CITATION: *Rosabelle Simon v Northern Territory of Australia* [2014] NTMC 006

PARTIES:	ROSABELLE SIMON v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Civil
FILE NO(s):	21329025
DELIVERED ON:	21 March 2014
DELIVERED AT:	Darwin
HEARING DATES:	3 and 5 March 2014
JUDGMENT OF:	JMR Neill
CATCHWORDS:	Nature of appeal under *Victims of Crime Assistance Act*; section 43(d) "fail to assist police officers"..."in a material way"... "without reasonable cause"; onus of proof; remedial legislation.

REPRESENTATION:

Counsel:

Appellant:	Ms Trappel
Respondent:	Mr Ingrames

Solicitors:

Appellant:	NAAJA
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID number:	006
Number of paragraphs:	48

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

No. 21329025

BETWEEN:

ROSABELLE SIMON
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR DECISION

(Delivered 21 March 2014)

John Neill SM:

1. This is an appeal from an assessor's decision dated 6 June 2013 that the Appellant Rosabelle Simon is not entitled to an award of financial assistance under the *Victims of Crime Assistance Act* ("the Act") because of the operation of section 43(d) of the Act.

2. On 3 March 2014 I ruled this is an appeal *de novo* although limited to the material which was before the assessor. In so ruling I accepted and followed the reasoning in the unreported Decision of Magistrate Trigg of this Court in *RM v NTA* delivered 22 July 2013.

3. Pursuant to section 49(3) of the Act I am empowered under limited circumstances to receive further material. Such an application was made by the Appellant and not opposed by the Respondent. By order made on 24 February 2014 I admitted further material namely the report of psychologist Dr Ruth Rudge dated 14 October 2013 and some records of the Appellant's

treatment at Milikapiti Clinic. I stated my reasons why I was satisfied "there were special reasons that prevented its presentation to the director or assessor" as required by subsection 49(3).

4. There is no dispute that the Appellant Rosabelle Simon is eligible for financial assistance under the Act on the basis she was the victim of a violent act which was a criminal act. I am satisfied on the evidence before me that the Appellant was the victim of a violent act by her son Jeffrey Simon on 23 December 2011 and that she suffered injury by that violent act. Charges were laid against the Appellant's son. Accordingly, I am satisfied that the Appellant was a primary victim.

5. I am further satisfied on the basis of the medical and psychological evidence before me that the Appellant is eligible to apply for an award for one or more compensable injuries suffered as a direct result of the violent act, including both physical and psychological injuries.

6. None of this is in dispute between the parties. What is in dispute is the operation of section 43(d) of the Act. I have to consider how that section is to be interpreted, the onus of proof relevant to different parts of the section and the factual background against which I apply the section.

7. S.43(d) provides:

> "43. An assessor must not award financial assistance if any of the following circumstances apply:
>
> (d) the Applicant failed, without reasonable cause, to assist police officers in a material way in the investigation or prosecution of the violent act, including by failing to make a formal complaint or statement."

8. Included in the material before the assessor and therefore now before me are three statements of the Appellant made respectively on 24 December 2011, 8 May 2012 and 23 March 2013. In addition there is her Application for Financial Assistance under the Act dated 24 April 2012 and an email dated

17 April 2013 from Crown Prosecutor Damien Jones to Sophie Williams in the Crime Victims Services Unit.

9. In *Francis Tirak v NTA and Ors* [2002] NTMC 35 Chief Magistrate Blokland (as she then was) considered section 12(b), a similar provision in the previous version of the Act. She said: "The principles revealed in (the) authorities are firstly, 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 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** (my emphasis).

10. I respectfully agree and I rule that the onus of proof under the Act and in this case is on the Respondent to satisfy the Court on the balance of probabilities that the Appellant failed to assist police officers within the meaning of section 43(d) of the Act.

11. Section 43(d) of the Act denies an award of financial assistance to an applicant if the applicant has failed within the meaning of the subsection to assist police "without reasonable cause." I am satisfied, and I rule, that it is the Appellant who bears the onus of establishing any "reasonable cause" once the Respondent might have discharged its onus of proving the relevant failure.

12. Section 12(b) of the previous Act was also considered in Woodroffe v NTA [2000] NTCA 8 where at paragraph [28] the Court of Appeal held that "a provision such as 12(b) which permits a person to be excused from his failure to give notice within reasonable time, is a beneficial provision and should be construed accordingly". The present Act is clearly remedial legislation. It should be construed beneficially. This applies also to the Court's consideration of any "reasonable cause" within the meaning of subsection 43(d).

13. I rule that the words "without reasonable cause" in section 43(d) of the Act are to be construed liberally within the context of this remedial legislation.

14. In her first statement made on 24 December 2011 within 24 hours of the violent act, the Appellant said in paragraph two that her son grabbed her by the hair, knocked her down and punched her really hard in the ribs. She lost her wind. She said she did not know he had a knife and she did not know she had been stabbed until she saw the blood.

15. In her Application dated 24 April 2012 for Financial Assistance under the Act the Appellant was asked to describe what had happened. Her description was: "My son, Jeffrey Simon, stabbed me with a large knife after punching me, causing me to fall." This Application was completed only 4 months after the violent act.

16. In her second statement made 8 May 2012, five and a half months after the violent act, the Appellant said in paragraph one she now had a clearer memory of what occurred than at the time of her first statement. She said this was because the first statement was made the day after she was stabbed, when she was in hospital in intensive care following surgery and medication. Her recollection set out in paragraphs three to five of her second statement was that her son knocked her down, that he had a knife about 8" long, he held it in his right hand and he stabbed her in the right side of her body "on my ribs".

17. She explained in paragraph 8 that she saw her blood, she saw the knife in her son's hand, and so she knew he had stabbed her.

18. The hearing of the prosecution case against the Appellant's son Jeffrey Simon was listed before the Supreme Court at Darwin to commence on about 24 March 2013. The Appellant cooperated with arrangements made by the prosecution and travelled from the Tiwi Islands to Darwin to be

available to give evidence at the hearing. On Monday 23 March 2013 she made her third statement. She made it to "a police man" – see paragraph 20 of her third statement.

19. In her third statement the Appellant now said she had seen her son with a knife in his hand but this was well before his attack on her. She thought he was going to cut up some buffalo for meat for the children – see paragraph 13. Subsequently, after she had entered and then emerged from the toilet, a violent act occurred which she recalled as follows: "I don't really know what happened next. Jeffrey must have been standing on the verandah. I think Jeffrey punched me and I fell down. Everything else I don't know" – see paragraph 15.

20. In paragraph 16, she went on to say: "I can't remember if he had a knife when I opened the door. I don't remember if he was angry or still yelling. I can't remember as it is too long ago."

21. Later in her third statement the Appellant sought to explain disparities with her first and second statements. As to her first statement she explained in paragraph 22 of her third statement that she was still drowsy from medication administered for her treatment. Indeed she had said something very similar in paragraph one of her second statement.

22. Then she went on in paragraph 23 of her third statement to say concerning her second statement: "I don't remember making this statement. I can't remember making that statement not now or not ever. In the statement I am supposed to have said I was stabbed by my son, I saw him stab me and I saw the knife in his hand. All I can say about that is that I can't remember that far back – I am now unsure of what happened on the night."

23. The Appellant went on to say in paragraph 24 of her third statement: "It is time to leave this all behind me and move on with my life. I am so stressed out because of work and with my family; I just want to leave it all behind. I

would like to drop all charges against my son, and I don't want the matter to go before the Court. Forgive and forget".

24. The Appellant concluded in paragraph 25 of her third statement: "That is all I have to say about the incident."

25. Crown Prosecutor Damien Jones had the carriage of the prosecution of the Appellant's son before the Supreme Court. He was asked by Ms Sophie Williams of the Crime Victims Services Unit to provide any information on the Appellant's reason for not wishing to go ahead with the prosecution. He replied by email dated 17 April 2013 that in the Appellant's second statement she recalled the stabbing and it was consistent with the first statement. He said: "Her evidence was critical. The fact she was now making a third statement, which was inconsistent with what she had previously stated. The fact that she was a reluctant witness, which would have likely resulted in the Crown making an application to have her declared as an unfavourable witness and seeking leave to cross-examine that coupled with her wish that the case against her son not be proceeded with made the Crown case significantly weaker to the point I formulated the view that there was no reasonable prospect of conviction".

26. On that basis the prosecution filed a *nolle prosequi* on 25 March 2013 and the prosecution of the Appellant's son was ended.

27. If her third statement had involved no more than the assertion the Appellant could no longer clearly recall the events of 23 December 2011 then this could be credible given the effluxion of time. If she no longer clearly remembered the relevant details of the violent act then in making her third statement to this effect she could not be said to be failing to assist police officers. However the contents of the third statement went further than that.

28. She also used her third statement to discredit her first statement (paragraph 22), to deny any memory of ever making her second statement (paragraph

23), and to express her desire to drop all charges against her son (paragraph 24).

29. In the case of *Woodroffe v NTA* [2002] NTSC 26 the Supreme Court on appeal from the Local Court considered the issue of failure to assist under section 12(b) of the former Act. In that case the Applicant had made contact with police in relation to the criminal matter and made a negative and unhelpful statement to the effect he was drunk at the time of the offence and could not remember what had happened or the identity of the offenders. He said there was no point in pursuing the matter and that he wished to withdraw the complaint. Her Honour Thomas J considered that this conduct constituted a failure to assist police.

30. Thomas J made it clear at paragraph [24] of that Decision that it was not the mere desire to withdraw the complaint that constituted the failure to assist; rather it was that plus the fact that information known to the Appellant in that case was not passed on to police.

31. In a Decision of Magistrate Luppino (as he then was) of *NTA v Rosaria Longmair* [2006] NTMC 5 the Applicant in that case had been assaulted by her boyfriend but nevertheless wanted to continue the relationship. She provided a statement to support the making of a restraining order but declined to make an official complaint. Magistrate Luppino found at paragraph [10] that the Applicant's actions amounted to a failure to assist police because it appeared her intention was not to give police the information and assistance they required properly to investigate the matter. At paragraph [14] he said, "...the statement that she did not want the offender to be prosecuted can therefore only indicate a failure to assist and a present intention not to give evidence against the offender. Consequently she had not given police all information available and she has not done all that was reasonably possible for her to do." At paragraph [17] Magistrate Luppino concluded "...a claimant who indicates an unwillingness to have

the offender brought before the criminal courts cannot he said to have assisted the investigation or prosecution of the offence whether or not charges are then laid."

32. He went on to say in paragraph [17] that the impact of the failure to assist is not the issue – that is, the failure to assist did not have to result in a failure to secure a conviction.

33. Under section 43(d) of the present Act the position is different. The failure must be a failure to assist in "a material way". This concept is not defined within the Act and so the words must be given their ordinary meaning. That is, the failure to assist must be a failure in some important way.

34. I rule that any failure to assist must be such as to have, actually or potentially, a negative impact on the police investigation of the case and/or on the prosecution of the case.

35. In the present case there was a third statement wherein the Appellant provided in paragraphs 13 to 16 inclusive a much more limited recollection than provided in her second statement. In the second statement she had recalled seeing her attacker, her son, with an 8" knife in his hand immediately after he "punched" her and she fell to the ground, she felt the pain, and she saw she was bleeding. In the third statement she claimed no longer to recall any knife or even any attack on her by her son, although she retained a precise recollection of events immediately before and after the violent act.

36. In paragraph 22 of her third statement the Appellant stated that she did not remember ever making her second statement "...not now or not ever." It strains credibility that a person could have attended on police and made a detailed statement concerning such a major event in her life and 10 months later have no memory whatsoever of her ever making that statement,

particularly when she does remember making her earlier first statement, and her memory of surrounding events remains unimpaired.

37. This change in and failure of the Appellant's recollection of events occurred in the context of her last-minute stated wish that her son no longer be prosecuted for the violent event.

38. Ms Trappel for the Appellant submitted that the discrepancies in recollection between the third statement and the earlier statements could be explained by the Appellant's poor memory submitted to be a result of her earlier long-grass life style and/or her subsequent PTSD caused by the violent act. She relied on the report of Dr Rudge in support of this submission.

39. Dr Rudge referred to a history provided to her by the Appellant of an earlier long-grass lifestyle but she did not elaborate on this. She stated that she did not carry out any formal memory assessment of the Appellant. She noted on page 5 of her report that recollection of the violent act was painful to the Appellant so she shied away from such recollection. This is not the same thing as saying the Appellant could no longer recall the violent act. Indeed, the recollection was quite clear to the Appellant four months and again nearly six months after it occurred, as appears from the Application and from her second statement.

40. I am not satisfied that the changes in the Appellant's recollection of the violent act set out in her third statement were attributable to her fading memory. I am satisfied on the balance of probabilities that the Appellant knowingly misrepresented her true recollection of the violent act in making her third statement.

41. Accordingly I find that the Appellant failed to assist police officers in the prosecution of the violent act by a combination of her knowingly resiling from material aspects of her evidence provided to police, and her saying in

her third statement and her also telling Crown Prosecutor Damien Jones that she wished to drop all charges against her son and she did not want the matter to go before the Court.

42. I find that this failure to assist was a failure "in a material way" in that in Mr Jones's opinion it "made the Crown case significantly weaker to the point I formulated the view that there was no reasonable prospect of conviction" and he filed a *nolle prosequi*.

43. I turn now to consider whether the Appellant's said failure was "without reasonable excuse".

44. It was submitted on behalf of the Appellant that her claimed inability to remember exactly what happened on the night she was stabbed, and her complete loss of memory about her second statement, were the result of her poor memory attributable to her PTSD. Dr Rudge's report does not establish any memory disorder beyond the possibility ("may have some impact on her ability to fully recall..." – page 5.2) that recalling the events in question is highly distressing so the Appellant has a "strong desire to cease the recall" – page 5.3.

45. This submission if accepted might explain why the Appellant could recall the traumatic events of the violent act but was now reluctant to admit this. That is, why she might deny that memory to avoid having to relive the events by giving evidence about them in Court.

46. There is no sufficient evidence before me to support that submission. Not only is this opinion couched in terms of possibility rather than probability, it is inconsistent with the very clear and open recall of events provided by the Appellant in her application for financial benefits completed in April 2012 – four months after the events, and in her her second statement in May 2012 – five and a half months after the event, and in her recollection of surrounding events in her third statement. The submission does not explain the

Appellant's claim that she had no memory whatsoever of having made her second statement.

47. The Appellant has failed to discharge her onus in respect of a reasonable excuse for her failure to assist police officers in a material way in the prosecution of the violent act.

48. The assessor's decision that the Appellant was not entitled to an award on the basis of section 43(d) of the Victims of Crime Assistance Act is confirmed.

Dated this 21st day of March 2014

John Neill
STIPENDIARY MAGISTRATE