

CITATION: *Noble –v- Northern Territory of Australia and Lanson* [2003]
NTMC 057

PARTIES: ALISA KAYE NOBLE

v

NORTHERN TERRITORY OF AUSTRALIA
And
MAXWELL LANSON

TITLE OF COURT: LOCAL COURT AT DARWIN

JURISDICTION: CRIMES (VICTIMS ASSISTANCE) ACT

FILE NO(s): 20215773

DELIVERED ON: 14 November 2003

DELIVERED AT: DARWIN

HEARING DATE(s): 9 October 2003

DECISION OF: D LOADMAN, SM

CATCHWORDS:

NEED TO PROVE COMMISSION OF OFFENCE ON BALANCE OF
PROBABILITIES – “BRIGINSHAW” QUALIFICATION OF STANDARD OF PROOF –
CONSEQUENCE OF FAILING TO DISCHARGE BURDEN OF PROOF
Crimes (Victims Assistance) Act

REPRESENTATION:

Counsel:

Applicant:	M Spazzapan
1st Respondent:	J Lewis
2 nd Respondent	No appearance

Solicitors:

Applicant:	Markus Spazzapan
1st Respondent:	Priestley Walsh

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 057
Number of paragraphs:	25

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

No. 20215773

BETWEEN:

ALISA KAYE NOBLE
Applicant

AND:

**THE NORTHERN TERRITORY OF
AUSTRALIA**
1st Respondent

MAXWELL LANSON
2nd Respondent

DECISION

(Delivered 14 November 2003)

Mr David LOADMAN SM:

Preliminary

1. An application for assistance was filed by the Applicant on 22 October 2002 relating to an alleged sexual offence on 8 March 2002. The application for assistance was filed pursuant to section 5(1) of the Crimes (Victims Assistance) Act (“CVA”)
2. Service on the 2nd respondent was dispensed with by order of 26 February 2003.
3. After various preliminary conferences, the matter was set down for hearing to commence on 9 October 2003. On that date, decision was reserved.

Legislation

4. Relevantly, section 4 CVA includes the following definitions:

"offence" means an offence, whether indictable or not, committed by one or more persons which results in injury to another person;

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

"injury" means bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property);

5. Section 5 CVA provides as follows:-

5. Application for assistance certificate

(1) A victim or, where the victim is an infant or the Court is satisfied the victim, because of injury, disease or physical or mental infirmity, is not capable of managing his or her affairs in relation to the application, a person who, in the opinion of the Court, is a suitable person to represent the interests of 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.

6. Section 12(a) CVA, provides as follows:

12. 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;

7. Section 15(1)(2)(3) CVA provides as follows:

15. Procedure

(1) On the hearing by the Court of an application under section 5, the procedure of the Court is, subject to this Act, the Regulations and any rules or practice directions made or given specifically for the conduct of the business of the Court under this Act, within the discretion of the Court.

(2) The hearing of an application under section 5 shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the application permit.

(3) Subject to this Act, the Court is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit.

8. Section 17(1) and (3) provides as follows:

17. Proof and evidence

(1) A fact to be proved by an applicant in proceedings under this Act shall be sufficiently proved where it is proved on the balance of probabilities.

(3) In proceedings under this Act, all evidence other than the evidence referred to in subsection (4) is to be given by affidavit.

The Law

9. Both counsel made oral submissions to the Court. Mr Lewis on behalf of the 1st respondent delivered written submissions which bear the date 11 October 2003. These submissions will be referred to by this Court as the submissions for the 1st respondent.
10. The submissions for the 1st respondent in paragraph 1 set out the legislation and the law which the Court needs to observe or which has application in coming to any decision in an application such as the present.
11. This Court does not propose to canvass in its entirety each of the submissions which were made in that paragraph for reasons which will be apparent.
12. Firstly, although as set out in the extracts from the legislation above, it is incumbent on an applicant to establish the facts said to give rise to an entitlement on a balance of probabilities, there is judicial qualification as to the actual standard of proof which it is necessary to discharge within the parameters of the “balance of probabilities”.
13. There is no dispute between counsel that the test is the test set out in the matter of *Briginshaw v Briginshaw* (1938) 60 CLR 336 (“*Briginshaw*”) cited in submissions for the 1st respondent.
14. In *Briginshaw* Sir Owen Dixon observed at p36:

"The truth is that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or 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."

15. The authorised report of *Briginshaw* has been supplied to the Court by Mr Lewis but no further need, in this Court's perception, dictates reference to any further passage than the one set out above.
16. As a primary step, the question asked is "has the applicant established the facts which are the basis of the application and did she suffer the injuries set out in the application?".
17. In order to assist with comprehension of this decision, this Court sets out what is contained in the application under cited headings:

"Offence

Time and Date: 11:50pm on 8 March 2002

Location: Carpark of Borroloola Hotel

What happened: The applicant was a victim of unlawful sexual intercourse by the second respondent

Injuries

Raped, severe bruising, post traumatic stress disorder".

18. As to the alleged circumstances of the offence, this Court adopts the analysis of the evidence set out in the submissions of the 1st respondent under the heading **Analysis of the evidence**, which is in the following terms:

“ANALYSIS OF THE EVIDENCE

Intoxication

Ms. Noble was intoxicated to a significant degree.

[declaration of the Applicant p.2.5] *"I couldn't get away because I was too drunk"*

[Declaration of Marissa Humphris p.2.3]

"my observations at the clinic are that she was very drunk"

[Progress Notes Territory Health Service] *"she had been drinking a lot - a little bit drunk but still remembers events"*

[Declaration of Clara Thompson p.3) *"Alisa Thompson walked to the gate but her husband Eric Mulholland wouldn't let her in because she was too drunk. . I saw her walk out of the main gate but then she walked back to the main entrance she was walking pretty wobbly"*

[Declaration of Bronson Charles Isaac p.2.9] *"When I saw them fucking I did not try to stop them because they were both drunk and I did not think that the woman was in trouble"*

[annexure to the affidavit of Timothy Dennis Ryan, psychologist] *"Ms Noble stated that . . .on the date of the incident she had been drinking heavily at the (Boroloola) Inn":"*

19. Furthermore, this Court accepts the correctness of the identified sources of evidence contained in the said submissions of the 1st respondent.
20. Further, the Court adopts as correctly set out the matters referred to under the heading **Incidents Referred to** in the submissions of the 1st respondent and for purposes of comprehension, also sets those matters out:

“INCIDENTS REFERRED TO:

1. First encounter with the assailant.

Declaration p.2 para 2. . . "a bloke came up and grabbed me by the **hair** and started dragging me to the corner fence where the tree is. When he grabbed me I was struggling and singing out but I couldn't get away because I was too drunk and because I have a sore throat"

Affidavit 07 10 02 [para 3.] . . . "the offender Maxwell Lanson came up to me and grabbed me by the **left arm** and dragged me into the car park "

Affidavit 15 04 03 [para 3.]: "I was attacked by the second Respondent who grabbed me by the **throat** and dragged me outside the Boroloola Inn. . . "

History given to Timothy Ryan on 11 June 2002 [page 2]: "circumstances of the Sexual assault"] . . "her male assailant grabbed her by the **throat**. . . "

History given to Maria Humphris just after midnight on Sat 9t' of March 2002 [Humphris declaration page 2 para 1 and para5]: "Alisa told me that a man which she didn't know by name but knew by sight had **put his fingers inside her**. . . " . . and. . ` para 5 I had another conversation about what occurred the previous evening . Alisa again told me that **a man put his finger inside her**, this time however she stated that the man was **Maxie Finlay's son**':

Hospital Progress Notes [page 1.5, 2.9, 3.1] entry: . . . "claims *digital rape* " . . "taken to police station for statement. . returned by police having had **'rape by penis' admitted to police**'"

21. Finally, under the heading **The 'Rape'** the first respondent's submissions set out pertinent matters which this Court adopts as correctly set out and recites below:

THE 'RAPE'

Declaration Statement 09 March 02 page 2 para 3 & 4

"I felt him put his dick inside me".. "I felt him take his dick out I fell what I think was his fingers going inside me "

Affidavit 07 10 02 [para 3]

"I had been waiting on the footpath for my partner to pick me up when he finished work at midnight . . . I knew the offender Maxwell Lanson, but didn't know his two companions . . .the other offenders joined in and held an arm each".

Affidavit 15 April 2003 [para 3]

"I explained to (Timothy Ryan) that I was attacked and sexually assaulted by these men.. "

Report of Timothy Ryan [page 2, "Circumstances of *the sexual Assault*']

"She claimed that the other two men then held her down whilst her initial assailant removed her clothing and then had intercourse with her. . . her assailants were interrupted by a passing police vehicle when they left the scene."

Declaration of Maria Humphries [page 2 para 1.]

"Alisa told me that a man which she didn't know by name but knew by sight had put his fingers inside her. . . on Saturday the 9th of March 2002. . . I had another conversation about what had occurred . . . Alisa again told me that a man had put his fingers inside her, this time however she stated that the man was Maxie Finlay's son . . . a couple of hours later, the Police returned to the clinic with Alisa, I then had a conversation with Police (who informed me that Alisa had stated she had suffered penile penetration).

Declaration of Maxine Boyd [para 8.]

"Lisa said to me "he tried to rape me ". . . Lisa said. . "I know who done it ". ~

22. It does not seem necessary for this Court to descend to a recitation of anything more in stating its conclusion. The anomalies and contradictions are highlighted as noted.

Conclusion

23. For reason of the inconsistencies and confusion of the applicant's evidence and taking into account also as part of the whole of the evidence the evidence of the eye witness group, this Court is not prepared to conclude that the applicant has established on a balance of probabilities the circumstances of the offence.
24. It is further this Court's view that not only does the applicant fail to achieve that degree of conviction required in *Briginshaw*, but objectively does not satisfy even the ordinary principles of establishing such circumstances on a balance of probabilities.

Decision

25. In the circumstances the decision of the Court is as follows:

1. The application for assistance filed and referred to in paragraph 1 of this decision is dismissed.
2. There being no ability to award costs against the applicant, that is the end of the matter.

Dated: 14 November 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE