

CITATION: *Nunggumajbarr v NTA* [2007] NTMC 020

PARTIES: RHONDA NUNGGUMAJBARR

v

NORTHERN TERRITORY OR AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes Victims Assistance

FILE NO(s): 20631575

DELIVERED ON: 3 April 2007

DELIVERED AT: Darwin

HEARING DATE(s): 29 March 2006

JUDGMENT OF: Acting Judicial Registrar Ganley

**CATCHWORDS:**

*Crimes (Victims Assistance) Act*, s.12(c) - Whether the applicant failed to assist police in the investigation or prosecution of the offence.

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

*Tirak v Northern Territory of Australia and Gumbaduck and others* [2002] NTMC 35

*March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506

**REPRESENTATION:**

*Counsel:*

Applicant: Mr S Dexter  
Respondent: Mr M Garraway

*Solicitors:*

Applicant: Priestleys  
Respondent: DeSilva Hebron

Judgment category classification:

Judgment ID number: [2007] NTMC 020

Number of paragraphs: 43

IN THE LOCAL  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20631575

BETWEEN:

**RHONDA NUNGGUMAJBARR**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

### REASONS FOR DECISION

(Delivered 3 April 2007)

ACTING JUDICIAL REGISTRAR GANLEY:

1. The Applicant has applied for an Assistance Certificate to issue pursuant to section 5 of the *Crimes (Victims Assistance) Act* (“the Act”). Liability is not in dispute, however, the Respondent opposes the Application on the basis of section 12(c) of the Act.

2. Section 12(c) states:

“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”.

### **Evidence**

3. The circumstances surrounding the assault are that on 31 January 2006 the Applicant was drinking with three other persons. One of the persons, the Applicant’s sister-in-law, stabbed the Applicant with a steak knife to the left shoulder blade. An ambulance and Police were called and the Applicant gave a statement to Police at the hospital.

4. In her Affidavit, sworn on 7 December 2006, the Applicant deposed that she went to the Police station a few weeks after the assault and withdrew her complaint because her ex-husband threatened to bash her if she didn't, and that she had been "bashed" by her ex-husband many times and she was very scared of him.
5. The Applicant also deposed to the fact that Police never asked her to do anything more after she withdrew her complaint, and if they had of she would have done what they asked.

**Section 12(c) of the *Crimes (Victims Assistance) Act***

6. The question before me is whether the Applicant's actions of withdrawing her complaint constitutes a failure to assist Police in the investigation or prosecution of the offence, and whether she is therefore precluded from being awarded an Assistance Certificate.
7. Mr Garraway of DeSilva Hebron, on behalf of the Northern Territory, conceded that the onus of proving the Applicant's failure to assist rests upon the Respondent. Further, that the withdrawal of the complaint is not prima facie evidence of a failure to assist (*Wolfe v Northern Territory of Australia [2002] NTSC 26*).
8. In *Wolfe* her Honour Justice Thomas stated:  
  
"The withdrawal of a complaint per se is not indicative of a failure to assist Police because it may well be that a person has provided all the information in their possession; taken all reasonable efforts to assist the police in their investigation of the matter; but at the end of the day the matter is not considered to be worth taking any further" (p.18).
9. Mr Garraway argued that *Wolfe's Case* should be distinguished from the present case as *Wolfe* was intoxicated and unable to identify the offender or witnesses. In this case the Applicant identified witnesses but withdrew her complaint three weeks after the alleged assault.

10. It was further submitted by Mr Garraway that it was not clear whether the persons identified actually witnessed the incident, and had the matter been taken further there would have been the prospect of a conviction. However, Mr Garraway conceded that he could not make submissions on why the matter was not taken further by Police as Police records had not been obtained by the Respondent.
11. Mr Garraway concluded that whilst the circumstances surrounding the Applicant's decision to withdraw her complaint were "unfortunate" that the action constituted a failure pursuant to section 12(c) of the Act, and prevented the Police matter being taken further. Further that whilst the Act is beneficial legislation there were "boundaries to the Territory's benevolence", provided for within section 12(c), which precluded an Assistance Certificate being issued.
12. The Applicant's solicitor, Mr Dexter of Priestleys, conceded there was little similarity between the present case and *Wolfe*, and submitted that the Applicant merely relied upon the law espoused in *Wolfe*.
13. As to the Applicant's role, Mr Dexter referred the Court to *Tirak v Northern Territory of Australia and Gumbaduck and Others* [2002] NTMC 35. In that case her Honour Ms Blockland SM stated:

"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 the police in providing assistance when required 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 the 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)".

14. Mr Dexter agreed that an issue for consideration was whether the Police matter was worth taking further, however, determination of the issue was one for Police and the Office of the Director of Public Prosecutions.
15. Mr Dexter also conceded that the Applicant is precluded from being awarded assistance if she failed to assist Police and that the threats relating to her withdrawal were irrelevant, however, there is no evidence that the Applicant refused a request by Police for assistance.
16. The Applicant's evidence, as set out at paragraph 3 of her Affidavit sworn on 7 December 2006, is that "police never asked me to do anything more after I withdrew my complaint. If they had asked me to do something, I would have done what they asked".
17. In concluding, Mr Dexter submitted that his client did take a proactive role, she provided a statement to Police, which gave information pertaining to the identity and names of two witnesses, and she deposed to an ability to attend Court.

**Application of Section 12(c) of the *Crimes (Victims Assistance) Act***

18. The Respondent bears the onus of proving that the Applicant failed to assist Police.
19. It is to be noted that I refused an interlocutory application by the Respondent, filed 28 March 2007, at the commencement of the hearing on 29 March 2007. The Application sought orders that the hearing date be vacated to allow a Summons for Production of Documents to be served on the Commissioner of Police.
20. In considering the application I noted that the Application and supporting Affidavit were filed on 7 December 2006; the Respondent was served with the Affidavit and documents in support of the application (pursuant to section 16 of the Act) at the time of being served with the Application (a rare occurrence in this jurisdiction); an Appearance was filed on 15 January 2007; a 6 week adjournment was

granted at the first mention on 18 January 2007 to allow the Respondent to assess the matter and seek instructions; and the hearing on quantum was listed for 29 March 2007, by consent, on 1 March 2007.

21. I determined to exercise my discretion to proceed with the hearing on the basis that the Respondent, a model litigant, had been afforded reasonable opportunity to investigate, assess and prepare for the hearing.
22. As to the merits of this application, the fact that the Applicant withdrew her complaint is not *per se* indicative of a failure to assist Police. All that is required of her is that she provide Police with all the information in her possession and take all reasonable efforts to assist Police in their investigation of the matter (*Wolfe v Northern Territory of Australia* [2002] NTSC 26 at p.18).
23. Whether the Applicant's evidence was necessary to prove the offence is a matter for consideration by Police and the Office of the Director of Public Prosecutions.
24. The Respondent did not adduce any evidence in respect of the Police investigation or as to why a determination was made by Police or the Office of the Director of Public Prosecutions not to proceed with the prosecution of the alleged offender.
25. The available evidence indicates that the Applicant made a statement at the earliest opportunity which identified two other witnesses to the assault. There is no evidence that the Applicant failed a request by Police for assistance.
26. As a consequence of the Respondent's failure to discharge its burden of proof, I cannot be satisfied on the balance of probabilities that the Applicant failed to assist police in the investigation or prosecution of the offence, pursuant to section 12(c) of the Act.

## Quantum

27. The Applicant's Affidavit of 29 August 2006 deposes that she was admitted to Royal Darwin Hospital for approximately two to three weeks, and that she left to attend a family funeral (paragraph 4). Her evidence is that:

- the pain was "the worst pain" she ever felt and on a scale of one to ten "it was easily a ten", however, the "pain got better after I had been in hospital for a few hours, and the pain medication started to work" and she wasn't in much pain for the rest of her stay in hospital (paragraph 5).
- She felt dizzy all the time while in hospital. She was unsure of whether it was because of the injuries or the medication, however, it stopped when she got out of hospital (paragraph 6);
- She suffers pain in her back around the stab wound at least once every day and it usually gets sore when she carries things with her left arm, when she is sleeping, and when she is walking or running (paragraph 7);
- She can no longer sleep on her left side because of the pain and can only sleep on her back or on her right side and she is unable to carry things with her left arm (paragraph 8);
- She thought she was going to die (paragraph 9) and since the assault she thinks about the knife and it makes her feel frightened and she thinks about the knife every day, and especially when she is not drinking (paragraph 10).

28. The Applicant's subsequent Affidavit, sworn 7 December 2006, evidences that the Applicant:

- could not move for two to three days after the assault due to the pain and she required the assistance of a nurse to help her into a wheelchair for her to go to the toilet and the shower. During that

period she could only lie on her right side and the wound would hurt too much if she laid on her back (paragraph 4);

- took pain medication for two weeks following her discharge to assist with the pain;
- suffered a loss of \$11.00 as the shirt she was wearing was ruined by bloodstains and tears.

29. Mr Garraway, on behalf of the Respondent, submitted that the Applicant's physical and emotional injuries deposed to in her Affidavits included a 5 to 6 cm long and approximately 2cm "flesh wound" and some mental distress. He submitted that as a consequence of being conveyed by Ambulance to Royal Darwin Hospital shortly after the assault the pain caused by the injury was diminished within a few hours as a consequence of the medical treatment; and that hospitalisation was a lesser period to that originally deposed.
30. In respect of the Applicant's ongoing pain it was submitted that it was limited to when the Applicant carried something heavy or ran. Mr Garraway further submitted "there is no expert evidence to support the Applicant's suggestion that the pain is a consequence of the alleged assault".
31. In reply to the Respondent's submission of a lack of expert evidence to support the pain as being a consequence of the assault, the Applicant's solicitor submitted that once there is prima facie evidence of the injury, and of its relationship to the assault, it is up to the Respondent to disentangle the effects of the injury. The Court was referred to *LMP v Collins* as authority for the proposition.
32. The Court received a letter from Mr Dexter, solicitor for the Applicant, following the hearing of the matter advising that he was "mistaken" in his reference to *LMP v Collins* and referred the Court to *Watts v Rake (1960) 108 CLR 158* at 160 per Dixon CJ and *Purkess v Crittenden (1965) 114 CLR 164* at 168 per Barwick CJ, Kitto and Taylor JJ as



authorities for the principle he submitted. Both cases being applied by his Honour Mr Trigg SM in *Frost v Northern Territory of Australia* [2006] NTMC 76.

### **Assessment of Quantum**

33. The medical evidence, via copies of *Surgical Discharge Summary*, *Operation Record*, *St John Ambulance Report* and *Test Results Report*, attached to the Applicant's Affidavit sworn 29 August 2006, is that the Applicant presented to the Emergency Department on 31 January 2006 after being stabbed with a kitchen knife to her left scapula, the wound being 5 - 6 cm in length and 2 cm deep. It was noted by Doctors that the Applicant was not experiencing any shortness of breath and chest test results were normal. The Applicant was taken to theatre for "exploration, washout and partial closure of stab wound" and for treatment of unrelated abscesses on her buttock. She was discharged "home" on 4 February 2006 "after she had not been seen for 6 hours".
34. There appears to be some ambiguities in the Applicant's evidence as provided in her medical records, the original Affidavit of 29 August 2006 and the subsequent Affidavit sworn 7 December 2006. For instance:
- (a) the Applicant deposes to being in hospital for 2 to 3 weeks, whereas the medical evidence reveals that she was in hospital from 31 January 2006 to 4 February 2006 – 4 days;
  - (b) in her original Affidavit the Applicant deposes to pain in her back around the stab wound at least once every day which worsens when she carries things with her left arm, when she is sleeping, and when she is walking or running (paragraph 7) and she can no longer sleep on her left side because of the pain and can only sleep on her back or on her right side and she is unable to carry things with her left arm (paragraph 8). In her subsequent Affidavit (paragraph 4) the Applicant states she could not move for two to

three days after the assault due to the pain and she required the assistance of a nurse to help her into a wheelchair for her to go to the toilet and the shower. Further, during “this” period (ie the 2-3 days) she could only lie on her right side and the wound would hurt too much if she laid on her back.

(c) in the original Affidavit she feels the pain at least once a day, which it gets sore when she carries things with her left arm, when she is sleeping and when she is walking or running. The subsequent Affidavit only evidences taking pain medication for two weeks following her discharge to assist with the pain.

35. In considering the law applicable to the assessment of damages I had regard to the cases put forward by the Applicant’s solicitor (refer to paragraph 31).

36. *Watts v Rake* found, inter alia, that if disabilities of the Applicant:

“can be disentangled and one or more traced to causes in which the injuries sustained through the [offences] play no part, it is the [Respondent] who should be required to do the disentangling and to exclude the operation of the [offences] as a contributory cause” (per Dixon CJ at p. 160).

37. Similarly in *Purkess v Crittenden* the High Court found that if the Plaintiff in a negligence action establishes a prima facie case that incapacity resulted from the defendant’s negligence, the onus of adducing evidence to show the Plaintiff’s incapacity is wholly or partly due to some pre-existing condition rests with the defendant and in the absence of such evidence, if the plaintiff’s evidence is accepted, the plaintiff will be entitled to succeed on the issue of damages and no issue will arise as to the existence of an pre-existing abnormality.

38. I do not find that there is a requirement on the Respondent to have disentangled the effects of the injuries on the Applicant. The evidence in the present case, as provided by the medical records, is that the

Applicant sustained a flesh wound which required surgical intervention and hospitalisation for 4 days.

39. It is the Applicant who bears the onus of proving that her injuries were “caused or materially contributed to” by the wrongful conduct of the Offender, per *March v Stramare Pty Ltd* (1991) 171 CLR 506 at 514.
40. The Applicant relies on her Affidavits to support her pain and suffering and mental distress. I find that there is prima facie evidence to establish the injury (the stab wound), however, there is no medical or psychological evidence to support the basis for the Applicant’s dizziness, the ongoing nature of the pain, or a mental injury.
41. Despite the nature of the assault the physical injuries were treated within a period of four days. I do accept that the pain required medication for a period of two weeks; that the Applicant suffers some mental distress associated with the assault; and the Applicant suffered the loss of her shirt. It is my view that an Assistance Certificate should issue in the amount of \$3,000.00 pursuant to subsections 9(1)(e) and (f) for pain and suffering and mental distress, respectively, and \$11.00 pursuant to section 9(1)(j) for the loss of her shirt.

### **Order**

42. An Assistance Certificate issue in favour of the Applicant in the sum of \$3,011.00; and
43. The Respondent pay the Applicant’s reasonable costs and disbursements, to be taxed in default of agreement.

Dated this 3<sup>rd</sup> of April 2007.

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KATHRYN GANLEY  
ACTING JUDICIAL REGISTRAR