

CITATION: *Highway v Northern Territory of Australia* [2006] NTMC 021

PARTIES: STUART HIGHWAY  
v  
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20422408

DELIVERED ON: 17 March 2006

DELIVERED AT: Darwin

HEARING DATE(s): 16 February 2006

JUDGMENT OF: Mr VM Luppino SM

**CATCHWORDS:**

Crimes (Victims Assistance) – Allegation of assault by police in the course of an arrest – Whether the applicant is a “victim” within the meaning of the Act – Whether an “offence” within the meaning of the Act has occurred – Whether injury sustained in the course of the commission of an offence – Whether justified application of force.

*Crimes (Victims Assistance) Act*, s 5, s 17(1), (3) and (4), s 10(2), s 12(f).

*Criminal Code* s 23, 27, 121.

*Trespass Act* s 10(a).

*Police Administration Act* s 123.

*Jones v Dunkel (1959) 101 CLR 298.*

**REPRESENTATION:**

*Counsel:*

Applicant: In person  
Respondent: Ms Dunn

*Solicitors:*

Applicant: In person  
Respondent: Priestleys

Judgment category classification: C  
Judgment ID number: [2006] NTMC 021  
Number of paragraphs: 24

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

No. 20422408

BETWEEN:

**STUART HIGHWAY**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR DECISION

(Delivered 17 March 2006)

Mr V M LUPPINO SM:

1. This is an application for an assistance certificate under the *Crimes (Victims Assistance) Act* (“the Act”).
2. The claim relates to an injury alleged to have been sustained by the applicant on 20 September 2004 at the premises of the Italian Club in Marrara. On that day a function was being held there on account of a visit by the Prime Minister during the course of an election campaign. The applicant was one of a number of demonstrators present on that occasion.
3. It is apparently undisputed that a representative of the Italian Club gave directions to the demonstrators, including the applicant, to leave the grounds of the Club. It is alleged that the applicant did not leave the premises as directed and he was arrested. The respondent alleges that the applicant resisted the arrest and that any injury he sustained was consequent upon that

resist and in circumstances which preclude the issue of an assistance certificate.

4. The applicant on the other hand claims that police officer Roger D'Souza deliberately and unnecessarily sprained the applicant's thumb in the course of the arrest. The applicant alleges that D'Souza grabbed his right hand and forced his thumb back causing the sprain.

5. The following definitions from section 4 of the Act are relevant namely:-

"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.

6. The following parts of the sections of the Act set out hereunder are also relevant namely:-

**10. Behaviour of victim, &c., to be taken into account**

(1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, the Court shall have regard to the conduct of the victim and to any other matters it considers relevant.

(2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances.

**12. Assistance certificate not to be issued in certain circumstances**

The Court shall not issue an assistance certificate –

(a)-(e) (Omitted);

(f) in respect of an injury or death that occurred during the commission of a crime by the victim.

7. The provisions of various other Acts are relevant. Firstly sections 23 and 27 of the Criminal Code which provide as follows:-

**23. Effect of authorization, justification or excuse**

A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or excused.

**27. Circumstances in which force not being such force as is likely to cause death or grievous harm is justified**

In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or grievous harm:

- (a) to lawfully execute any sentence, process or warrant or make any arrest;
- (b) to prevent a person who is being or who has been lawfully arrested from escaping or from being rescued;
- (c)-(d) (Omitted);
- (e) to prevent the commission of an offence;
- (f)-(j) [Repealed]
- (k) (Omitted);
- (m)-(n) [Repealed]
- (p)-(r) (Omitted).

Secondly, section 123 of the *Police Administration Act* dealing with the powers of arrest:-

**123. Arrest without warrant by members of Police Force**

- (1) A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

Thirdly, section 10 of the *Trespass Act* namely:-

**10. Power of removal**

Where a person fails or refuses to leave a place after being directed to do so under section 7 or trespasses on a place after being warned to stay off under section 8, a member of the Police Force may warn that person of the consequences of not leaving the place forthwith and, if the person fails to leave forthwith –

(a) arrest the person without warrant to be further dealt with according to law; or

(b) without arrest but by force if necessary, remove the person and the person's property (if any) from that place.

8. The evidence before me was primarily in the form of affidavit material as required by s 17(3) of the Act. The exception was in relation to some medical information which was tendered by the applicant in the course of the hearing and which is not required to be in affidavit form by s 17(4) of the Act. That material consisted of a one page medical summary dated 20 September 2004. The remaining material comprised:-

1. Affidavit of the applicant sworn 19 November 2004;
2. Affidavit of the applicant sworn 13 April 2004 (the only material difference between these two affidavits is that the alleged assailant is named in the latter);
3. Affidavit of Shane Ryan Dexter affirmed 18 October 2005 annexing various documents comprising a number of statutory declarations of police officers and the transcripts of two records of interview produced on summons by the Commissioner of Police;
4. Statutory declaration of Roger D'Souza declared 1 November 2005

9. The extend of the applicant's evidence, other than medical evidence, is sufficiently set out in full in the following extract from his second affidavit i.e.:-

“Roger D’Souza assaulted me on Monday 20 September 2004 inside the cage of a police van in the car park of the Italian Club at Marrara in Darwin. He was a plain clothes police officer and he deliberately sprained my thumb. Several times he grabbed my right hand and held it, at the same time forcing back the thumb to cause pain. For weeks afterwards I suffered pain in my thumb. That evening (20/9) I had 3 X-Rays at Royal Darwin Hospital and was given a letter regarding the injury. The diagnosis was sprained right thumb. I lodged two complaints with NT Police regarding this matter but after 7 months have heard nothing from them”.

10. There is some elaboration of the applicant’s version of events in the transcripts of the records of interview which were conducted on 22 and 27 September 2004 respectively. These transcripts formed part of Exhibit SRD-1 annexed to the affidavit of Shane Ryan Dexter affirmed 18 October 2005. At page two of the first transcript the applicant says:-

“He um grabbed my right hand and forced the thumb back as far as you could push it causing pain...”

At page three of the same transcript the applicant says:-

“...they’d already um, um placed my (*sic*) under arrest and I was in the back of the van and um they were roughing me up and trying to get my back pack off my back and get things out of my pockets and uh it was a bit of a struggle ....I kept taking my hand away so he couldn’t continue assaulting me but uh and I, I uh called out in protest, stop doing that, stop bending my thumb back, stop torturing me, and he said something like oh yeah right in a sarcastic tone ....”

11. In the transcript of the second record of interview, at pages three and four the applicant says:-

“...they warned me that I’d be arrested for trespassing if I didn’t leave the premises and this an officer said to me uh do you understand this, and I didn’t uh reply I just took a step back and uh and uh then basically they moved over and grabbed me and said you’re under arrest and they lead me towards the van, and I went quietly and they put me in there and um then this guy started grabbing things out of my pockets and they were a bit rough, rough stuff and um...they were just uh grabbing stuff and they didn’t ask me you know well say look we have to, can you give us the stuff out of your pockets or can we get things out of your pockets we have to

explain, no explanation of anything and he just sort of grabbing and when I was already in the van I think my legs might have been outside I can't really remember but it's uh I was already in the cage and uh and the two officers leaning in and just grabbing and I just, well I'd been uh um feel like I'm under attack so I was wrestling, there was a bit of a wrestling match and um and uh um they did get most of the stuff out of my pockets... and it was the one in plain clothes that was um he um he used unnecessary violence and force and several times he grabbed my hand and forced the thumb back....”

12. In summary form the evidence contained in the statutory declarations of the police officers involved is as follows:-

12.1 James O'Brien: He said that after he had given the applicant one further opportunity to leave the premises under threat of arrest, he told the applicant that he was under arrest and directed other police members to complete the arrest. He said that he observed police members as they took the applicant by the arms and directed him to the back of the van. He said that the applicant started to flay his body about mildly in an attempt to break free from the holds of the police members. He said that the members placed the applicant in the van and then he noticed that the applicant was refusing to hand over his property. He said that he could see that there was some sort of struggle occurring at the time which continued for a short time. He said that he then saw the applicant attempt to get out of the police van by placing his feet between the rear of the cage and the door.

12.2 Timothy James Nixon: He confirmed that upon Sergeant O'Brien's direction Constable O'Neill took hold of the arms of the applicant and walked him to the rear of a police vehicle where members began to search the applicant and to remove his backpack. He said that the applicant was unco-operative. He said that Constables O'Neill, Warren and D'Souza were then involved in a struggle to remove the property from his pockets and take the backpack from him. He said

that the applicant made attempts to stop members from closing the cage door by putting his legs out.

- 12.3 Brent Aaron Warren: He said that he saw Constable O'Neill take the applicant by the arm. He said that he went ahead and opened the rear of the cage door and that the applicant sat down at the back of the cage. He said that O'Neill was attempting to remove the applicant's backpack and that D'Souza was standing on the other side of O'Neill trying to assist in this process. He said that the applicant was resisting their efforts by pulling his arms to his chest to prevent removal of the backpack. He said that he told the applicant to remove his backpack and to stop resisting. He said that the backpack was removed by D'Souza. He said that O'Neill and D'Souza continued searching the applicant and they took several items from his pockets. He said that when police attempted to close the cage door the applicant attempted to prevent this by placing his feet out of the cage area.
- 12.4 Peter Lance Henwood: He confirmed Sergeant O'Brien's direction to arrest the applicant and he says that he saw two uniformed police officers take the applicant by an arm each and escort him to the police vehicle. He said that as they approached the vehicle the applicant commenced to struggle and other members became involved in assisting with searching and placing the applicant in the cage. He says that during this time he heard the applicant say words to the effect that he was being assaulted but that nothing of the sort occurred.
- 12.5 Alan Joseph Hodge: He said that he observed police members take the applicant by the arms and directed him to the back of the vans. He said that the applicant initially walked towards the back of the van where police members began searching him. At this time he said



that the applicant resisted and that some force was used to remove his property and his backpack.

- 12.6 Nathan Rodney McGrath: He said that in consequence of Sergeant O'Brien's direction to arrest the applicant, he observed Constables O'Neill and Hughes lead the applicant to the rear of the van. He said that he observed the applicant struggling with them as they attempted to search him. In particular he said that the applicant was refusing to yield up his backpack. He said that other police members assisted in the search while he held the van door open until the applicant was searched and placed fully into the rear of the police van.
- 12.7 Vicki Koum: She said that the applicant was escorted to one of the vans and that he resisted when they arrived at the cage door. She said that all she could see were members trying to close the cage door of the van and the applicant kicking out with his feet to prevent it being closed.
- 12.8 Wayne Jeffrey O'Neill: He confirmed that he was one of the officers directed by Sergeant O'Brien to take the applicant into custody. He said that he took the applicant by the left arm and walked him to the rear of the van. He confirmed that the applicant had a backpack and he attempted to remove the backpack. He said that the applicant objected by pulling away and dropping himself inside the van. He said that he continued to struggle with the applicant in an effort to remove the backpack from him and this succeeded after a short struggle. He said that the applicant then continued to struggle and resist his attempts to empty the contents of his pockets. He eventually succeeded and then he attempted to close the rear door of the van but the applicant obstructed this by putting his legs out.
- 12.9 Eloise Hughes: She was one of the officers directed by Sergeant O'Brien to take the applicant into custody. She said that in company

with Constable O'Neill she escorted the applicant to the rear of the van. She said that she felt the applicant begin to resist her grip and that when he was placed in the van he began attempting to push forward. She said that Constable D'Souza took over from her and that D'Souza and O'Neill then began removing property from the applicant's possession. She said her assistance involved holding the applicant's legs stable during this period.

- 12.10 David Taylor: He confirmed that the applicant was arrested by Constables Hughes and O'Neill and was escorted to the rear of the vehicle whereupon the applicant resisted by pushing against them and dragging his feet. He confirmed that the applicant was wearing a backpack which he would not remove and it had to be removed from him. He also confirmed that once he was placed in the rear of the police vehicle the applicant pushed against the door with his feet to prevent the door being closed.
- 12.11 Roger D'Souza: He said that Sergeant O'Brien directed O'Neill and another member to take the applicant to a police caged vehicle. He said that he observed the applicant struggling with the two uniformed members and he therefore approached. He said that he took hold of the applicant's right hand and tried to stop him from moving his hand around to allow Constable O'Neill to remove the applicant's backpack. He said that he kept telling the applicant to stop struggling but that the applicant continued to do so. He said that at one point the applicant grabbed hold of his left hand and he had to use his right hand to pry open the applicant's grip. He said he used both hands to restrain the applicant's right hand. He said that Constable O'Neill emptied the applicant's pockets and removed his belt and that he then released the applicant's hands. He said that as O'Neill attempted to shut the cage door the applicant prevented this by the placement of his legs.

13. Other relevant parts of the two records of interview are firstly in the first transcript at page six where the applicant concedes that he remained after he was directed to leave. Secondly in the second transcript at page three he confirmed that he was warned that he would be arrested for trespassing if he did not leave (see paragraph 11 above). At page four, he confirms that he struggled against the officers i.e.,:-

“...well I’d been uh um feel like I’m under attack so I was wrestling, there was a bit of a wrestling match and uh and uh um they did get most of the stuff out of my pockets...”

He adds at page 5 of that same transcript:-

“...I was probably kept pulling my hand away and uh trying to get away from him and he was uh um and uh he kept grabbing my hand...”

At page 6 he confirms again that he was directed by a person at the Italian Club to leave the premises. At page 8 he says:-

“...there were only two, there were two they were leaning into the, through the doorway of the cage and uh they were getting stuff out of my pockets...”

Lastly at page 12 he was asked if he was resisting and he replied:-

“...well you know I was, I was struggling a little bit because there was people just grabbing at me and uh you know grabbing stuff out of my pockets and saying look you’re pickpocketing me this is what are you doing this for and uh and I was, I was angry yeah and uh but I wasn’t like really nasty, viciously attacking anyone, pushing anyone in the face or spitting at anyone or anything, I was uh, I was just uh I think I was just trying to sort of um sort of just defend myself.”

When asked how he was defending himself, the applicant replied:-

“I don’t know, I think I was sort of just um moving my arms around or something I uh there wasn’t much I could do...”

14. At various points therefore the applicant confirms that he was on the premises of the Italian Club, that he was given a direction to leave by

“someone” from the Italian Club, that he was still there when police arrived, that he was warned by police to leave under threat of arrest, that he did not leave and that he struggled and resisted the police when they attempted to remove his bag and the contents of his pockets.

15. The above summary shows that the evidence produced by the applicant is quite scant in comparison to that of the respondent. He was with a group of people on the day and it is clear from the affidavit material that some members of that group were in a position to have seen relevant events. I invited the applicant to make an appropriate application to enable him to produce further evidence if that was what he wished to do. He did not take up that invitation. Neither did the applicant seek the leave required by s 17(6) of the Act to cross-examine any of the aforementioned deponents. An inference that had those people been called, they would not have supported the applicant’s case is therefore able to be drawn in accordance with *Jones v Dunkel* (1959) 101 CLR 298 and I am prepared to draw such an inference.
16. During the course of his final submissions the applicant attempted to comment on matters which had not been the subject of evidence. He had to be continually reminded that his submissions had to be supported by the evidence before me. The applicant seemed to have difficulty with that concept as he continuously made submissions which introduced evidence for the first time. I can only have regard to the evidence properly before me.
17. The respondent’s submission is that the evidence shows that if any injury occurred, it occurred in the context of a lawful arrest by D’Souza and other police officers and in circumstances where the applicant was resisting the police in the lawful execution of their duty. It was submitted that if the act of bending back the thumb occurred, it was in the context of that arrest and of that resistance and that the force used was reasonable and necessary. She submitted that the evidence shows that the applicant was solely responsible for his own injuries and consequently is not entitled to an assistance certificate by s 10(2) and s 12(f) of the Act.

18. The burden of proof for applications under the Act is on the applicant and the standard is on the balance of probabilities (s 17(1) of the Act).  
Essentially the only serious discrepancy in the versions of the respective parties is as to the injury to the applicant's thumb. The applicant alleges that it was a deliberate and unnecessary act whereas the respondent's case is that it occurred in the course of the applicant's resistance.
19. The evidence produced by the respondent is broadly consistent within acceptable limits and is in considerable detail. This is compared with the very scant evidence produced by the applicant. All evidence being by way of affidavit, the court is denied the usual and valuable assessment tool of the direct observation of the witnesses. Likewise, the court is denied the benefit of the cross-examination of witnesses. Noting the volume, detail and consistency of the evidence produced by the respondent compared to the very scant evidence of the applicant, noting the admissions the applicant makes in the two records of interview and noting the applicant's unexplained failure to provide apparently material evidence and all in the context of the applicant having the burden of proof, leads inevitably to the evidence of the respondent being preferred to that of the applicant. On that basis a finding that any injury sustained by the applicant occurred in the course of the lawful arrest of the applicant and in the course of the applicant committing the offence of resisting police in the course of that arrest follows naturally. The applicant could only make out a case for an assistance certificate if he could show that the force used was excessive or unreasonable or unnecessary. However, as I have preferred the evidence of the respondent, such a finding cannot be made. Similarly a finding that D'Souza deliberately inflicted injury to the applicant is also untenable.
20. Lastly, in his record of interview, the applicant has raised, albeit barely, defensive conduct and I need to deal with this. The relevance of that is that if the applicant could show that his actions were necessary and reasonable to protect himself or his property then his criminal conduct is excused. Police

have the right to search and remove items of property from persons arrested. The evidence as I have found it shows that they did no more than was necessary for that purpose. As I have found that the arrest of the applicant was lawful and that only necessary and reasonable force was used for this purpose, self defence cannot be maintained.

21. Having regard to the foregoing I find:-

1. that the applicant was a trespasser on the occasion in question;
2. that he had been directed to leave but refused to do so;
3. that he was thereupon arrested by the police;
4. that he then resisted the police attempts to search him and to remove items of personal property;
5. that he struggled with police in the course of that resisting that and a number of police officers became involved;
6. that in the process of subduing him it was necessary for police officers to take hold of inter alia, his arms and hands;
7. that any injury sustained by the applicant in the course of his arrest and until completion of the removal of his personal property resulted incidentally to the arrest process and entirely from the application of only such force as was reasonable and necessary.

22. The net effect of these findings is that any injury sustained by the applicant did not occur in the course of “an offence” as defined in s 4 of the Act. Consequently the applicant is not a “victim” as defined in that section and he is therefore not entitled to an assistance certificate. Equally however it follows from my findings that any injury sustained by the applicant was sustained in the course of the commission of an offence by him namely, resisting police in the execution of their duty, in turn arresting the applicant

for trespass. He is accordingly precluded from receiving an assistance certificate in any event pursuant to s 12(f) of the Act.

23. The applicant's claim is therefore dismissed.
24. I will hear the parties as to any ancillary orders.

Dated this 17th day of March 2006.

---

**V M LUPPINO**  
STIPENDIARY MAGISTRATE