

CITATION: *Verity v Kerr* [2013] NTMC 009

PARTIES: BRETT JUSTIN VERITY

v

LESTER KELLY KERR

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 21248796

DELIVERED ON: 5 April 2013

DELIVERED AT: Darwin

HEARING DATE(s): 5 April 2013

JUDGMENT OF: JMR Neill

CATCHWORDS:

Definition (d) of “vulnerable witness” section 21A(1) *Evidence Act* (NT); meaning of “special disability”.

REPRESENTATION:

Counsel:

Prosecution: Ms T. McNamee

Defendant: Mr D. Woodroffe

Solicitors:

Prosecution: DPP

Defendant: NAAJA

Judgment category classification: B

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Number of paragraphs: 22

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21248796

BETWEEN:

BRETT JUSTIN VERITY
Plaintiff

AND:

LESTER KELLY KERR
Defendant

SUMMARY OF DECISION
(Delivered as an Ex Tempore or Oral Decision)

(Delivered 5 April 2013)

Mr John Neill SM:

1. I have heard submissions today about the meaning of “vulnerable witness” in definition (d) in subsection 21A(1) of the *Evidence Act* (NT).
2. Counsel appearing before this court, usually counsel for the prosecution, from time to time seek a ruling that a witness is such a vulnerable witness, however there is little authority on the point. When the question arose in this case I requested counsel for the parties to make submissions and to refer me to any authority which might assist me to rule on this question. I have been given that assistance and I am grateful to both counsel.
3. The process under the legislation involves two and potentially three steps. The first step is to determine whether the witness in question is a vulnerable witness as defined in subsection 21A(1) of the Act. If a positive determination is made the second step pursuant to subsection (2) of section 21A involves determining and ordering the manner in which the evidence may be given so as best to protect that vulnerable witness. The third step

may arise under subsection 21A(2A) and if so will involve a consideration of the interests of justice. Even where the Court is satisfied that somebody is a vulnerable witness, if the court is further satisfied that it is not in the interests of justice for the evidence of that witness to be given in one of the ways provided for then the vulnerable witness must nevertheless give evidence in the usual way.

4. In this case I have had before me virtually the whole of the Crown brief in the preliminary examination – Exhibit P1. I have also had Exhibit P2 prepared for today's submissions which is a further Statutory Declaration of the witness in question, Pauline Murrungurran.
5. In the material in Exhibit P1 there are statements which establish for the purpose of my deliberation today a long history of violence by the defendant against the witness going back over nearly 16 years, sometimes resulting in serious personal injury. There have been domestic violence orders made between them, culminating in a full non-contact domestic violence order.
6. But that history of itself does not necessarily establish the witness's vulnerable witness status. The language of definition (d) in subsection 21A(1) requires that the witness be a person "...who is, in the opinion of the court, under a special disability because of the circumstances of the case or the circumstances of the witness".
7. Must the disability referred to be of such a nature it might literally prevent the giving of evidence? This does not appear to be the case when we consider the view expressed by Mildren J in *Dennis William Hart v Andrew Wrenn and the Australian Broadcasting Corporation* (1995) 5 NTLR 17 at para 210.
8. Mildren J was not primarily concerned in that case with any disability or reduced ability on the part of the relevant witness actually to give evidence. He said: "In my opinion, where a witness has a particular vulnerability to

giving evidence which could cause her injury of a mental kind by having to give evidence as a witness in the case, then that person is a witness who has a special disability because, although witnesses or nearly all witnesses that are expected to give evidence would be anxious, it is not every witness who has a latent disability or vulnerability to be caused what might be said to be a fairly serious problem of a medical kind if that anxiety is converted into a medical condition”.

9. In the particular circumstances of that case Mildren J was dealing with the possibility (based on medical evidence) that if the witness gave evidence without some of the protections afforded to vulnerable witnesses, she could subsequently suffer a deterioration in her pre-existing fragile mental state. The question was not whether she might have a reduced ability to give evidence by virtue of her mental state; rather, that she might pay an unacceptable price in so doing.
10. I am satisfied that Mildren J in that particular case has made it plain that the special disability referred to in subsection 21A(1) (d) in the definition of vulnerable witness is not limited to an inability or reduced ability actually to give evidence. It is a broader concept than that.
11. The Shorter Oxford English Dictionary, third edition, defines “special” to mean “such a kind as to exceed or excel in some way that which is usual or common”. That which is usual or common is the anxiety which every witness who is going to give evidence in court is going to feel. We need to look for evidence of constraint, fear, timidity at the prospect of giving evidence which goes beyond that and which might make it special. It needs to be marked off from others of the kind by some distinguishing quality or feature and it needs to have a distinct or individual character which is additional to the usual or ordinary as I have identified.
12. “Disability” is defined in the same dictionary to mean a want of ability, an inability, an incapacity. However, on the basis of what Mildren J said in

para 210 of his Decision in the matter of *Hart*, I am satisfied that “disability” is not intended to mean and does not mean in this subsection, a complete disability or a complete inability; it includes of necessity degrees of reduced capacity or ability.

13. In the present case I have to consider whether on the evidence before me the witness Pauline Murrungurran is under a special disability within the meaning of the subsection. Is her capacity to give evidence in some way reduced or constrained because of her circumstances or those of the case? Is she is at risk of suffering some particular after effects or consequences of giving evidence which might be ameliorated through the vulnerable witness arrangements?
14. The mere fact that an abused woman gives evidence against the man who has been abusing her and thereby exposes herself to the possibility or even the probability that he will punish her at some future time for doing so, will not automatically make her a vulnerable witness as defined. The vulnerable witness arrangements provided for in the Act cannot prevent or even reduce the risk of such retribution.
15. What I have to consider is whether the witness is likely to be better able to give evidence, or be less constrained in her giving of evidence, or less likely to be adversely affected by her giving evidence, if she is able to give that evidence in one of the ways provided for under the vulnerable witness provisions of the Act.
16. In her Statutory Declaration declared at Darwin on 4 April 2013 being Exhibit P2, Pauline Murrungurran says the following:

“I want to tell my story to the magistrate, but I want someone beside me to make me feel brave about talking. I have never been in court to tell my story before, this is my first time. For this, I need someone next to me to make me brave to tell the magistrate”, and she goes on to say, ‘When I am telling the magistrate my story, I do not want to see Lester in the court either’.

17. She goes on to talk about some of the violent history between them and then says:

“I think if I could have a screen or be in another room away from Lester in court so that I could not see him, I would be less scared about Lester hurting me again and with someone next to me, I would be much more brave to talk about my story to the magistrate”.

18. The witness has made it plain in this statement, which adds to her two other statements and statements of police officers relevant to this matter, that she feels constrained through both general anxiety and specific fear and apprehension about giving her evidence and that she believes she would be less so constrained in the circumstances that might be available to her as a vulnerable witness under the arrangements which the Court can make.
19. Mildren J said in *Hart v Wrenn and the ABC* in para 210, “Although all witnesses or nearly all witnesses that are expected to give evidence will be anxious, it is not every witness who has a latent disability...”, and then he goes on to refer to the particular problem of the witness in that case. In the present case, I am satisfied on the evidence before me that the circumstances of the witness Pauline Murrungurran and the circumstances of the case potentially affecting her giving evidence are not limited to her being a witness who is anxious solely by virtue of being required to give evidence in court.
20. There are further factors which arise in this case. On the material before me it is plain that this witness is an indigenous woman with English as a second language who, although she might not live an entirely traditional lifestyle, certainly does not live a standard western lifestyle. Those circumstances are likely to aggravate the anxiety which she personally might experience giving evidence in court. They are likely to take it beyond the anxiety which, as Mildren J says, all witnesses or nearly all witnesses expected to give evidence in court will experience. There is likely to be a higher degree of

anxiety on the part of unsophisticated witnesses or of people from a very different cultural background.

21. There is no suggestion on the evidence before me that Pauline Murrungurran absolutely could not give evidence because of the fears and constraints that she has deposed to. However, there is evidence that her ability to give evidence may be impaired because of those matters and I am satisfied that such impairment is contemplated by the definition of “special disability” in the subsection.
22. I conclude that Pauline Murrungurran is a vulnerable witness for the purposes of this case for the reasons I have identified.

Dated this 5 day of April 2013

John Neill

STIPENDIARY MAGISTRATE