CITATION: *Marshall v Northern Territory of Australia & Sayer* [2003] NTMC 045

PARTIES:	JILLIAN MARGARET MARSHALL
	v
	NORTHERN TERRITORY OF AUSTRALIA
	AND
	KEVIN SAYER
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance)
FILE NO(s):	20202745 & 20202692
DELIVERED ON:	15th September 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	9th September 2003
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

"Victim" - section 12(a) & (e) Crimes Victims assistance Act – Dangerous Act section 154 of the Criminal Code.

Spreadborough v Northern Territory of Australia & MacDonald [2001] NTMC 64
Sandby v R [1993] 117 FLR 218
R v Volz [1990] 100 FLR 393

REPRESENTATION:

Counsel:

Applicant:	Ms Saraglou
1st Respondent:	Ms Truman
2nd Respondent:	No appearance

Solicitors:

Applicant:	Withnall Maley
1st Respondent:	Halfpennys
2nd Respondent:	self

Judgment category classification:	A
Judgment ID number:	[2003] NTMC 045
Number of paragraphs:	35

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

No. 20202745 & 20202692

[2003] NTMC 045

BETWEEN:

Jillian Margaret Marshall
Applicant

AND:

Northern Territory of Australia
1st Respondent

Kevin Sayer
2nd Respondent

REASONS FOR DECISION

(Delivered 15th September 2003)

Judicial Registrar Fong Lim:

1. The Applicant has made two applications under the Crimes (Victims Assistance) Act ("the Act"). One application for injury pursuant to section 5(1) and one for grief pursuant to section 5(2A). The Second Respondent whilst served with the applications for assistance has shown no interest in the proceedings and took no part in the hearing. The Northern Territory accepts that the Applicant suffered severe injuries and the loss of her de facto partner but does not accept that there was an offence upon which the Applicant can rely. The Northern Territory also argues that pursuant to section 12(e) of the Act the court cannot find for the Applicant unless the Applicant has proved a "dangerous Act" pursuant to section 154 of the Criminal Code.

2. Section 5(1) provides

> (1) A victim ……, may, within 12 months after the date of the offence, apply to a Court for an assistance certificate in respect of the injury suffered by the victim as a result of that offence

3. Section 5(2A) provides

> (2A) Where a victim has died as a result of the injury suffered by the victim –
>
> (a) the widow or widower, or the de facto partner; ……
>
> of the victim may, within 12 months after the death of the victim, apply to the Court for an assistance certificate in respect of the grief suffered by that person as a result of the death of the victim.

4. "victim" is defined in section 4 as

> "victim" means a person who is injured or dies as the result of the commission of an offence by another person.

5. Section 12(a) & (e) state:

> 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; …….
>
> (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

6. Basically as the death of the Applicant's de facto partner and her own injuries arose out of the use of a motor vehicle the Applicant must prove to me on the balance of probabilities that the use of that motor vehicle was a "dangerous act" pursuant to section 154 of the Criminal Code.

7. It is important to note at this point that while the onus on the Applicant is to only prove on the balance of probabilities that an offence under section 154 of the Criminal code occurred the seriousness of the offence means the court

must be convinced to its "reasonable satisfaction". In Briginshaw v Briginshaw [1938] 60 CLR 336 Sir Owen Dixon observed:

> The truth is that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence of existence before it can be found. It can not be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality … except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of the allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. 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."

8. While I do not have to be convinced beyond a reasonable doubt I do have to be convinced to my reasonable satisfaction that an offence occurred and in this case an offence pursuant to section 154 of the Criminal Code.

9. Section 154 of the Criminal Code provides:

> (1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years

10. The Applicant relied upon her affidavits of the 10th June 2003 and the affidavits of Ms Truman of the 13th and 26th August 2003 which annexed statements and documents obtained from the files of the Director of Public Prosecutions.

11. Ms Saraglou for the Applicant submitted that there was evidence to support "dangerous act" pursuant to section 154 of the Criminal Code in that there was evidence that the Second Respondent was intoxicated, was driving with defective headlights and failed to swerve. The Applicant has no memory of the accident and therefore gave no personal account of what happened.

12. The Second Respondent's record of interview and statements of other witnesses were admitted into evidence.

13. **The facts -**In his record of interview the Second Respondent admitted that he had 4 –5 light beers after work and then 6 mid strength beers at the Winnellie hotel straight after that. He then drove home after collecting take away food for the family. It was after he reached his home at approximately 8:30pm that he realised he had not gotten any cigarettes and went out to buy some. It was on that journey when the accident occurred.

14. The Second Respondent was travelling along Hopewell road when:

> "I dunno what happened. It was – this car just appeared out of the nowhere. It was – I seen it on the side of the road half on half off and um I'm still not sure whether I hit the car or it was the people that I hit that I felt , but I thought I'd just sideswiped the car so I did a – didn't notice anybody there with the car" (page 3 of record of interview)

15. The Second Respondent was consistent all the way through his record of interview that the victims car "just appeared out of nowhere" and that he had no idea he had hit anyone until he went back to the car and saw the Applicant and her partner on the road in front of the vehicle.

16. The fact that the Applicant's car was parked on half on the road and half off was corroborated by the statement of Charlene Philp a resident of the area who attended the scene. Ms Philp stated that when she and her husband arrived on the scene "we came across the vehicle which had its headlights on, it was parked half on the road and half off the road."

17. The Second Respondent stopped his vehicle as soon as he could and ran to get help, he attempted to assist the Applicant and her partner along with others who had come to help and co- operated with the police officers when they attended and later when they interviewed him.

18. The Applicant must prove to the court on the balance of probabilities that the evidence shows the Second Respondent in driving his car on that night did so in circumstances where he should have clearly foreseen that doing so would create the serious danger which resulted the injury and death of the Applicant and her de facto partner.

19. **Defective headlights -** Ms Saraglou for the Applicant made much of the fact that the headlights on the Second Respondent's vehicle were not working to full capacity. There is certainly an acceptance by the Second Respondent that his headlights "aren't that fantastic" (page 6 of record of interview). He also states that the lighting on his ute on low beam would be about the same as the lighting on his commodore (the car involved in the accident) on high beam. When asked the Second Respondent stated his lights "they would have been on high beam" (page 10 of record of interview).

20. There was also evidence from the Motor Vehicle Registry that the vehicle being driven by the Second Respondent was in an unroadworthy condition (see para 1 of the report annexure "L" to the affidavit of Truman 13th August 2003). The inspector found the car to be unroadworthy because there was no reflective material remaining in the headlights making the headlights dull and the horn was inoperative. The evidence of the Second Respondent was that about 6 weeks prior to the accident his mechanic had done a roadworthy test because "the rego ran out –ah- about six weeks ago"(page 4 of record of interview). Apparently there was some work done on the headlights in relation to a switch. Interestingly registration did not in fact run out until about a week after the accident (see MVR report) however I only make that comment to point out Second Respondent's possible level of confusion at the time.

21. Ms Saraglou also took me to a report from Hella which is apparently a report on the headlights of a VL Commodore. The test results were not explained to me nor was there any evidence connecting the test results to the Second Respondent's car. I attached no weight at all to that report.

22. It is clear from the evidence of the Second Respondent and the Motor Vehicle Registry report that the headlights on the Second Respondent's vehicle were not up to standard. The question must be whether in the circumstances would the ordinary person have reasonably forseen the use of the motor vehicle with substandard lights would cause serious danger.

23. What is clear from the statements of all of the witnesses is that the night was clear, the road in good condition, there was no lighting and the speed limit was 100kmph. Second Respondent was driving within the speed limit (there is no evidence to contravert his claim he was travelling within the speed limit) with his lights on high beam on a straight stretch of bitumen road. Suddenly a car appeared in his headlights.

24. Would the ordinary person have foreseen that travelling along a road in good condition at up to 100 kph in the dark with headlights equivalent to low beam would mean that you would not have enough reaction time to avoid a hitting a pedestrian on roadway. It is my view that the knowledge the Second Respondent had in relation to his headlights would have made an ordinary prudent driver more cautious about driving along a darkened road but I don't believe that alone makes the serious danger reasonably foreseeable. Angel J in Sanby v the Queen [1993] 117 FLR 218 at 222 held that

> The deliberate use of the words 'serious' and 'clearly' is significant……. the line should be drawn between dangers which may be characterised as ordinary incidents of modern life and dangers caused by plainly blameworthy conduct. In my opinion , section 154 is not directed a conduct which causes dangers which are ordinarily accepted as incidents of modern life , or, conduct which, even if giving rise to liability in negligence would not widely be regarded as criminal.

25. It is my view that Second Respondent's action in driving a vehicle with substandard lights could lead to a civil claim for negligence but I do not hold the view that Second Respondents' actions in driving the car was "plainly blameworthy conduct". He thought his headlights weren't fantastic but that they were roadworthy as a mechanic had looked into the roadworthiness of the vehicle six weeks prior. The decision to drive the vehicle the night in itself cannot constitute a dangerous act.

26. **Failure to swerve -**It is important to note that Second Respondent was not sure if he swerved or not "I can't remember swerving I might have just swerved a little bit but it wasn't like a major veer across the road"(see page 5 of record of interview). It is clear from the Second Respondent's evidence he did not have much time to react at all between the time he saw the vehicle and the time he heard a "bump". There is no clear evidence as to the time lapsed between the sighting of the vehicle and Second Respondent's reaction. There is no evidence before me to establish how far away the Applicant's vehicle was when sighted by the Second Respondent or how much sooner the Second Respondent may have seen the vehicle had his lights been working properly. Would an ordinary person have swerved to a greater degree? Given that the Applicant's car itself was not hit and the Applicant and her partner were not visible to the Second Respondent it is my view that an ordinary person may not have taken any further evasive action than actually taken by the Second Respondent.

27. Ms Saraglou argued that the failure to swerve, the defective headlights and the fact that the Second Respondent was driving while under the influence alcohol were all factors which meant the Second Respondent had acted in a manner in which an ordinary person would have foreseen the danger of running someone over.

28. The Applicant's car was parked partially on the road with its headlights off and the Applicant and the deceased were not even visible to Second

Respondent when he came upon them. If this were a civil claim for negligence the Applicant would probably be found to have contributed to her own injuries for failure to have some sort of lighting to warn oncoming motorists that she had stopped on the side of the road. Given this and the lack of evidence to indicate that better headlights may have meant the accident could have been avoided the Second Respondent's conduct cannot be found to be clearly blameworthy.

29. **Intoxication -** the issue of the Second Respondent's intoxication cannot be brought into the discussion whether his actions were a "dangerous act". It is clear from the judgement of Martin J in Volz v The Queen[1993]100 FLR 393 at 400 that as intoxication is not an element of the offence and the merely a circumstance of aggravation. This reasoning was taken up by Mr Lowndes of this Court in the matter of Spreadborough v Northern Territory of Australia & MacDonald [2001]NTMC 64 at para 77

> "the allegation of that the Applicant was under the influence of alcohol is put forward in the indictment only as a circumstance of aggravation. The act of driving the manner described goes to the offence, the state of intoxication to penalty if the offence is proved.
>
> "intoxication may provide a reason or explanation as to why something otherwise extraordinary and dangerous occurred, and assist a jury in determining whether the accused had acted or failed to act as alleged"

30. Ms Truman argued that even if the Applicant could prove that the Second Respondent was intoxicated then that is not enough to constitute dangerous act. This is clearly correct in fact the intoxication or otherwise is can only be an explanation of why the Second Respondent acted or omitted to act in the way he did. There is certainly evidence of a degree of intoxication of the Second Respondent in his record of interview he admits to having several beers after work. The police officers who attended the scene observed that he had bloodshot eyes and his breath smelt of alcohol. Further, the Second Respondent was breathalysed at the time with a resultant reading of .137%.

The test was taken more than 2 hours after the accident and in a criminal proceedings would not be admissible however, in this jurisdiction I am not bound by those rules (see sections 15 (2) & 15(3) of the Act) and I accept that reading as an indication of the Second Respondent's intoxication. However the Second Respondent and the evidence of independent witnesses suggest that even though his blood alcohol levels were high he was functioning well and without restriction you would normally associate with intoxication.

31. One of the witnesses, Ms Philp, was questioned about the state the Second Respondent was in and answered as follows:

> "Did you form an opinion that he might have been intoxicated or under the influence of any drugs at all?
>
> "No I didn't…….I didn't think he was drunk, I….I never really thought about it ,….Cause he didn't act as if he was drunk and it was pitch black so I don't know what his eyes looked like or anything like that .. as in drug related no. He didn't … he certainly seemed normal , walking and speaking at that point of time"

32. Another witness, Ms Walker stated that :

> "I thought he was in deep shock. He did not seem intoxicated. He was quite lucid and concerned for the people on the ground."

33. There was of course the evidence of two of the police officers who attended stating that the Second Respondent had bloodshot eyes and his breath smelt strongly of alcohol and the later breath analysis which showed a level of .137%. Nevertheless the only observation which suggested that the Second Respondent was affected by the alcohol in his body was the from Officer Bohlin who stated "her had very blood shot eyes and smelt of liquor, <u>he was also unstable on his feet</u>."

34. I cannot consider the level of Second Respondent's intoxication in deciding whether an offence was committed however as the matter has been raised by the Applicant I am bound to consider the role it plays in this matter. I do not have enough evidence to convince me that Second Respondent's

intoxication affected his decision to drive his car with the defective headlights nor do I have any evidence to suggest his level of intoxication caused him not to swerve to avoid the Applicant and her partner. In short the Second Respondent's intoxication is largely irrelevant in these circumstances because the evidence has not convinced me to my reasonable satisfaction that and ordinary person similarly circumstanced would have reasonably forseen the serious danger of not been able to avoid hitting people who were on the road on a pitch black night where the speed limit was 100kph.

35. **Conclusion** the Applicant has only relied on three factors to establish a liability under section 154 of the Second Respondent the fact that he drove a car with defective headlights, that he failed to swerve to avoid a collision and that the Second Respondent was intoxicated. The third factor is not properly considered in establishing the offence and for the reasons I set out above the Applicant has not discharged her burden of proof to convince me to my reasonable satisfaction that an offence took place pursuant to section 154 of the Criminal code. It is obvious that the Applicant has suffered dreadfully as a result of this accident however it was just that a terrible accident for which the Second Respondent cannot be found clearly blameworthy.

Dated this 15th day of September 2003

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Tanya Fong Lim
JUDICIAL REGISTRAR