

CITATION: *Molina v Northern Territory of Australia* [2006] NTMC 054

PARTIES: CIRIACO MOLINA
Applicant
v
NORTHERN TERRITORY OF AUSTRALIA
Respondent

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20407060

DELIVERED ON: 15 June 2006

DELIVERED AT: Darwin

HEARING DATE(s): 16 May 2006

JUDGMENT OF: V M Luppino

CATCHWORDS:

Crimes Victims Assistance Application.

Crimes (Victims Assistance) Act ss 4, 15, 17(1), (2), (3), (4), (6)

Briginshaw v Briginshaw (1938) 60 CLR 336

REPRESENTATION:

Counsel:

Applicant: Ms Spurr

Respondent: Mr Moss

Solicitors:

Applicant: Halfpennys

Respondent: De Silva Hebron

Judgment category classification: C
Judgment ID number: [2006] NTMC 054
Number of paragraphs: 26

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

No. 20407060

BETWEEN:

CIRIACO MOLINA
Applicant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Respondent

REASONS FOR DECISION

(Delivered 15 June 2006)

Mr VM LUPPINO SM:

1. This is an application for an assistance certificate under the Crimes (Victims Assistance) Act (“the Act”). The claim relates to injuries sustained by the Applicant consequent upon an alleged assault by a person identified as Jose Magro (“the Offender”) on 19 October 2003.
2. The evidence before me was in documentary form as required by subsections (3) and (4) of section 17 of the Act. The entirety of the evidential material before me comprised:
 - 1 Affidavits of the Applicant sworn 12 September 2005, 16 January 2006 and 27 February 2006.
 - 2 Affidavit of Miguel Ferraz sworn 28 March 2006.
 - 3 Affidavit of Morgan Moss sworn 17 February 2006.

- 4 Medical report of Dr Barrie Kenny dated 6 April 2005.
- 5 Transcript of evidence in Court of Summary Jurisdiction in *Police v Magro*.

3. The sections of the Act relevant to the issues in this matter are:-

4. Interpretation

(1) In this Act, unless the contrary intention appears –

"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);

"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.

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.
- (4) A Judicial Registrar appointed under section 9(1) of the *Local Court Act* may exercise all the powers and perform all the functions of the Court under this Act, subject to practice directions given by the Chief Magistrate.

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.
- (2) In proceedings under this Act, the Court may receive in evidence any transcript of evidence in proceedings in any other court, and may draw any conclusions of fact therefrom that it considers proper.
- (3) In proceedings under this Act, all evidence other than the evidence referred to in subsection (4) is to be given by affidavit.
- (4) Evidence included in a sworn statement, a medical report, or any other report relevant to the victim's injury, filed at the Court in accordance with rules or practice directions referred to in section 15(1) or with an order of the Court, is not required to be given by affidavit, whether filed –
 - (a) before or after the commencement of this subsection; or
 - (b) in accordance with rules or practice directions in force before or after the commencement of the Crimes (Victims Assistance) Rules.
- (5) Subsection (4) does not prevent a report referred to in that subsection from being given by affidavit.
- (6) A party may cross-examine the deponent of an affidavit, or the person who made a statement or report referred to in subsection (4), only with the leave of the Court.

4. The transcript of hearing of the related criminal charges against the Offender in the Court of Summary Jurisdiction was tendered pursuant to section 17(2) of the Act. The affidavit of Morgan Moss contained two annexures one of which was another part of the transcript of the same proceedings. Whereas the transcript referred in paragraph two above was of the evidence, the transcript annexed to that affidavit comprised the submissions of counsel and the reasons for decision of Mr Loadman SM.

The other annexure to the affidavit was all the Promis records of Northern Territory Police.

5. Noting that section 17(3) of the Act stipulates that all evidence is to be by affidavit and that section 17(6) of the Act stipulates that cross examination of deponents of affidavits is only permitted with the prior leave of the Court, the task of the Court in making findings of fact where there is a dispute or where credibility is an issue is made more difficult. The Court is denied the usual advantage of observing the witnesses but more importantly of having the evidence of the witnesses tested by cross examination. Relying on the transcript of the allied criminal proceedings in the Court of Summary Jurisdiction is a useful alternative and of some benefit but it is less informative given that nuances, expressions, emphasis and other body language is unable to be detected. Markings made by witnesses on exhibits, such as to indicate the location of events and persons, are meaningless unless they are actually described on the transcript. As the burden of proof is on the Applicant, such a situation will commonly operate against the Applicant particularly where a Court is unable to resolve conflicting versions of fact. The Act allows me to both receive the transcript and to draw any conclusion of fact from that transcript that I consider appropriate. However, section 17(2) only applies to a transcript of “evidence” of the proceedings. It does not apply to the submissions of counsel or the reasons for decision of Mr Loadman and consequently I cannot draw any conclusions of fact from those.
6. In the course of the allied criminal proceedings in the Court of Summary Jurisdiction evidence was given by a number of persons. The first was Mr Timothy Gwynne followed by Ms Tracey Merton. They both lived next door to where the alleged incident occurred. The Applicant also gave evidence as well as Senior Constable Kaye Pemberton. The person whom the Applicant describes as his friend in his affidavit of 12 September 2005 also gave evidence. Her name is Thawin Burt. Constable Andrew Jamieson took

statements from some witnesses and he also gave evidence. The defendant in those proceedings and the alleged Offender here, Mr Jose Magro, also gave evidence. Mr Miguel Ferraz, one of the deponents of the affidavits submitted to me, did not give evidence in the Court of Summary Jurisdiction proceedings. I do not know why that is the case but that does not appear to be material in any event. I do not think that the evidence of Mr Ferraz adds much if anything. It generally confirms more or less, other evidence, that there was ill feeling between the Applicant and the Offender.

7. The second annexure to the affidavit of Morgan Moss contains the Police records in relation to the incident including witness statements. Included is the log of the initial attendance by Police. Section 15 of the Act allows me to have regard to this and I think it is particularly telling given aspects of the evidence of the Applicant and Ms Burttt in the allied criminal proceedings. That log records:-

“GALATI/SANDERS attended. Both parties were verbally arguing which then got out of hand and the victim falling to ground. Both the victim and the witness were heavily intoxicated and the victim sustained head and leg injuries from falling to the ground. Nom offender was sober and we informed him that we believe we would be speaking to him at a later date. The next door neighbours saw the 2 males fighting and they believed it to be a fair fight with neither party gainoing (sic) the upper hand. Ambos attended and Transported to RDH. Enquiries continuing...”

8. The reference to the “witness” could only be Ms Burttt given that the “neighbours” are separately referred to. The comment that “...the victim and the witness were heavily intoxicated...” is telling as is the comment that “...the victim sustained head and leg injuries from falling to the ground...”. There is no mention of the stomping at this crucial stage. Indeed, the contrary is the case given the comment that the “... next door neighbours saw the 2 males fighting and they believed it to be a fair fight with neither party gaining the upper hand...”. It is also important to note that the Offender was sober.

9. On the Applicant's affidavit of 12 September 2005, a very vicious, unexpected and unprovoked assault is described. The Applicant alleges that he was approached from behind by the Offender at the entrance to his own unit, he claims that he heard the Offender say "you want something" and that the Offender punched him to the right eye as he, (the Applicant), turned towards him. He claims that the Offender continued to punch him several times to the right side of the head and face. He claims that he then fell to the ground and the Offender jumped on his leg a number of times. He said that as his foot was lying on the palm of a tree stump was not supported by the ground, the jumping caused a break of the leg. The Applicant then says that his friend Ms Burtt came to his assistance but that the Offender pushed her away. He said that Ms Burtt then grabbed a shovel, presumably to prevent any further assault. The Applicant also says that the Offender rubbed a handful of dirt it into his eyes and face.
10. The Applicant says that he then saw that the Offender was struggling with Mr Burtt and he somehow managed to get there but claims he could not stand or walk properly. He said he tried to assist Ms Burtt by pushing at the Offender and trying to pull the shovel away from him. He said that in the course of this further struggle the Offender then pushed him and kicked him to the right side. The Applicant claims that at this point the "neighbours", which could only refer to Mr Gwynne and Ms Merton, came over. He claims that the Offender stopped kicking him when he saw the neighbours. He said that the Offender then left and then he went inside to his unit and called the Police.
11. In an attempt to resolve some inconsistencies between the Applicant's version as per his affidavit of 12 September 2005 and his statement to the Police, the Applicant swore a further affidavit on 27 February 2006. The background to this is that the Applicant gave a statement to Police which was ultimately transcribed into a statutory declaration apparently declared 21 October 2003. That statement was taken by Senior Constable Pemberton

at Royal Darwin Hospital. No interpreter was used at that time. In that statutory declaration the Applicant describes, in similar terms to his affidavit of 12 September 2005, how the assault commenced i.e., that he was punched without warning as he turned to face the Offender. He says however that only one blow was struck at that time and that he then grabbed hold of the Offender's hands and a struggle started. He says that the Offender then punched him three or four times on the right side his face although he describes the punches coming with both fists. He then says that he had fallen to the ground and was trying to protect his head with his hands. He says that he felt pain in the left ankle area. He says nothing at all about the rather vicious stomping that he describes in his first affidavit. The next thing he says is that he noticed the Offender and Ms Burttt struggling over the shovel and that he says that he attempted assist. He says that he looked up and saw his neighbours looking from their balcony on the next door upstairs unit, but does not say that they came and said something to the Offender as he said initially.

12. The omission of any reference to the stomping on the leg and the rubbing of dirt in his eyes and, in comparison to his evidence in the allied criminal proceedings, the crawling to assist Ms Burttt, is quite critical in my view. It is one of the more important points of contention between the parties. Ms Spurr, counsel for the Applicant, pointed out that even if the broken leg occurred in the course of the struggle i.e., by way of a fall as opposed to the stomping the Applicant describes, then the injury is still compensable. Although that is clearly correct in principle, that submission disregards credibility issues.
13. In the Applicant's further affidavit sworn 27 February 2006, the Applicant attempts to explain these omissions and relies on language difficulties. Clearly there were some language difficulties. Despite that he says that he told Senior Constable Pemberton that the Offender jumped on both of his legs and broke the leg. This is in an attempt to address the more limited

information recorded in paragraph 11 of the statement taken by Senior Constable Pemberton. There he is recorded as simply claiming that he felt pain in his left ankle.

14. Similarly where at paragraph 14 of that statement he is reported to have said that his eyes were nearly closed from the assault, he claims that he told Senior Constable Pemberton that that was because the Offender had rubbed dirt in his eyes. He says that she has omitted this. There is no reference to that rather dramatic incident either in the Applicant's statutory declaration and I consider that to also be a notable omission.
15. I have great difficulty in accepting that a Police Officer would not record details of an incident as dramatic as the stomping leading to a broken leg and the rubbing of dirt into the eyes in a statement taken for the purposes of assault proceedings. The Applicant suggests that Senior Constable Pemberton has simply overlooked this. He does not apparently rely on difficulties in communicating this information. That makes the apparent omission by Senior Constable Pemberton even more unlikely in my view. In any event, had he relied on language difficulties, I would not consider that any more credible given the apparent ease with which he adequately described those events in the allied criminal proceedings.
16. The statements of Mr Gwynne and Ms Merton together with their evidence in the allied criminal proceedings also highlight issues relevant to the Applicant's credibility. Neither Mr Gwynne nor Ms Merton saw the start of the altercation. Mr Gwynne checked on the situation three times during the course of the altercation and the first two times he did not think much of it. This itself is inconsistent with the Applicant's version of a sudden, unprovoked and one sided attack. It is consistent with what the attending Police Officers are reported to have been told by the neighbours (which must be a reference to Mr Gwynne and Ms Merton as I have said) i.e., that it was a "fair fight with neither having the upper hand". On the third occasion,

Mr Gwynne took some action as by then the shovel featured. He said that both the Applicant and the Offender had hold of the shovel. It is apparent from his evidence that this occurred outside the Offender's unit. He also said that he could smell alcohol on the Applicant's breath but could not comment about Ms Burt's level of intoxication. He recalled that the Applicant said that his leg was broken and that he had said this after he had taken the shovel away.

17. Merton largely confirmed all this although she recalled seeing Ms Burt at some point involved in the struggle over the shovel. She says she did not get close enough to smell liquor on the breath of either the Applicant or Ms Burt. She recalled that the Applicant uttered something about having hurt his leg, not that it was broken.
18. These two witnesses contradict much of the Applicant's version particularly the claimed suddenness, severity and one sided nature of the assault, the location where the assault occurred and state of intoxication of the Applicant. Mr Gwynne's evidence also has relevance to the location of Ms Burt at the relevant times and puts some doubt to her claim that she saw the Offender stomping on the Applicant's leg.
19. Part of the evidence of Ms Burt contradicts that of the Applicant. The Applicant attested that the Offender approached him at the front door of his (the Applicant's) unit. Ms Burt said that the Applicant went towards the Offender's unit.
20. Although I do not rely on the assessment of credibility of witnesses by Mr Loadman or his findings on the facts, based on the evidentiary material before me, including the transcript of evidence in the allied criminal proceedings, I come nonetheless to the same conclusion as to the credibility of the Applicant and Ms Burt. They were both intoxicated and their denials in that regard are unimpressive and could only be motivated by a perceived need to put their evidence in the best possible light. With that motivation in

mind, an inference that they have colluded in their evidence is easy to draw. The Applicant's explanation for having consumed some alcohol after the event, i.e., as a mouthwash to treat his injuries is convenient but not credible. The transcript from the allied criminal proceedings suggests that he first used an antiseptic as a mouthwash, then apparently the whiskey for the same purpose. That is unlikely and leads to an inference that the claim is conceived purely for the purposes of putting the observations of the attending Police Officers as to the Applicant's state of intoxication in a somewhat favourable light.

21. Assessing the evidence as best I can in the circumstances described, I cannot accept the Applicant and Ms Burt as witnesses of truth. Too much is left either unexplained or is inconsistent with otherwise largely credible, independent or more objective evidence on a number of crucial matters. Those matters are the state of intoxication of the Applicant and Ms Burt, the severity and the claimed sudden and one sided nature of the assault and the Applicant's involvement in the altercation and in the lead up to the altercation. The state of intoxication of the Applicant and of Ms Burt alone is sufficient to seriously question the reliability of their evidence even disregarding any suggestion of collusion. A finding that the Applicant approached the Offender at the Offender's unit in a highly intoxicated state, that an argument ensued which developed into a struggle with both being equally involved is the most likely course of events and this is dramatically at variance with the Applicant's version.
22. That then has to be applied to the context of the current proceedings. The burden of proof before me, per section 17(1), is on the balance of probabilities subject to the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 given the nature of the allegations and the consequences which follow.

23. It is clear that a struggle has occurred and I think it is clear that the major injury suffered by the Applicant namely the broken leg, was suffered in the course of that struggle. According to the Act, the Applicant is only entitled to the issue of an Assistance Certificate if he is a “victim” and suffers “injury” as a result of the commission of an “offence” by another person. All of these terms are defined in section 4 of the Act.
24. For there to be an “offence” within the meaning of the Act, on the facts of the case before me, I must be satisfied that essentially there was an assault. Where the offence relied on is an assault, this requires proof of the absence of consent. My assessment of all the available evidence leads me to conclude on the balance of probabilities that the Applicant sustained his injuries during the course of a fight which occurred after he approached the Offender and as a result of a consensual struggle where both were equally involved. That finding means that the existence of an “offence” has not been established. The Applicant has failed to satisfy the burden of proving the matters required for the issue of an assistance certificate.
25. I therefore decline to issue an assistance certificate.
26. I will here the parties as to any ancillary orders and in particular as to costs.

Dated this 15th day of June 2006.

V M Luppino
STIPENDIARY MAGISTRATE