

CITATION: *Smart v Northern Territory of Australia* [2005] NTMC 045

PARTIES: CRAIG SCOTT SMART

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: LOCAL COURT

JURISDICTION: Crimes (Victims Assistance) Act (NT)

FILE NO(s): 20417200

DELIVERED ON: 21 July 2005

DELIVERED AT: DARWIN

HEARING DATE(s): 21 June 2005

JUDGMENT OF: A/JR Day

CATCHWORDS:

Crimes (Victims Assistance) Acts.12(c) – failure to assist police in investigation or prosecution of offence

REPRESENTATION:

Counsel:

Applicant: M. Spazzapan
Respondent: P. Tregear

Solicitors:

Applicant: Markus Spazzapan
Respondent: Hunt & Hunt

Judgment category classification: B

Judgment ID number: [2005] NTMC 045

Number of paragraphs: 14

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

No. 2041 7200

BETWEEN:

CRAIG SCOTT SMART
Applicant

AND:

**THE NORTHERN TERRITORY OF
AUSTRALIA**
Respondent

REASONS FOR JUDGMENT

(Delivered 21 July 2005)

ACTING JUDICIAL REGISTRAR DAY:

The Basis of the Claim

1. By application filed 22 July 2004 the applicant seeks an assistance certificate pursuant to s.5 of the *Crimes (Victims Assistance) Act* ('the Act'). The applicant asserts that he is a victim within the meaning of the Act in that he was assaulted at Vestey's Beach by an unknown assailant on 29 July 2003. The applicant further asserts that he has suffered injury as a result of the commission of the offence.
2. The evidence upon which the applicant relies is contained in his affidavits sworn 29 November 2004 and 20 June 2005, the affidavit of Eloise Hughes sworn 30 March 2005, the affidavit of Pamela Tregear affirmed 10 March 2005 and the report of Dr. Mary Frost dated 30 May 2005.
3. The applicant was at Vestey's Beach with a friend, Trevor Warner, on 29 July 2003 when Warner was attacked by a man. The applicant came to Warner's aid and was then also attacked by the man who was armed with a

knife. The assailant was, and remains, unknown to either the applicant or Warner. During the attack the applicant was stabbed with a short bladed knife in the left arm and left leg. Warner was stabbed in the chest.

4. The applicant and Warner were treated after the incident at Royal Darwin Hospital. The hospital discharge summary confirms that the applicant was treated for stab injuries at the date and time stated by the applicant. The police file notes, a copy of which are produced as annexure B to Ms. Tregear's affidavit, indicate that the incident was reported to police at 22.57 hours on 29 July 2003. Therefore, the applicant has produced evidence to satisfy me that, on the balance of probabilities, he was the victim of an offence and that he suffered injury as a result.

Failure to assist the Police Force

5. Ordinarily the above finding would entitle the applicant to an order for the issue of an assistance certificate. In this case however the respondent argues that the applicant is not entitled to an assistance certificate because the applicant has failed to assist the Police Force as required by s.12(c) of the Act.
6. The relevant facts surrounding the investigation of this claim, so far as they can be established from the evidence presented, are as follows:
 - a. The offence was reported to police on 29 July 2003 at 22.57 hours. There was some dispute in the evidence about the making of a 'formal complaint' or not at this time however for the purposes of this application nothing turns on that point. It has not been suggested that there was any failure on the applicant's part to comply with section 12(b) of the Act.
 - b. Warner attended Darwin police station gave a signed statement and made a formal complaint on 8 August 2003.

- c. On 12 August 2003 the applicant attended Darwin Police Station and requested that a formal statement be taken from him. The relevant police officer was unavailable.
- d. On 25 August 2003 the applicant telephoned police and complained about the delay in taking his statement. The applicant's statement was taken the same day.
- e. On 23 October 2003 the case was allocated to Constable Eloise Hughes to investigate.
- f. On the same day Constable Hughes made contact with the applicant. The details of that conversation are contained in the affidavit of Eloise Hughes at paragraphs 5 and 6 and at p.23 of the copy police case notes (annexure B to the affidavit of Pamela Tregear). That evidence, which I accept as an accurate (and uncontradicted) report of the conversation, is as follows:

“5. On this occasion Mr. Smart stated that he was uncomfortable in sharing information with previous members and may have further to add to the incident details. Mr. Smart stated he was very pleased the matter had been assigned to a GLLO [Gay and Lesbian Liaison Officer] and was impressed know a GLLO scheme had been implemented in the NT Police.

6. Mr. Smart added he remembers the incident well and the face of the offender. He stated he believed the alleged offender had been conveyed to Royal Darwin Hospital by unknown police members. At the time the members may have been unaware that the alleged offender may have been suffering injuries the victims had inflicted in self-defence.”

- g. Constable Hughes attempted to contact the applicant on his mobile phone on 25 October 2003. Although the phone was switched off she says in paragraph 8 of her affidavit that she “explained that she wished to speak to him in relation to the further information he stated he had and the possibility of a comfit construction.” It is not entirely clear how this information was conveyed. It is likely that a

message was left by Constable Hughes although she does not say so directly. It is reasonably clear from the applicant's evidence at paragraph 4 of his affidavit of 20 June 2005 that he acknowledges that there was telephone contact between himself and Constable Hughes on this day. He does not say whether this was in a direct conversation or a message left on his mobile phone, although the last sentence of that paragraph refers to a 'discussion' which may mean that there was direct conversation, it is unclear.

- h. Constable Hughes' evidence in paragraph 9 of her affidavit is that she spoke directly with the applicant on 26 October 2003 and that on that occasion she made an appointment to meet with him at Darwin Police Station on 27 October 2003. The applicant does not dispute that this conversation took place, although he says that he has no memory of it (paragraph 5 of his affidavit of 20 June 2005).
- i. The applicant does however dispute some important aspects of Constable Hughes' evidence about the telephone contact on 25 October 2003 and the conversation on 26 October 2003.
 - i. The applicant states at paragraph 4 of his affidavit of 20 June 2005 that the telephone contact of 25 October 2003 from Constable Hughes was about further information related to the person he saw at the hospital and obtaining hospital records, including the fact that this may be difficult. The applicant denies that anything was said about a comfit. The applicant does not say whether or not he thought that the police wanted him to do anything as a result of that contact. The applicant does not say that Constable Hughes required further information from him, as opposed to others such as the hospital.
 - ii. As stated above Constable Hughes' evidence regarding the telephone contact of 25 October 2003 is that she explained that

she wanted to talk to the applicant about further information which he had told her he may have and the possibility of a comfit. There is therefore a direct conflict between the police officer's evidence and that of the applicant. Such conflicts are difficult to resolve without the benefit of cross-examination. Constable Hughes' version of events is confirmed by the police notes which appear to have been written by her reasonably contemporaneously, although there is no direct evidence about that either. The applicant on the other hand admits that he has no recollection of a telephone conversation on 26 October 2003 (see 5 of his affidavit of 20 June 2005) and he admits at paragraph 12 of the same affidavit that his capacity to deal with the police was limited due to his emotional state at the time. Therefore the applicant's recollection is likely to be less reliable than that of the police officer.

- iii. I am weighing up the recollection of a man who made no notes and who was by his own admission in a distressed emotional state at the time, sufficient for him to abandon his employment without notice, against the evidence of a police officer who kept contemporaneous notes on the police file. On the balance of probabilities therefore I prefer the evidence of Constable Hughes where there is a conflict with the evidence of the applicant. I find that it is more likely than not that Mr. Smart was aware, as a result of the telephone contact from Constable Hughes, that the police wished to speak with him further to determine whether he had any further information which could assist with their investigation and that he may be requested to do a comfit for the police.
- iv. The applicant denies that an arrangement was made by Constable Hughes on 26 October 2003 to meet with him on 27

October 2003. His evidence about this is that he does not have any recollection of the conversation of 26 October 2003 and that if there was an appointment he would have put it in his diary, which diary is no longer in his possession. In this regard also I prefer the evidence of Constable Hughes, supported by the police records. I find that there was an arrangement to meet with the applicant on 27 October 2003 as deposed by Constable Hughes in her affidavit. As I have already stated above I also find that the applicant knew that the purpose of the meeting was for him to give further information to the police and possibly to do a comfit.

- j. The applicant did not attend the meeting at Darwin Police Station on 27 October 2003 as arranged.
- k. On 29 October 2003, 30 October 2003, 3 November 2003 and 3 December 2003 Constable Hughes attempted to contact the applicant on his mobile phone without success. Constable Hughes does not state whether she left any message for the applicant on any of those occasions although when she attempted to call on 3 December 2003 she was notified that the phone had been disconnected.
- l. On 2 November 2003 the applicant left the Northern Territory and relocated to Perth, WA. He left in a hurry, resigning his employment without notice via an electronic letter left for his supervisor.
- m. Sometime in early November 2003 the applicant's mobile phone was replaced. The applicant says this was because it 'did not work'.
- n. Constable Hughes contacted the applicant's former employer and on 10 November 2003 collected a copy of his resignation letter. That letter gave the applicant's address as c/o Post Office, Perth, WA, 6000. There is no evidence that the police attempted to contact the applicant via this address.

- o. Constable Hughes arranged for a search warrant directed to Royal Darwin Hospital, which was issued on 10 December 2003 and executed sometime thereafter with no result.
 - p. On 5 February 2004 the NT Police wrote to the applicant's then solicitors in Perth, responding to a request for information from them dated 28 January 2004.
 - q. On 18 March 2004 Constable Hughes contacted the applicant's solicitors in Perth and left a message for the applicant to contact her.
 - r. The applicant telephoned NT Police the same day and spoke with Constable Hughes on 19 March 2004. There was a discussion about a comfit on this day. The evidence of the applicant and Constable Hughes differs as to whether Constable Hughes contacted the applicant again about this. Constable Hughes says that she did so, but does not give a date, the applicant says that she did not. In any event I do not consider it necessary to attempt to resolve this particular conflict one way or another. It is clear that the upshot was that despite having made contact with the applicant again, having gained his contact details and confirmed that he was prepared to cooperate the police decided that a comfit could not be pursued due to the time elapsed since the incident. No further explanation was given for this.
 - s. Between 26 October 2003 and 19 March 2004 the applicant did not attempt to contact the NT police by any means. The reason for this was probably his mental state at the time, as deposed at paragraph 12 of his affidavit of 20 June 2005.
 - t. The case was closed on the basis of 'enquiries exhausted' after Constable Hughes' recommendation to that effect on 8 April 2004.
7. The effect of s.12(c) of the Act has been the subject of a handful of decisions. I respectfully adopt the summary of the law given by Ms.

Blokland SM in *Tirak v. Northern Territory of Australia & Ors* [2002] NTMC, Unreported 11 September 2002 where she said at paragraph 4:

“The principles revealed in those authorities are first, that an applicant need not take a proactive role; secondly, the applicant's role is contemplated as being secondary to the role of police in the sense of providing assistance when requested to do so; thirdly, the onus of proof is on the respondent to show that an applicant has failed to assist in the sense of the section. This is all within the context of a remedial Act which should be construed liberally, save for excepting provisions which do not necessarily attract a liberal interpretation: (*Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52, citing *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521).”

8. The question in this case is whether the actions of the applicant in failing to attend at the police station on 27 October 2003, to provide any further information which he may have had and to possibly do a comfit, and then leaving Darwin without contacting the police further in relation to the matter, Until March 2004, amounts to a failure to assist the police force in the investigation of the claim.
9. Constable Hughes sets out at paragraph 25 the ways in which the investigation might have proceeded had the applicant provided the assistance sought in October 2003. Her evidence was also that it was not possible to proceed with the matter after Mr. Smart got back in touch in March 2004. I am not entirely sure why this was the case. Perhaps it was because it was then approximately eight months since the incident and likely witnesses, perhaps even the offender himself, may no longer be in Darwin. I do not know. The question is not however what might have happened but whether the applicant had failed to assist at the particular time alleged.
10. It should be said that the entire delay in the investigation of the offence cannot be laid at the feet of the applicant in this proceeding. The evidence put forward in this case suggests that although the applicant's statement was taken about a month after the assault, the investigation was only commenced

in earnest when Constable Hughes was assigned on about 23 October 2003, three months after the assault. This delay on behalf of the police is unexplained. Clearly there can be no suggestion that the applicant should have done anything further during this time. In this regard I have considerable sympathy for the applicant as there is evidence (in the police records and the applicant's affidavit of 20 June 2005) that he was keen to see the matter investigated by police and did in fact assist police during this period.

11. I have also been somewhat troubled by the meaning of 'assist' in this context. This is because it may be that the applicant had no further information to give and that any comfit exercise which he participated in would not have produced a composite picture useful for the purposes of identification of the offender. I have come to the view however that a person can be assisting even where that endeavour does not in the end result in an advancement of the investigation. The point is that the applicant was asked to attend an interview for a purpose which was related to the investigation of the offence. I do not know what would have come of it. It is clear however that Mr. Smart was available to assist in the sense that he was able to attend and was not suffering from any illness or injury which would have prevented him from participating. He was not, as at 27 October 2003, out of the jurisdiction. The request from police for the applicant's assistance was reasonable in the circumstances in that it was a direct request for specific assistance directed towards furthering their investigation of the offence.
12. It was put by the applicant's counsel that the applicant could not be blamed for failing to contact police after 27 October 2003 when there was no evidence that they had attempted to contact him at the address left for his former employer, namely c/o Post Office Perth, WA. To some extent the force of this submission rests on the assumption that there was no arrangement for a meeting on 27 October 2003, and I have already found

that there was. It may remain true however that the police could have made quicker contact with the applicant had they written to the forwarding address. This, however, was after the fact. Any action by the police could not change the fact that the applicant had already failed to assist. The police having made a reasonable request it was for the applicant to provide the assistance asked. This he failed to do.

Conclusion

13. Therefore I find that in all of the circumstances the respondent has shown that the applicant has failed to assist the police force in the investigation of the offence. There had been a definite request to assist with which the applicant failed to comply. Accordingly his application for an assistance certificate must be dismissed.
14. I will hear the parties as to costs.

Dated this 21st July 2005

MEREDITH DAY
A/JUDICIAL REGISTRAR