

CITATION: *Bronwyn Lee Bates v The Northern Territory of Australia* [2004]
NTMC 067

PARTIES: BRONWYN LEE BATES

v

THE TERRITORY

TITLE OF COURT: LOCAL COURT

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20302451

DELIVERED ON: 18th August 2004

DELIVERED AT: Darwin

HEARING DATE(s): 6th August 2004

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Offence – *Briginshaw v Briginshaw* [1938] 60 CLR

REPRESENTATION:

Counsel:

Applicant: Saraglou
1st Respondent: Tregear

Solicitors:

Applicant: Withnall Maley
1st Respondent: Hunt & Hunt

Judgment category classification: A
Judgment ID number: [2004] NTMC 067
Number of paragraphs: 37

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

No. 20302451

BETWEEN:

Bronwyn Lee Bates
Applicant

AND:

Northern Territory of Australia
1st Respondent

REASONS FOR JUDGMENT

(Delivered 18th August 2004)

Judicial Registrar Fong Lim:

1. The Applicant has applied for an Assistance Certificate to issue in her favour on the basis that she has suffered an injury due to an alleged sexual assault upon her on the 17th February 2002. The Respondent argues that the evidence available to the Court is contradictory and the Applicant's evidence inconsistent in so many ways the Court cannot be convinced that there was an offence committed.
2. It is of course the Applicant's burden to prove to the court's reasonable satisfaction (Briginshaw v Briginshaw [1938] 60 CLR) that on the balance of probabilities an offence occurred.
3. The Applicant relied on her own affidavit of the 23rd of April 2004 and the affidavit of Vanessa Farmer of the 28th May 2004 which annexed statutory declarations of other witnesses. The Respondent tendered an affidavit of Pamela Tregear which annexed statements from witnesses taken by the

Police, records of interview and some pages of the transcript of the committal proceedings

4. The uncontroversial evidence of the Applicant is that she and her friend Erin decided to go out on the town late on the 16th February 2002 after having been to a movie and a party. Both girls were 17 years old at the time. They went to the nightclub Discovery, stayed until about 3:30am then they decided to go home and went to the taxi rank to wait for a taxi. While waiting for a taxi they got chatting to an American sailor (Burch) and then all got into a taxi together. It is common ground that the Applicant, her girlfriend and Burch were all intoxicated. When approaching the Applicant's residence in Nightcliff the Applicant realised that there was second taxi following them. The Applicant then asked the taxi to stop a couple of houses short of her flat. The Applicant, her girlfriend and the American sailor (Marc Burch) all got out of the taxi and the offender, Walker, got out of the second taxi. Erin and Burch walked away leaving Walker and the Applicant together.
5. It is at this point the evidence significantly diverges. The Applicant says she was scared of Walker and offered to call him a taxi. She called him a taxi and that is when he pushed her to the ground and raped her. Walker's statement and record of interview indicates that he agrees he had sexual intercourse with the Applicant but that it was consensual although they both agreed after that it should not have happened because he was married and she had a boyfriend.
6. The Applicant reported the incident to the Police later that morning and an investigation ensued. Charges were laid however the Director of Public Prosecutions decided not to go ahead with the prosecution on the grounds that the evidence of the Applicant and the other witnesses were too contradictory to support a conviction by a jury.

7. The Applicant's evidence was inconsistent in several ways. In her affidavit she states that she and Erin got into the taxi with Burch as he offered to pay the taxi fare. The boyfriend in his statement states that Erin had told him that two guys had followed her and Erin in a taxi and wouldn't leave them alone. The transcript of the Applicant's report to police showed that she told the police at that time that two American sailors had followed her and Erin home in a taxi, at page 2 of 9 the report states:

“Comms: What happened Bronwyn?
unknown male.....

Bates: Um we were in town and we um got a taxi, we were in town and a taxi followed us home so we thought it was a bit weird and we didn't want to actually go to our actual house, we just stopped at the corner of the road.
.....

Comms: home or a taxi.

Bates: Yeap in a taxi and they got quickly, they were talking to my friend, I wasn't paying any attention to them and um hopped in the taxi, they go in the one behind us.

Comms: oh okay

Bates: followed us”

8. This account is inconsistent with the account she gave in her affidavit and in her statutory declaration to the Police given the next day in which she states Burch was in the first taxi and it was only Walker who was in the taxi behind. In cross examination at the committal hearing the Applicant admitted that she had lied to her boyfriend and the police on the phone about the two sailors following her and her girlfriend and she explained that lie by saying she was scared. She says she was scared of what people would think of her see page 55 of the transcript where the Applicant admits to lying:

“the reason I had said that because I was scared of what the police would think. Because I was scared of what this – how everyone would think, like me getting in a taxi with someone.”

9. Another inconsistency in the Applicant's evidence is her description of the alleged rape. In her affidavit and statutory declaration made to the police the

Applicant claims that Walker grabbed her by the wrists, pushed her to the ground and then raped her while holding her wrists with one hand. Yet in he when interviewed by the police officers at her home the next day the Applicant stated that Walker had grabbed her by the upper arms and that she had yelled at him and pushed him away. She also denied she had been sexually assaulted until she spoke to a female officer later that day.

10. Of course Walker tells a different story in his records of interview with the police. He tells a story of following his mate Burch in a taxi because he wanted to get the keys to the apartment they were staying in off Burch because he needed to go and be ready for his next shift. He states that the Applicant had initiated sex with him by encouraging him to sit down next to her and assisting with the removal of her underwear to allow him access to have sexual intercourse, see page 15 of 42 of the record of interview with the Police officer Kerr:

“...I pulled her panties down to about here and she lifted up and she took them off the rest of the way. She brought em up and she (inaudible) ... on her bag”

11. Walker also suggested that he had offered the Applicant his shirt to lie on because where they were was fairly rough ground, but she said she was fine.
12. In that same record of interview Walker suggested that after some foreplay he was able to lean back and put a condom on, see page 16 of 42:

“I was on both knees like in between her , her legs was already open so I reached in my pocket and grabbed my condom.....I put it on and I leant over and I started kissing her again and then we started having sex.”

13. Walker stated that the sexual intercourse didn't last very long because they both realised that they shouldn't have done it because he was married and she had a boyfriend so they stopped after a very short time. Walker maintains that he was feeling so guilty about having had sex with Bates that he wasn't thinking straight. Walker stated that after having sex with the

Applicant he went looking for his friend to catch the taxi back to town. He accepts that the Applicant's boyfriend came out and started harassing him until he managed to get away in the taxi, previously called for him by the Applicant.

14. It is clear that Walker also had a conversation with the taxi driver who had about what had happened and it was then he realised that he still had the condom on which he removed and threw out of the window. He confirms that he had a conversation with the taxi driver however when asked to comment on the taxi driver's statement he vehemently denied what the driver apparently said. See page 26 of 42:

“Kerr: “And he said that you told him that you fingered her and when you were going to have sex she got cold feet”
Walker: Bullshit”

at page 27 Officer Kerr quotes from a typed statement of the taxi driver as follows:

“ Kerr: “He said the reason why he didn't have sex with her, have sex, was she got cold feet.”

15. Of course Walker denied having said that to the taxi driver at all. The statement of the taxi driver was not made available to the court as evidence.
16. Statements were also taken from the girlfriend, Erin Harker, boyfriend, Steven Valentine, Marcus Burch, Bate's mother Rhonda Mason and David Young a person who was living with the Applicant and her boyfriend at the time. I have considered these statements carefully and while there are inconsistencies in those statements which could perhaps assist counsel in cross – examining the witnesses to attack their credibility it is my view that the inconsistencies in those statements do not shed light on the issue of the Applicant's consent to sexual intercourse. The credibility of the witnesses in these proceedings cannot be tested.

17. The statements taken from Erin Harker confirm that she and the Applicant got into the taxi with Burch and were followed by Walker in another taxi. She further confirmed that once out of the taxi she and Burch went off together and were engaged in some sexual conduct when about 10 minutes later Walker approached them and kissed her on the cheek. The next thing she remembered was the Applicant's boyfriend (Steven) coming around the corner and confronting the Walker and Burch. She also relates Walker and Burch telling Steven about another American who had gone around the corner which was completely untrue. She then says that she went to the Applicant's house where the Applicant had told her that " he tried to rape me he was holding my hands down"
18. In her statement of the 19th February 2004 Harker states that the Applicant while not crying looked like she had been crying and her mascara had been running. This was inconsistent with her statement taken on the day of the incident, in that statement she says:

"Bronwyn didn't seem upset at all to me which I though was really odd considering she claimed to have been attacked and nearly raped"

19. Harker explained this observation as a wrong because in hindsight she has realised that Bates was just reacting differently to how she would, see last page of her declaration of the 19th February 2002:

"I have seen Bronwyn once since this has happened and I saw how she was at the police station that day and her mum had told me how upset she was at the medical and how she always keeps trouble used. After I have thought about it again ,..... I thought this was strange at first because I was only comparing this to how I thought I might react to something like this happening."

20. Harker also explains that she wasn't exactly forthcoming in her first statement because she was worried about her parents knowing that she had been with an American sailor that night.

21. In her later statement Harker provided more detail about what happened on the night including the fact that after having been with Bates, Walker interrupted Harker and Burch and kissed her on the face making some comment about her tasting good. In his record of interview Walker admitted to approaching Harker and Burch and kissing Harker on the face but denies any comment made.
22. Walker kissing Harker while she was having sex with Burch does not seem to be the actions of a married man who is racked with guilt at just having had sex with another girl as he suggested in his record of interview see page 24 of 42:

“..I feel like super bad cause, you know I just violated my vows and all that type of stuff.”
23. The statements of the boyfriend, Steven Valentine, state that he was at home waiting for Bates to come home. When she arrived home she seemed unusually quiet and after some badgering by him she told him that a man had just tried to rape her. He goes outside to confront this man, has an argument with him and when Walker eventually got away in the taxi he then goes back into the house to wake his friends up for assistance in finding the other American. He tells of being angry about his girlfriend being attacked and angry at the Harker. He confirms that he told Bates to report the incident to the police.
24. The statement of the mother (Mason) confirms that Bates brought Harker around to her house that night saying that Harker had to stay with her because Valentine was angry with Harker. Mason could see that her daughter was upset however she would not say what had happened. Mason only found out about the alleged rape when Harker was asked to go to the police station the next day.
25. The statement of David Young (the flatmate) confirms that he was woken up by Valentine asking for help. Once dressed he went outside and observed

Valentine yelling abuse at a man in a taxi. After the taxi drove off they all went inside where Bates told her that she had been attacked but didn't go into detail. He then confirms that Valentine wanted Harker to get out of the house and that Bates walked Harker to her mother's place. Young also stated that since the assault Bates had not been back to school and had been spending a lot of time at her mother's place.

26. There is no doubt that there had been sexual intercourse between Walker and Bates the only question is whether it was consensual. The actions of both parties subsequent to the intercourse and the statements of independent witnesses are the only evidence available to the court to assess whether consent was given or not. The question for the court is whether there is more independent evidence supporting the Applicant or the alleged offender and if that evidence is enough to convince the Court to its reasonable satisfaction that the sex between the Applicant and Walker was not consensual.
27. Further evidence provided was that of the results of the Sexual Assault Referral unit's medical investigations. The investigation showed a minor graze on the left elbow and some chaffing on the inner thighs with some tenderness on the pubis. The Statutory Declaration from Annie Whybourne the doctor from the Sexual Assault Referral Centre came to the conclusion that the chaffing on the Applicant's thighs were "consistent with forced vaginal penetration with and unlubricated condom".
28. There is also evidence in the form of a "Report to Court" from Gail Bowker a counsellor at the Sexual Assault Referral Unit. Ms Bowker had five counselling sessions with the Applicant four in the two months after the incident and once after the committal hearing. Ms Bowker accepts the symptoms described by the Applicant as that of Acute Post traumatic Stress Disorder and by implication accepts that those symptoms were caused by the alleged assault. In her conclusion Ms Bowker states that the Applicant had a

resurgence of symptoms after the committal hearing and that other future events may trigger past symptoms.

29. In addition to the report of Ms Bowker the Applicant was assessed by Dr Markou for the purposes of these proceedings. Dr Markou diagnoses the Applicant as having a major depressive illness and given the history related to him by the Applicant attributes that illness to the assault.
30. The Respondent did not challenge the report of Dr Markou nor the report of Ms Bowker. Although they did make comment that the Applicant's description of the assault was different to that of her statements made to the police.
31. It is my view that the description of the incident as recounted by Dr Markou was slightly different to that given to the police however that may be explained by Dr Markou's summarising what the Applicant has related to him. What is not controverted is Dr Markou's opinion that the Applicant suffers a major depressive illness because of the assault.
32. The only evidence in favour of Walker's version of events is his own records of interview and the consistency of his evidence in his description of how he came to have sexual intercourse with the Applicant and the events immediately after. He offers credible explanation of his actions and the lead up to him following the Applicant's taxi.
33. Nevertheless it is my view that the evidence, as it is before the court in these proceedings is such that it is weighted in the Applicant's favour and I am reasonably satisfied that given all of the evidence and in particular the assessment by the psychologist and psychiatrist, and the fact that the Applicant reported the assault straight away and sought immediate counselling, that the Applicant was the victim of an unlawful sexual assault.
34. Having come to the conclusion that on the balance of probabilities that an offence occurred I must then consider the quantum of the Applicant's claim.

The Applicant has provided the Court with school reports that show a deterioration in her grades from 1998 (grade 8) to 2002 when she failed to attain her Northern Territory certificate of education (NTCE). In Grade 8 the Applicant was achieving “As” in all of her subjects yet in year 12 she failed. The Applicant blames her failure to achieve results in year 12 on the assault. Counsel for the Respondent argued that a careful look at the Applicant’s progression throughout her secondary school life shows a deterioration of her grades over the years up to grade 12, and therefore the assault cannot be blamed for the Applicant’s failure to achieve her NTCE.

35. The Board of Achievement transcript shows that in the whole of 2001 the Applicant was achieving average satisfactory grades (even though not as high as in Grades 8 & 9). Subsequent to the assault in early 2002 the Applicant failed in subjects she had previously had satisfactory results in (see the results in Business Studies, Business Mathematics and Biology). Taking note of those results and given the report of Ms Bowker it is my view that the assault clearly affected the Applicant’s ability to concentrate at school for that year. Since that time the Applicant has been able to enrol in a certificate program at Victoria University, a hospitality program in Adelaide and hospitality in Charles Darwin University and has been unable to complete any of those programs. The Applicant is suffering a major depressive illness and despite the support of her family has attempted suicide a couple of times.
36. It is clear from the Applicant’s evidence and the supporting medical reports that her life has been severely affected by the assault. She continues to suffer the psychiatric effects and requires medical treatment to overcome those.
37. My orders are as follows:
 - 37.1 An Assistance certificate issue in the sum of \$25000.00

37.2 The Respondent pay the Applicant's reasonable costs and disbursements to be taxed in default of agreement.

Dated this 18th day of August 2004

Tanya Fong Lim
JUDICIAL REGISTRAR