CITATION:	*Lynas v Northern Territory of Australia* [2005] NTMC 048
PARTIES:	MARNIE FRANCES LYNAS
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance) Act
FILE NO(s):	20322197
DELIVERED ON:	8th August 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	3rd August 2005
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Failure to Assist – withdrawal of complaint – section 12 Crimes (Victims Assistance Act)

Peter Langlois Geisler v Northern Territory of Australia and Craig Geoffrey Bojczuk [1996] NTSC 19

Vincent Wolfe v Northern Territory of Australia [2002] NTSC 26

Tirak v Northern Territory of Australia, Gumbaduck & Phillips [2002]NTMC 35

Jones v Dunkel [1959]101 CLR 368

REPRESENTATION:

Counsel:

Applicant:	Ms Tregear
Respondent:	Ms Spurr

Solicitors:

Applicant:	Hunt & Hunt
Respondent:	Halfpennys

Judgment category classification:	C
Judgment ID number:	[2005] NTMC 048
Number of paragraphs:	39

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

No. 20322197

BETWEEN:

Marnie Francis Lynas
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 8th August 2005)

Judicial Registrar Fong Lim:

1. The Applicant has applied for the issue of an Assistance Certificate in her favour pursuant to section 5 of the Crimes (Victims Assistance) Act ("the Act"). Section 5 of the Act provides that a person who is a victim of an offence and who has suffered an injury arising out of that offence can apply for an assistance certificate to issue in her favour.

2. The Applicant relied on her affidavits of the 5th of October 2004 and the 24th April 2005.

3. The Respondent opposes the application on two bases, one that the Applicant has not provided the Court with enough evidence to establish that there was an offence and two, if there were an offence then section 12(c) applies and the Applicant is precluded from having an assistance certificate issued in her favour.

4. **The Evidence**

The applicant attests that on the 5th of February 2005 the Applicant was on

her tricycle doing her physiotherapy exercises in the front of her home on Wilmot Street when she saw the alleged offender, Jamie, walking towards her. Jamie was known to the Applicant. Jamie was being pursued by a man who was demanding she return his wallet. The man and Jamie stopped in the front of the Applicant's house and continued to have an argument there. The Applicant told them both to go away as did some neighbours who were also watching what was happening.

5. Jaime, the man and the neighbours then started yelling at each other then Jamie grabbed the handlebars on the Applicant's bike and started yelling at her. Jamie then punched the Applicant twice in the face with her fist and after yelling further abuse ran away. The Police attended on the Applicant at her home that night and recommended she consider pressing charges.

6. The Applicant then attended the police station the next day to make a statement and was told that the officers concerned were on four days leave. She attended the forensic unit later that day for photos to be taken of her injuries (the court was not provided with a copy of those photos even though they would have been helpful in assessing quantum).

7. On the 13th of February 2005 the Victims of Crime organisation rang the Police station enquiring as to why the police had not contacted the Applicant about her complaint. After that enquiry a police officer attended upon the Applicant on the 17th February 2005 and took her statement. According to the Applicant she made a handwritten statement and then signed a typewritten version when the police officer took it back to her the next day. The typed version was not dated for some unknown reason.

8. The Applicant then states that on the 18th of February 2005 she received a visit from Constable Sheppard who had a long conversation with her after which she signed a handwritten withdrawal of complaint which was later typed up as a statutory declaration but seemingly not signed by the Applicant.

9. The Applicant claims she was convinced to withdraw her complaint by what Constable Sheppard told her when he visited. The Applicant does not claim that Constable Sheppard encouraged her to withdraw her complaint rather that on the basis of him advising that Jamie would only get a "slap on the wrist" and that he confirmed her view that Jamie might be mentally unstable the Applicant decided it would not be worth pursuing.

10. The Affidavit of Constable Sheppard attempts to deny that he made any statements to the Applicant which may have given the impression that it was not worth her while to pursue the complaint. Constable Sheppard's evidence is that he cannot recall his conversation with the Applicant and makes statements of what he usually does and does not do in those situations, that is not evidence as to what happened on the day. The only evidence I have as to the Applicant's conversation with Constable Sheppard on the 18th of February is her sworn affidavit.

11. **"Failure to Assist"** – section 12 (c) of the Act provides:

> "The Court shall not issue an assistance certificate –
> …….
>
> (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;"

the Respondent argues that the Applicant's withdrawal of complaint and then subsequent relaying of complaint some 6 months later constitutes a "failure to assist".

12. The Respondent referred the Court to the case of Geiszler v Northern Territory of Australia [1996] NTSC 19 as authority for that proposition. In Geiszler's case the Applicant had failed to report the offence to the police until 2 months after the offence, the magistrate in the first instance found that the report was made within a reasonable time. The discussion in Geiszler's case was around the application of section 12(b) of the Act which provides:

(b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;

13. The Respondent relied on the reasoning of Justice Kearney in Geiszler's case in which his honour found that the whether the delay is reasonable should be considered in light of whether the delay has hindered the police's ability to properly investigate the complaint. However in their reasoning Justices Mildren and Angel disagree with his honour on this point it is their view the reasonableness should be determined by all relevant circumstances not just prejudice to the police investigation.

14. It should also be noted that nowhere in the judgement do any of their Honours characterise delay in reporting an incident as a "failure to assist" under section 12(c). Clearly the facts and law in Geiszler's case are distinguishable to the present case.

15. In the present case there was no delay in reporting the alleged assault and therefore section 12(b) does not apply. The Respondent's argument that the Applicant's withdrawal of complaint and subsequent relaying of complaint 6 months late is a "failure to assist" does not sit well with the authorities on this issue.

16. The Supreme Court of the Northern Territory considered the application of section 12(c) in Wolfe v Northern Territory of Australia [2002] NTSC 26. The applicant in Wolfe's case had, like the Applicant in this case, signed a withdrawal of complaint. The Magistrate found thethat section 12(c) precluded the applicant from the issue of an assistance certificate and that decision was upheld by Justice Thomas on appeal.

17. In her judgement her honour stated that it was clear that the magistrate had relied on other factors as well as the withdrawal of complaint to find that the Applicant had failed to assist. The applicant had in Wolfe's case also knew

the name of the offender but did not tell the police, had a friend who had witnesses to the assault but did not the police and that one of the witnesses was an off duty policeman and he did not tell the police of this either. At page 4 of her judgement her honour adopted the magistrate's finding that

> "The withdrawal of a complaint per se is not indicative of a failure to assist to police because if may well be that a person has provided all the information in their possession taken all reasonable efforts to assist the police in the investigation of the matter but the end of the day the matter is not considered to be worth taking any further."

18. It is clear law that there needs to be more than a withdrawal of complaint for the respondent to establish a "failure to assist" as required under section 12(c). In Tirak v Northern Territory of Australia, Gumbaduck & Phillips[2002] NTMC 35 her worship Ms Blockland confirmed the principles set down by the Supreme court in Wolfes case and Woodruffe v Northern Territory of Australia[2000] 10 NTLR 52 at page 4 her Worship states:

> "The principles revealed in those authorities are first, that the 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."

19. It is clear on the evidence of both the Applicant and Constable Sheppard that the Applicant was willing to assist the police in their enquires she was the one who in fact pursued them personally and through Victims of Crime (NT) when they had not contacted her about taking her statement. It was only after she had a conversation with Constable Sheppard that she decided she would withdraw her complaint.

20. Constable Sheppard in his affidavit states that

> "4. On the 5th of February 2003 the alleged victim , Marnie Lynas, made a formal complaint to Police that she had been assaulted by a lady later identified as Jamie McPherson. Due to the seriousness of

the complaint made by Lynas the Police were under an obligation to investigate further.

5. On 18 February 2003 the Lynas signed a statement authorising a formal withdrawal of her complaint. As the complaint was of a serious nature we would not have been above (*I think this is a typo in the affidavit)* to finalise Police investigations before coming to a final conclusion without her consent. I cannot recall Lynas' reasons for withdrawing the complaint."

21. The Respondent has argued that paragraph 5 of Constable Sheppard's affidavit meant that once the Applicant had withdrawn the complaint then the police were unable to continue with their investigations. The Applicant argues that the paragraph actually means that given the seriousness of the case the police would not have been able to cease their investigations without the complainant's consent. It is not the case that when a complainant withdraws a complaint the police are unable to continue to investigate and prosecute an offence. It is in fact a common occurrence in this jurisdiction that offences are prosecuted without the co – operation of the complainant particularly in the cases of breaches of domestic violence orders. In my view it is more likely that Constable Sheppard was stating the investigation would have had to continue if the complaint was not formally withdrawn.

22. In any event the true meaning of Constable Sheppard's statement is of little significance in the application of section 12(c). The Respondent must prove to the court that the Applicant had been asked to do something to assist in the enquiry regarding her complaint and had failed to do so or withheld some information from the police. There is no evidence that the Applicant has at any time failed to co – operate with the police, no evidence that the complaint was withdrawn despite the police urging the complainant to continue with her complaint, no evidence that the Applicant had withheld evidence or not made herself available to the police when requested to. In fact there is more evidence to support the view that the police did not have a particular interest in pursuing this matter and it was only after a complaint

was made to them some two weeks later that they decided to attend upon the Applicant and take her statement. There is no evidence that the police had spoken to the neighbours about the altercation where there was a clear indication from the applicant that the neighbours were possible witnesses. There was no suggestion that police had spoken to the applicant's son either.

23. It cannot be that it was the intention of Parliament to preclude an applicant from the benefits of this beneficial legislation when the delay caused was clearly caused by the police inaction.

24. It is my view that the circumstances of this case do not invoke the operation of section 12(e) and therefore the Applicant is not precluded from an Assistance Certificate pursuant to section 12(c).

25. **Was there an offence**- the Respondent argued that the Court should not be convinced by the Applicant's evidence only that there was an offence committed. The Respondent pointed out the police's case summary in the PROMIS records that shows that they had spoken with Jamie Mcpherson, the alleged offender, and that she had given a different story than the Applicant. Apparently Mcpherson told the police that she was walking back from the shops when she saw the Applicant who came at her on her three wheeled push bike so she punched the applicant as she was scared she was going to be struck by the bike. There is no affidavit or even formal statement given to the police by Mcpherson only what has been recorded on the case report.

26. The Respondent argued that Applicant should have addressed Mcpherson's story in her later affidavit and should have had evidence from her neighbours and her son to corroborate her evidence given the alternative story given by McPherson. The Respondent argued because of the doubt created by police records the court cannot be satisfied on the balance of probabilities that an offence occurred. The Respondent also argued that the Applicant's failure to call evidence from the neighbours and her son should lead the court to an adverse inference as to the nature of that evidence. I

think that the Respondent is asking the court to apply the rule in Jones v Dunkel [1959]101 CLR 368 when making this submission although I was not specifically referred to the rule.

27. The rule in Jones v Dunkel was expressed succinctly by O'loughlin J in Cubillo v Commonwealth [2000] FCA 1084 as follows:

> "The rule is that the unexplained failure of a party to give evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted that party's case, so entitling the court the more readily to draw an inference against that party which might otherwise fairly be drawn from the evidence which was adduced. In essence, an inference may be drawn contrite to the interest of a party who although having it within his or her power to provide or given evidence on some issue declining to do so."

28. The only evidence of the alleged assault comes from the signed police statement of the Applicant and her affidavit. There is no other sworn evidence contradicting the Applicant's version of the events. There is no signed statement from the alleged offender giving a different version of events. The Respondent is saying that because the police had noted the alleged offender's version of events in their notes the Applicant should have provided further evidence supporting her version.

29. It is a common misconception that the rule in Jones v Dunkel means that a party's failure to call evidence which is within in their power to call necessarily means an adverse inference will be made against them as to that evidence. In fact the inference to be drawn is that evidence would not have assisted the party's case and that inference will be drawn at the Court's discretion.

30. In the present matter the Respondent is arguing given the alternative story given by the alleged offender the Applicant should have called evidence from her son or her neighbours as to the incident. In *Cross on Evidence* 4th edition volume 1 at [1215] it is said that:

> "the rule only applies where a party is "required to explain or contradict" something. What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts "requiring an answer".

31. This passage was quoted with approval in the joint judgement of Gleeson CJ and McHugh J in Schellenberg v Tunnell Holdings Pty Ltd [2000] 170 ALR 594.

32. It is my view that in the present matter the Applicant has nothing to contradict or explain. The respondent has not produced contrary evidence to the Applicant's sworn evidence only a note in the police case summary which has to be given very little weight. An adverse inference will not be found against the Applicant if the court is satisfied that based on the evidence before it the Applicant has proved her case on the balance of probabilities.

33. It is clear on the evidence provided by the applicant that she was consistent in her story she related to the police, the Victims support and her doctor all of whom she spoke with within three weeks of the alleged assault. The letter from the doctor confirms that the Applicant relayed the incident to her in the same terms as her statement to the police and confirms her injuries as treated by the doctor were consistent with the attack as described.

34. An interesting fact that can also be gleaned from the doctor's letter is that the Applicant as a sufferer of motor neuron disease is "poorly mobile" which in my view makes it highly unlikely the that the story told by Mcpherson to the police can be believed. A "poorly mobile" person is surely not going to be riding her tricycle in a manner that would make another believe she was "coming at" them and fear that they were about to be hit.

35. Given the above it is my view that no adverse inference should be drawn in the present circumstances even though it would have been of assistance to

the court had the Applicant provided some corroborative evidence of the offence.

36. I find that on the balance of probabilities there was an offence of assault by Jamie McPherson upon the Applicant and that the Applicant has suffered injuries arising out of that offence.

37. **Quantum :** the Applicant suffered a soft tissue injury to her right jaw and left eye orbit which required treatment of ice an analgesics. The Applicant says it was three months before she had normal feeling and appearance in her mouth. The Applicant also says that she is now more wary of people in the park and fears that McPherson will return and burn her house down. There is no psychological report to support a claim for mental injury and the Applicant's counsel confirmed that she was only claiming mental distress for those emotional difficulties she is continuing to suffer.

38. Given that the physical injuries were relatively minor and the Applicant's continuing mental distress in also on the minor side it is my view an assistance certificate should issue for the sum of $2000 for pain and suffering and mental distress.

39. Order:

    39.1 An assistance certificate issue for the sum of $2000 and the Respondent pay the Applicant's costs and disbursements to be agreed or taxed in default of agreement.

Dated this 8th day of August 2005

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Tanya Fong Lim
JUDICIAL REGISTRAR