ITATION: *Mbitjana v Northern Territory of Australia* [2007] NTMC 048

PARTIES: SHIRLEY MBITJANA

v

NORTHERN TERRITORY OF AUSTRALIA

AND

BRIAN CHOOLUM

AND

PAMELA ROSS

TITLE OF COURT: Crimes (Victim's Assistance)

JURISDICTION: Local Court - Alice Springs

FILE NO(s): 20204213

DELIVERED ON: 8 August 2007

DELIVERED AT: Alice Springs

HEARING DATE(s): 25 July 2007

JUDGMENT OF: G Borchers SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Applicant: John McBride

1st Respondent: Mark Heitmann

Solicitors:

Applicant: John McBride

1st Respondent: Mark Heitmann

Judgment category classification:

Judgment ID number: [2007] NTMC 048

Number of paragraphs: 16

IN THE CRIMES (VICTIMS ASSISTANCE) COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20204213

BETWEEN:

SHIRLEY MBITJANA
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
1st Respondent

BRIAN CHOOLUM
2nd Respondent

PAMELA ROSS
3rd Respondent

REASONS FOR JUDGMENT

(Delivered 8 August 2007)

Mr G BORCHERS SM:

1. The applicant filed an application for assistance under the Crimes (Victim's Assistance) Act (hereinafter referred to as "the Act") on 7 March 2002 for injuries she sustained on 7 March 2001. Her injuries were inflicted by the second and third respondents, who it is alleged assaulted the applicant at the house of Ted Purvis in the Willowra Community.

2. It is alleged that the second and third respondents separately assaulted the applicant. The second respondent is alleged to have struck her on the head and back with a nulla nulla and the third respondent is alleged to have struck her right lower leg with a wheel spanner.

3. As a result of the assault the applicant suffered a minor laceration to her head, bruising to her back and right ribs and a fractured right ankle. These injuries were

noted on her admission to the Alice Springs Hospital on the night of the alleged assault and set out in a medical report of Dr Charles Butcher dated 10 April 2002 and annexed to an affidavit sworn by the applicant on 14 May 2007.

4. In her application for assistance the applicant seeks an assistance certificate only in respect of pain and suffering and loss of amenities of life. Although there was reference to "mental injury" and "loss of clothing" in the application there was no evidence submitted in support of these claims.

5. Counsel for the first respondent, Mr Heitmann did not concede that the applicant was a "victim" for the purpose of the Act. "Victim" is defined to mean, s.4 of the Act:

> "a person who is injured or dies as the result of a commission of an offence by another person."

The first respondent did not call any evidence but relied on the absence of a Certificate of Conviction.

6. While there is no Certificate of Conviction the applicant relies on material set out in her own affidavit:

   (a) an unsigned statement she made on 16 April 2002;

   (b) an unsworn statutory declaration taken by Constable E W Andrew;

   (c) and correspondence from the Officer in Charge at the Ti Tree Police Station dated 10 January 2002 setting out the investigation undertaken by the police into the alleged assault.

7. Having regard to the material contained in these documents I am satisfied on the balance of probabilities that the applicant was assaulted by the second and third respondents at the Willowra Community on 7 March 2002 and as a result she suffered injuries.

Section 12(c) Crimes (Victim's Assistance) Act

8. Mr Heitmann submitted that the first respondent opposed the issuing of an assistance certificate relying upon s.12(c) of the Act. This section is in the following terms:

> "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;"

9. The law dealing with this section was considered by Ms Blokland SM in *Tirak v NTA* [2002] NTMC 035 wherein she referred to the decisions *Doboon v Northern Territory of Australia* [2002] NTMC 006 and *Wolfe v Northern Territory of Australia* [2002] NTSC 26 and noted:

> "The principles revealed in those authorities are first, that an applicant need not take a proactive rule; secondly, the applicant's role is contemplated as being secondary to the role of the 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."

10. These principles were also considered by Luppino SM in *Stradford v Northern Territory of Australia* [2006] NTMC 004. In answering the question as to what level of "assistance" does s.12(c) of the Act refer to, the learned Magistrate said:

> "A general request must be sufficient and in my view to satisfy that, all that the police need to do is to make it clear to the claimant that they seek information to investigate the matter with a view to prosecuting the offender if the investigations reveal that charges should be laid. Obviously the best way to communicate this is by a direct statement. Absent that, indirect evidence and inference can establish the request in those terms."

11. It is not an issue as to whether the applicant did or did not take a proactive role. On the facts I am satisfied that:

(a) police were called to the Willowra Community on Stirling Station on the night of the alleged incident and spoke to the applicant while she was receiving medical attention of the Community Health Clinic. The applicant indicated that she did not wish to pursue a formal complaint;

(b) the applicant made a statement to police sometime while she was in the Alice Springs Hospital between 9 March 2001 and 10 March 2001. While that statement was never signed by the applicant in it she disclosed the identity of the persons who assaulted her, the location where the assault took place, the identity of possible witnesses and a clear statement that she did not give anyone permission to assault her. In addition she indicated she would be available to give evidence, which I infer constituted an acceptance that should charges be laid after police investigated her allegation she would attend Court;

(c) some thirteen months later on 6 April 2002, before a legal practitioner employed by Central Australian Aboriginal Legal Aid Service (CAALAS) the applicant signed a statutory declaration in which she stated:

> "There is no reason why Pamela and Brian should not go to Court. I understand if they go to Court on a criminal charge, they may face a goal term. I still want the Police to take them to Court for what they did to me. I understand that if the Police take Brian and Pamela to Court for the criminal charge, then I might have to go to Court and tell the Court what happened."

12. There is no evidence that the 6 April 2002 statement prepared by the CAALAS solicitor was ever provided to the police.

13. There is no evidence of what investigation the police undertook in the thirteen months after the applicant provided the information contained in her unsigned statement on 9 or 10 March 2001.

14. I am satisfied that the applicant had assisted the police in all matters known to her as at 9 or 10 March 2001. I am not satisfied that as at that date she had demonstrated any unwillingness to cooperate. As there appears to have been no further contact between the applicant and the police until April 2002, I am not overly surprised that the applicant told the police on that date she was tired of the trouble with the second and third respondents and didn't want to pursue the matter any further. In any event the applicant later recanted her statement and says it arose out of a misunderstanding of what was said to her at that time by police. I do not have to make a finding about whether that was the case or not as it is not particularly relevant given the statement she made in March 2001 and the apparent lack of any investigation into the allegations contained in that statement. I do not conclude that the April 2002 statement eventuated from the police seeking further assistance from the applicant as the police were at that time in possession of sufficient information to investigate the applicant's complaint.

Assessment of Compensation

15. The applicant is an elderly woman. At the time of the assault she was 60 having been born on 1 July 1940. According to Dr Butcher's report she suffered a bi-malleolar fracture of the right ankle. She was admitted to the Alice Springs Hospital and discharged with a fibreglass cast. She was later seen as an outpatient and x-rays in June 2001 revealed that there had been a non-union of the medical malleolus. She was re-admitted on 14 June 2001 for open reduction and internal fixation of the malleolus. It appears that this procedure did not require overnight admission. There is no further evidence concerning her injuries other than Dr Butcher's prognosis that she may be more prone to arthritis. Mr McBride on behalf of the applicant submitted that she had suffered pain for which she had taken Panadol and that as an older person her recovery had been slower and somewhat more difficult than expected. He also submitted that any lack of mobility affected the applicant's lifestyle and accordingly constituted a loss of amenities of life.

16. Taking these matters into account I therefore order that an assistance certificate be issued for compensation in the sum of $9,500 and award the applicant costs in

respect of her application. I will hear the parties further as to those costs in the event that there is no agreement.

Dated this 8th day of August 2007.

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G Borchers
STIPENDIARY MAGISTRATE