back was open. The back was wide open. Only just the sides were covered."* … There was a canvas cage on the back of it?

"*Yep*". He said there were supports for the canvas cover and that in height it was just above the cabin.

[Transcript at p1091] The canvas cover "*went over the top*". [There is some other focusing on this canvas cover, the only construction to be placed upon it is that probably the back was open and the rest of the utility tray was covered by a canvas structure supported as one would imagine in some appropriately conventional manner. There is some wild estimate of numbers, clearly 45 or 50 boys could not be an accurate number. There was retreat to the number of 30 and otherwise the description was that the utility was filled up with students. Consistently the Applicant said that on each of the alleged occasions all the boys were only wearing shorts and the location on the beach was near a saltwater tidal creek.]

[Transcript at p1097] The Applicant was swimming

[Transcript at p1098] From 35 or so metres away, he observed some of the boys attending the 2nd Respondent who was lying on the beach.

[Transcript at p1101] The 2nd Respondent was on the beach and he had no clothes on.

[Transcript at p1102] He agreed with the proposition the 2nd Respondent was sitting on the beach and confirmed that he had his hands back, his elbows back and leaning on them and that the Applicant had emerged from the water and joined in a communal masturbation, as it were, involving 4 or 5 of the boys, the first of whom he noticed being Sylvanus Tipiloura.

[Transcript at p1103] He saw the 2nd Respondent ejaculating.

[Transcript at p1104] There is some reference to "*he'd sit on – on his elbow and then come up and put his arm down, sit down like that, because ...*". [This Court cannot make anything of this evidence]

[Transcript at p1105] He then described some contact with semen and as to what happened to the sperm "*Went all over the sand, on his body, on some of the kids' hands, Sylvanas' hands*". He was unable to remember how either the 2nd Respondent or the children involved washed off the semen from their persons.

[Transcript at p1106] On the second occasion the distinctive difference was that there were 2 ejaculations but again he came from the water to where the 2nd Respondent was lying on the beach.

> [Transcript at p1108] On each of the 2 occasions where masturbation occurred to the stage of ejaculation, he took some part in the actual masturbation of the 2nd Respondent. On this occasion he recalled the 2nd Respondent walking down to the beach and described some movement of his hand in washing his body.
>
> [Transcript at p1109 and 1110] Again the years when the incidents described took place *"in 1985 or '86"*.
>
> [Transcript at p1112] He didn't have acquaintance with the English word "wank" until he came to school in Darwin. [Precisely when that occurred is unclear to this Court.]
>
> [Transcript at p1117] He denied being involved in fellatio personally and explained that insofar as it may have been construed to lead to that deduction he no longer abided by it.

The EROI transcript was then identified. There was some focus on several apparent inconsistencies which to this Court is not sufficiently persuaded to recount for its purposes.

11. The next affidavit filed by the Applicant also in terms identical in each of the first file and second file in relation to the merits of the matter as opposed any extension of time, was on 15 January 2003 ("Applicant's January affidavit"). In this affidavit the relevant matters to be focussed on are:-

> [Applicant's January affidavit para 6]. *"In or about 1985 I went to Francis Xavier College for year 6."*

In relation to the second file:

> [Applicant's January affidavit para 9]. *"This assault occurred approximately one month after I commenced year 6"*
>
> [Applicant's January affidavit para 12]. *"Brother Hallett stripped and walked naked down to the water. There were about three or four boys including myself that were near him. I saw the others begin masturbating Brother Hallett and I became curious and went over to see what was happening"*.

There is no reference obviously to the 2nd Respondent lying down in the sand and calling out to boys or otherwise anything which is coincidental to previous description of the alleged incidents.

> [Applicant's January affidavit para 13]. *"I remember at this time that Brother Hallett was staring at me. He then motioned to me and I went over and masturbated him for a while. I remember that Brother Hallett never said anything he would just smile and lean back."*

In relation to the first file:

> [Applicant's January affidavit para 16]. *"I went down to the beach and I remember that Brother Hallett was with some of the same boys as from the first incident."*
>
> [Applicant's January affidavit para 17]. *"Brother Hallett again was staring at me and I once again felt out of place if I did not join in. When I touched him he smiled and I masturbated him. I remember at one stage a coastal plane came over and Brother Hallett ran up to the Ute and put his clothes back on. It was at this point that I became confused because I felt that if he was hiding what was happening then perhaps it wasn't the right thing to do."* [This commentary particularly the issue about the plane is the first mention of that aspect of the matter in any of the material at all]
>
> [Applicant's January affidavit para 18]. *"I recall that after the coastal plane left Brother Hallett again stripped down and came back to the beach. Brother Hallett again looked at me and I knew that he wanted me to continue masturbating him and so I did. I specifically recall on this occasion that Brother Hallett ejaculated once.*

12. In relation to this description either in relation to the first or second file, it is noteworthy that the Applicant does not describe himself as having first gone for a swim and then having come back to the beach where the 2nd Respondent was lying in the sand as he previously described him being located and in the manner that he described him taking up the posture that he did.

13. There is reference in the Applicant's January affidavit at paragraph 30 to an annexure being a copy of the statutory declaration provided to the police on

4 May 1994. Referring to that statutory declaration the Applicant in that document refers to the tray back with the canvas cage. There are names set out in this document which are different from the names described earlier in this decision and given to the police, namely Angelo Munkara, Henry James Tipungwuti, Gabriel and Jose Purantatamari. There is also reference to a Sylvanus. Again this Court remarks that none of these people were produced to give evidence by either side. In this document relevantly:-

> "*Brother HALLETT TOOK his clothes off at the car and the then walk down the beach and sit on the sand. I was swimming in the beach. The tide was half way out. I saw five or six kids around him. I saw two kids playing with his disk, Sylvannus was one of them. I saw holding HALLETT'S DICK AND pulling it. I call this wanking. I walked out of the water and touched his dick with my hand. He had an erection. I wanked him. By this time there was five or six kids there, we all took turns wanking him for a short time.. On this time, Brother HALLETT EJACULATED."*
>
> *"When this happened, Hallett was just laying on the sand, he did not lay on a towel. He would just sit up a bit and watch the kinds wanking him. He did not say anything".*
>
> *"Other time when I went out there, Brother HALLETT ejaculated. He would ejaculate twice.. I saw him once go down to the saltwater to have a swim and wash himself. On teach of the three times that I went to Tarrantippi with Brother HALLETT, MYSELF AND other kids wanked him."*

14. Clearly there are some evident contradictions with other evidence already set out which do not need to be highlighted.

15. Again only focusing on the relevant factual matters to be elicited from the document, this Court next refers to a Report provided by a psychiatrist, the report being dated 25 September 2002 and the provision of the report being to Halfpennys, the Applicant's current solicitors. Again the incidents are described as having occurred "*on the beach"* although there is also reference on this occasion to the plane flying over, being the incident highlighted before in previous aspects of the commentary.

16. There is however another new element introduced at page 2 of the Report"-

> *"He said this Brother Hallett would touch his genitals and he would get erections."*

17. Having regard to the fact that the Applicant at the time of the alleged incidents about 10 years of age, this Court construes that peculiar reference as being an explanation by the Applicant to the psychiatrist that Hallett would touch his own genitals. In the event it is an innovation in terms of factual description in relation to the matters previously described on the beach.

18. The psychiatrist opines, although relying on the accuracy of the history presented to him (it not being clear as to whether he was briefed with the material which has already been visited by this Court and described by it),

> *"It would seem that he was subjected to sexual abuse by this Brother Hallett as described."*

19. The next descriptions of the incident were those given by the Applicant to this Court when he gave oral evidence on 18 June 2003. As previously remarked it was on this occasion that another player "Stormboy" was introduced into the scenario. The Applicant otherwise simply affirmed the contents of his affidavits previously referred to.

20. The Applicant was then cross-examined by Mr Hunter. The Applicant explained that he had left it to his solicitors (which is hardly surprising) to do the necessary checking and ascertain what year it was that he was a student in grade 6 at Xaviers Boys School. He described numerous lawyers who from time to time had been involved with him and his problems.

21. The Applicant was then cross-examined by Ms Farmer, on behalf of the 1st Respondent, but in relation to the actual incidents or the alleged facts comprising the incidents giving rise to the first file and the second file, no

particular remarkable evidence was elicited and after some short re-examination by Ms Spurr the Applicant's case was closed.

22. The 2nd Respondent swore an affidavit in relation to the first file and the second file on 28 March 2003. Relevantly to the topic being examined by the Court, in paragraph 1, the 2nd Respondent:-

- denies the acts alleged or any impropriety in dealing with the Applicant;
- denies a criminal offence of any nature;
- denies any memory of the Applicant from his time on Bathurst Island.

23. In the 2nd Respondent's affidavit, he then focuses upon his personal movements in 1985 commencing with "*leaving Bathurst Island in very early January of 1985"*. There is no point in traversing all of that evidence in this decision because it is unremarkable and cannot be disputed. The focus in the 2nd Respondent's affidavit was also on the allegation by the Applicant that the 2 incidents, comprising the genesis of the first file and the second file, occurred in the Dry season. His 1985 movements are corroborated by Cyril Thomas Hally, in an affidavit of 28 March 2003.

24. There was no way the Court was able to conclude in any realistic way that if the Applicant is believed in relation to what occurred, that it occurred in 1985 involving the second Respondent. He patently could not have done so. That of course does not exclude the "possibility" that it did occur at some other time, perhaps in 1986 and or even perhaps at some time apart from that.

25. Probably shortly before, but in any event very close to, 16 November 1993 the Applicant reported the alleged incidents to the police and as has already been recounted, at tab 6 of Exhibit A1, and from the EROI there was definitely police involvement at 16 November 1993. That of course is 8 or 9 years after the alleged event.

26. The first and only evidence of complaints as to the incidents is to be found in the transcript also previously recounted, at tab 7 of Exhibit A1. It appears that in 1991, early in the year, the Applicant made a complaint to Henry Sambono. Henry Sambono was not called to give evidence in the proceeding nor was any affidavit tendered by him.

27. This Court raised with the 2nd Respondent the issue of the alleged vehicle, the subject of the transportation of the children said to be involved in these matters by the Applicant. The second Respondent denied that he had ever possessed at the relevant time or at all a tray back motor vehicle with a canvas canopy over it.

The Authorities

28. The Court does not find it necessary to set out the various authorities in support of the following proposition. Evidence of complaint, particularly early evidence of complaint, is merely evidence which goes to the credit of the Applicant. The fact that there was a delay in making the complaint between 1985 or 1986 until 1991 is also, according to the authorities, not intrinsically indicative of a negative finding or need to make a negative finding on the credibility of the Applicant.

29. The Court does not propose to canvass in this decision all the submissions by the relevant parties, in the light of the decision that it has in fact come to in this matter.

30. Ms Spurr asserted or submitted that the singular focus by the 2nd Respondent on his movements in 1985 was to deliberately divert attention from the prospect of his having been involved in the alleged incidents at another time. That, further, the focus was an attempt to try and distort the issue. That indeed is a view open to this Court to take, but for reason of the Court's findings in any event, there is no point in dwelling on the issue any further.

31. This Court does not know whether there is evidence of school records which would be of assistance in establishing in what year the Applicant was at Xaviers Boy School on Bathurst Island. Further, in what years the 2nd Respondent was indubitably employed in his teaching position at that school on Bathurst Island. Self-evidently there are numerous witnesses who apparently could have been called and if there was some cause such as death or illness preventing them from doing so this Court was not enlightened as to the existence of any such facts. The Court does not have transcript but believes it to be an accurate statement that Ms Spurr, and if it was not she it was someone else, alleged that the application of what is known as the Rule in Jones and Dunkell *(Jones v Dunkell* (1959) 101 CLR 298) did not apply in civil matters. Ms Spurr asserted that pronouncements to that effect had been made by Gillies SM and Wallace SM of this Court. That may be so, but if to be so, with the greatest of respect to my two colleagues, that is against the weight of the authorities assembled conveniently at paragraph 1210 (page 1086) and thereafter in the Australian edition of *Cross on Evidence*.

32. Despite this Court's finding that it can, should and does apply to civil matters and that it therefore has application in the instant matter, its significance in the light of the finding of the Court is neither pivotal, signal or paramount. In the event, in this proceeding it is both the Applicant, the 2nd Respondent and for that matter the 1st Respondent who has not it seems made any effort to call independent evidence or to explain the reason for not doing so. There appears to be available evidence which could have been called both by way of oral evidence or documentary evidence such as the school records already referred to, together with any affidavits by those named as having involvement.

33. It is true that the kind of abuse which is the subject of this proceeding is ever increasingly being revealed and necessarily being revealed to have occurred in the long distant past. The revelation embraces the systematic

abuse of pupils and or those of tender years ostensibly involved in the functioning of schools, churches, scout groups and similar organisations in which children of tender years are in the unsupervised control of male adults in the main. This is not to say there has not been abuse by female counterparts, but the predominant complaints seem to be levelled at males. Those difficulties and ever increasing realisation that the abuse was systemic and extensive in these institutions does not alter the principles of law to matters of this nature.

34. Mr Hunter submitted and proffered the authority from the internet, not being the authorised report as is conventional, namely a judgment of the Chief Justice, *Northern Territory of Australia v Herbert & Anor [2002] NTSC 4,* to the effect that the Applicant bore the onus of proof. That is not in issue and indeed it was conceded by Ms Spurr that the test to be observed in dealing with a matter criminal in nature in a civil proceeding was "the Briginshaw test" *(Briginshaw v Briginshaw* (1938) 60 CLR 336). The said judgment of the Chief Justice of the Northern Territory, ironically if not by Mr Hunter's design deliberately, related to the reversal of a finding by myself in a *Crimes (Victim's Assistance) Act* matter. Whilst it is not a complete dissertation of the principle it is true that it entails essentially

> *"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proof, indefinite testimony, or indirect inferences."*

35. More generally and hopefully more simply stated it is a principle which requires that where, as in this proceeding, there is a need to decide on a matter which has its genesis in what would if established have amounted to a crime, there is not a burden on the Applicant to prove the facts in issue beyond reasonable doubt but on a balance of probabilities. The weight of

the evidence must however be more all embracing, more persuasive and more weighty than the evidence which would suffice where the facts in issue were not derived from any criminal genesis at all. As is trite, Mr Hunter submitted that the burden of proof remained with the Applicant from first to last and that it was a burden which had to be scrutinised and decided upon, based on all of the evidence before this Court.

36. It must be apparent from the recitation of the facts elicited from the various sources attributed to the Applicant above, that there is a confusion of factual evidence. That confusion commences with the basis of the application in both the first and second files. The alleged incidents, as has been set out, are said to have occurred "*in the water*". That is in marked conflict with the other evidence which is set out above.

37. Mr Hunter especially drew attention to the following matters:

(a) The delay from 1985 or 1986 was to be looked at; whether he was intending to refer to the delay which occurred prior to the voicing of the 1st alleged complaint alone or whether he was referring in addition to the matter being brought to the police in 1993, may not really matter.

(b) The lack of any corroboration of any one of the alleged offences and particularly, because the defendant must have known or is at law deemed to have known, what the outcome was of an appeal in respect of convictions of apparently like offences dealt with by the Court of Appeal in the Northern Territory. That decision was overturned principally upon the basis that there were 8 persons in relation to those matters who were known to have been or alleged to have been witnesses to the event, they were not called by the prosecution. Mr Hunter submitted that in the light of such findings the Applicant should have called as witnesses those he named as being involved in such incidents. He submitted the failure to do so should count against a finding in favour of the applicant.

38. Mr Hunter referred, in the course of the above and variously, to the decisions in authorities to which he referred the Court. The first of those is *SJB* (2002) NSWCCA 163 ("*SJB")*. He did however not submit the full authorised report, which is not a matter of criticism by this Court, but the internet report. This authority, and the other authorities of which the Court will subsequently make mention are all decisions in relation to criminal matters. They do not stand as an authority for any proposition directly to be derived and be applied from any of the learned dicta.

39. Nevertheless, as this Court understands Mr Hunter, he seeks by referring to them to make the point that by analogy, albeit in different and discrete application, there is a principle to be gleaned in circumstances such as now face this Court. That principle, as this Court understands him, is that in circumstances, where as a matter of law a Court dealing with the trial of a matter in which a jury is involved and where there is no corroborative evidence, must direct the jury "*that it would therefore be dangerous to convict on that evidence alone*". The reference is to uncorroborated evidence of a complainant in an alleged sexual offence, in relation to circumstances where there was substantial delay in either making complaint or report or both.

40. The judgment in *SJB* sets out at paragraph 52

> *"(1) This was a trial in which there was delay in complaint.*
>
> *(2) The first delay was of some 4 years before the conversation with Mr Sharples when the complainant was aged about 15 years. It is trite to say of course that of this complaint the appellant would have no knowledge until the service of statements upon him consequent upon charges being laid, themselves being consequent upon the formal complaint made some 16 years after the alleged events.*
>
> *(3) There was, as I have said, no evidence of a corroborative kind.*
>
> *(4) It was a case of stark simplicity in structure involving in a real sense the account of the complainant being denied in the only way possible, that is, a simple denial by the accused on oath. "*

41. Of course all of those features exist in this current case, but the Court repeats that it is not a criminal matter. Certainly those criteria set out above are nonetheless relevant matters to consider when deciding whether the burden and standard of proof required of the Applicant in this matter have indeed been discharged or met.

42. Mr Hunter referred the Court to other authorities which are not set out in this decision, since they simply echo the principles already visited above.

43. In amplification of the extract referred to in *Briginshaw* the Court has referred to *Cross in Evidence*, a work previously cited in this decision. At paragraph 9050 and thereafter the issue is dealt with. The learned author refers to dicta of Latham CJ, Rich J and Dixon J, but however points to the unhelpful or misleading nature of generalisations, learned or otherwise, and the author finds

> *"the most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities. "*
>
> [The} *the balance of probability is not to be applied merely mechanically on a serious issue such as whether due skill had been exercised in building work, for this might result in the cancellation of the builder's licence and determination of his capacity to earn his livelihood in that occupation. Similarly, the exercise of executive discretion to interfere with liberty depends on proof on the civil standard at the high end of the scale".*

44. It is the perception of this Court that the numerous parties it is informed complained of matters which resulted in criminal action being taken against the 2nd Respondent, are not likely to have all collaborated or conspired to do so without cause.

45. However emotive perceptions, arising as a result of excited suspicion, are not the basis upon which such serious allegations as are made in these matters ought be decided.

Conclusion

46. It is this Court's decision that the following factors militate against any finding that the Applicant in either the first file or the second file proved on the balance of probabilities tempered by the *Briginshaw* philosophy that the event, the subject of each of the applications, took place.

1. The conflict of evidence of a factual nature including, but not exclusively so, comprising the fact that the application in each case has the event occurring in the water. Most if not all of the other evidence set out in this decision has the events occurring on the beach at Tarruntippi. There are apparent the other self evidently conflicting factual matters.

2. There was a delay in the making of a complaint to any one prior to the complaint being made to Henry Sambono as set out above. That of course as the decisions referred to lay down is an issue firstly only related to the credibility of the Applicant. Secondly it is in no way conclusive even in relation to the aspect of credibility. It is however an unusual factor. One would have expected a boy of 10 or 11 years of age to complain to his mother.

3. There is next the aspect of delay in any report to the authorities until effectively 1993. That delay in itself is prejudicial to the ability of the 2nd Respondent to have properly obtained the necessary evidence to refute the allegations made against him.

4. There is the lack of certainty as when the Applicant was in fact a student in Grade 6 or for that matter Grade 7 at Xaviers Boys School.

That is a matter which at least on the face of it lay within the capacity of the Applicant to discharge.

5. The evidence which at least at first would have been available from the other persons mentioned whose names have already been set out in this decision not having been forthcoming and the reason for such lack of such adduction of evidence not being explained, leaves the Court to conclude that they would not have given evidence which would have advanced the Applicant's cause.

6. The allegations that the event occurred in 1985, 1986 and maybe even at some other time, make it impossible in objective terms for the 2nd Respondent to meet the allegations which are made against him.

47. Whilst it is the case that this Court as a consequence, albeit it with a sense of unease and misgiving, therefore must find that the Applicant has not discharged the burden of proof incumbent upon him, it nevertheless so concludes.

Order

48. In the circumstances, the formal order of this Court is that in each of applications for the first and second files, the application is dismissed.

49. ~~There is no power reposing in the Court to award costs and as a consequence there is no issue relating to costs to be resolved.~~ [At the handing down of this decision in Court, this paragraph was amended to read:] First and second Respondents costs reserved. Liberty to apply in 14 days.

Dated: 8 July 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE