PARTIES:	GEISZLER, PETER LANGLOIS
	v
	NORTHERN TERRITORY OF AUSTRALIA & ANOR
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRRITORY
JURISDICTION:	Civil
FILE NOS:	No. AP9 of 1995
DELIVERED:	Darwin 3 April 1996
HEARING DATES:	19 December 1995
JUDGMENT OF:	Kearney, Angel and Mildren JJ

CATCHWORDS

Appeal - Criminal law - Compensation for injuries - Crimes (Victims Assistance) Act s12 - Reporting of offence to police within a reasonable time - "reasonable time" - Lack of evidence to make finding not reasonable - Appeal allowed

Crimes (Victims Assistance) Act s12
Northern Territory Criminal Code s154

Dodd v Executive Air Services Pty Ltd [1975] VR 668, applied
Hick v Raymond & Reid [1893] AC 22 applied
Opera House Investments Pty Ltd V Devan Buildings Pty Ltd (1936) 55 CLR 110 applied
Viscount Tredegar v Harwood (1929) AC 72 applied
Wilson v Lavery (1993) 110 FLR 142 applied
Wilson v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328 applied
Schmidt v South Australia (1985) 37 SASR 570 disapproved

REPRESENTATION:

Counsel:

Appellant: J B Waters

First Respondent: P Tiffin

Solicitors:

Appellant: Mildrens

First Respondent: Attorney-General of the Northern Territory

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP9 of 1995

BETWEEN:

PETER LANGLOIS GEISZLER
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND:

CRAIG GEOFFREY BOJCZUK
Second Respondent

CORAM: KEARNEY, ANGEL and MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 3 April 1996)

KEARNEY J:

The background to the appeal and the matters which have been argued are conveniently set out in the judgment of Mildren J; I need not do so again.

The appeal to the Supreme Court was restricted to a question of law; on the further appeal, this Court is confined to deciding whether the Supreme Court was right or wrong in dismissing the appeal.

It was accepted before the learned Magistrate that the first respondent was required to establish that the commission of the alleged offence of 16 May had not been reported to the Police within a reasonable time after that date.

The effective requirement that there be a report within a reasonable time is, I think, imposed to enable Police properly to investigate the allegation. Where the allegation is of conduct such as that alleged here, the lack of any report until a long time has elapsed may in itself suffice to establish without more, as a matter of common sense, that the allegation could no longer be properly investigated. The period of "almost 6 months" which elapsed in the circumstances which obtained in *Schmidt v South Australia* (1985) 37 SASR 570 fell into that category. In the present case the period which elapsed was about 2 months.

His Worship accepted that the personal circumstances of the appellant-reporter constituted a consideration relevant to the assessment of a "reasonable time", and were such that non-report by 18 June did not enliven s12(b) of the Crimes (Victims Assistance) Act. He appeared to draw the outer limit of reasonableness at 1 July.

What is a "reasonable time" for the purposes of s12(b) is to be assessed objectively: what would a reasonable person regard as a time in all the circumstances of the case

within which Police could properly investigate the allegation. That is a question of fact and degree, involving an evaluation on which minds may reasonably differ; it was in that sense, I think, that her Honour characterised the decision as discretionary.

In my opinion, it cannot be said in this case that the period 16 May - 20 July was self-evidently so long that, without more, it established that a proper Police investigation was no longer practicable. What was clearly required of the first respondent-applicant was some evidence from the Police to that effect. No such evidence was sought to be adduced. There was no other evidence material to the issue of the reasonableness of the time. Giving the widest scope to his Worship's exclusive fact-finding power, and to his evaluation of whether the report was within a "reasonable time", I consider that his conclusion was not supported by any evidence, and therefore cannot be sustained.

Accordingly, I would allow the appeal; I concur in the order proposed by Mildren J.

ANGEL J: The facts and circumstances giving rise to this appeal are fully set out in the reasons for judgment of Mildren J and I will not repeat them.

Having regard to the terms of s12(b) of the Crimes (Victims' Assistance) Act, proof that the commission of the offence was reported to a member of the police force within a reasonable time is not a condition precedent to the issue of a Certificate. I am of the view that the onus was on the respondent to prove that the commission of the offence was not reported to a member of the police force within a reasonable time after the commission of the offence. Section 12, so far as relevant, provides:

> "The court shall not issue an assistance certificate -
>
> (b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;
>
> (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;".

This section is materially different to the South Australian provision considered by Bollen J in *Schmidt v South Australia* (1985) 37 SASR 570. The South Australian provision, s7(9a) of *Criminal Injuries Compensation Act*, provides:

"(9a) The court shall not make an order for compensation in favour of a claimant if it appears to the court that -

(a) the claimant failed, without good reason, to report the offence to the police within a reasonable time after its commission; or,

(b) the claimant failed, without good reason, to co-operate properly with the police in the conduct of their investigations into the offence,

and that the failure hindered the police to a significant extent in carrying out their investigations into the offence."

Section 7 (9a) concerns only the claimant and the police. Section 12 of the Northern Territory Act is of much wider import. Section 12(b) makes no mention of an applicant and places no onus on an applicant or anyone else to inform the police. Nevertheless, unless the commission of the offence is reported to a member of the police force within a reasonable time after the commission of the offence, the court is bound to refuse a certificate. Contrary to the view of Thomas J, s12 does not involve matters of discretion.

As I have said, s12(b) casts no onus on an applicant to report. In contrast, s12(c) requires the applicant to assist the police force in the investigation or prosecution of the offence. Under s12(b) a report may be made by anyone. It is the absence of a report within a reasonable time, rather than

the applicant's failure to report within a reasonable time, which precludes qualification for a certificate.

I agree with Mildren J that it was not open for the learned Magistrate and Thomas J to find that the police were prejudiced in their enquiries, the matter not having been reported to the police by the appellant until 20 July 1993. There was no evidence of prejudice and no evidence from which such could be inferred. Had the period between the incident and the report thereof to the police been a very lengthy period, such an inference might have been drawn, but in the circumstances of this case I do not think such an inference could be drawn from the period 16 May 1993 to 20 July 1993.

The question of the police being prejudiced in their enquiries may or may not be a consideration under s12(b). It is a prime consideration under the South Australian legislation. The learned Stipendiary Magistrate and Thomas J, by analogy with the South Australian provision, held the police had been so prejudiced. However, such parity of reasoning is, in my view, unsound, given the express requirement in the South Australian legislation that a failure to report an offence (by the claimant) within a reasonable time must, "hinder[ed] the police to a significant extent in carrying out their investigations into the offence". No such

stipulation appears in s12. Prejudice to police enquiries is more properly to be considered under s12(c), a point the appellant did not address in submissions.

The ambit of s12(b) is determined, not by inferring "prejudice to the police" but by the words "within reasonable time". The words "within reasonable time" in s12(b) mean within a time reasonable in all the relevant circumstances of the case. In determining what circumstances are relevant, regard must be had to the nature of the offence, the circumstances of its commission, its consequences and its aftermath.

The appellant does not say his injuries were maliciously inflicted, ie by a deliberate assault, but that they were a consequence of what was described by the learned Magistrate as "a non-malicious piece of physical horseplay". The criminal nature of "Bongo's" conduct would not have been self-evident to the lay mind - foolish, negligent, even loutish, it may have appeared, but not self-evidently criminal. Section 154 of the *Criminal Code (NT)* is a hybrid; it is not known to the common law.

Apparently there were other patrons present. We do not know whether they saw the incident. It occurred in a public

bar and one may infer there was a barman or barmen present. We do not know whether he or they saw the incident.

No one other than the appellant was demonstrated by the evidence to have reported the matter to police. On the other hand, there was no evidence that it was only the appellant who reported the matter to police.

If, in all the circumstances, the appellant was required to act reasonably himself in seeing that the matter was reported to police, he was not compelled altogether to disregard his own interests; he was quite entitled to take into consideration the motives of convenience and interest which affected him rather than the police. A civil claim, whether in tort or pursuant to the *Crimes (Victims Assistance) Act* was his to pursue and nothing in s12(b), as I read it, compelled the applicant to elevate reporting the matter to police above his other interest in investigating and pursuing a civil claim. I do not think it can be said the applicant acted unreasonably. In so far as there be any question whether the appellant acted reasonably, the learned Magistrate was bound to take into consideration the motives of convenience and interest which affected the appellant not those which affected the police force, see *Viscount Tredegar v*

Harwood [1929] AC 72 at 82; *Opera House Investments Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 125, 126.

As the learned Magistrate held, the appellant had good reason for not reporting the matter prior to 18 June 1993 when he was advised by his solicitor as to his rights. However, the learned Magistrate found that it was unreasonable to delay reporting the matter until 20 July. I think the learned Magistrate was wrong in this respect. In the interim, the appellant and his solicitor had identified the hitherto unidentified man called "Bongo". There was no evidence to suggest the police could have identified and located the whereabouts of "Bongo" any quicker and I do not think the appellant was shown to have acted unreasonably in the circumstances.

In my opinion, the respondent failed to adduce evidence to show that the commission of the offence was not reported to a member of the police force within a reasonable time after the commission of the offence.

I would allow the appeal and remit the matter back to the Local Court for rehearing before a different Magistrate. The appellant should have his costs here and in the courts below.

MILDREN J:

On 16 May 1993 the appellant was at the Karama Tavern, Kalymnos Drive, Karama. He played eight ball with a man called "Bongo". At 8pm the appellant left the hotel. As he was leaving, "Bongo" grabbed him from behind in a bear hug around the shoulders and upper arms. The appellant lost his balance and fell to the ground with "Bongo" on top of him. The appellant suffered a broken left ankle which required surgery. He remained in hospital until 29 May 1993 and subsequently returned to hospital for outpatient treatment and physiotherapy. It appears to have been accepted by the appellant that the injury he suffered was not maliciously inflicted but was as described by the learned stipendiary magistrate "a non malicious piece of physical horse play". The appellant consulted a solicitor, Mr Cameron Stuart, of Mildrens, solicitors, on 18 June 1993 and was advised by Mr Stuart that the actions of the assailant may amount to a dangerous act under s154 Criminal Code and that the appellant could apply for compensation pursuant to the *Crimes (Victims Assistance) Act*. This advice was confirmed by letter from Mr Stuart dated 21 June 1993. Mr Stuart and Mr Geiszler made efforts to ascertain the true name of "Bongo". When this was achieved the appellant reported the incident to police on 20 July 1993. The police file went missing and nothing was done by police for some weeks. On 9 September 1993, the Officer in

Charge at Casuarina Local Police Office advised Mr Stuart that the matter was being handled by Senior Constable Wardrope. By letter (undated) from Senior Constable Wardrope to the office of Mildrens, solicitors, apparently received on 22 November 1993, Constable Wardrope advised he had interviewed Mr Bojczuk in relation to the complaint made against him by Peter Geiszler. He further advised the matter had been forwarded to the Prosecution Section for a decision. On 25 November 1993 the Police Prosecutions Unit advised Mr Stuart by letter that no charge would be laid as a result of the incident.

The matter before the learned stipendiary magistrate on 30 September 1994 was an application by the first respondent for an order that the application for an assistance certificate by the applicant dated 10 February 1994 be struck out for failure to report the offence to a member of the Police Force within a reasonable time after the commission of the offence pursuant to section 12(b) of the *Crimes (Victims Assistance) Act*.

The evidence before the learned stipendiary magistrate included oral evidence given to the Local Court by Acting Senior Sergeant Stephen John Wallace, the officer in charge of the communications centre. He gave evidence to the effect that there are a number of ways members of the public can lodge a complaint with the NT Police Force. These include contact by telephone, arranging for another person to make contact with the police, or arranging for police to attend

either their home or whilst they are in hospital to enable them to make the complaint.

Section 12(b) of the *Crimes (Victims Assistance) Act* states as follows:

> "The Court shall not issue an assistance certificate -
>
> (b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;"

The learned stipendiary magistrate in his reasons for decision stated that he accepted there was good reason why the appellant did not report the matter prior to 18 June 1993 when he received certain advice from his solicitor as to his rights. The magistrate found that it was unreasonable to delay the report much beyond 18 June 1993 and "certainly unreasonable by say 1 July in the circumstances of this case, let alone 20 July". Accordingly, the magistrate found that pursuant to s12b of the *Crimes (Victims Assistance) Act* the matter was not reported to the police within a reasonable time, there were no circumstances which prevented the

reporting of the matter to the police after 18 June, and therefore an assistance certificate shall not issue.

From that decision, the appellant appealed to Thomas J. The sole ground of appeal pursued before her Honour was that there was no evidence to support the learned magistrate's finding that the commission of the offence was not reported within a reasonable time. The learned magistrate arrived at his finding in this way. He held that the delay in reporting the matter up to the time the appellant became aware that the second respondent's conduct may be a criminal offence was not unreasonable; but he held that the delay thereafter, until 20 July, was unreasonable because the delay was sufficient to prejudice the police in their enquiries in that the matter was not then sufficiently fresh to be properly investigated.

The appellant's complaint before Thomas J was that there was no evidence to support the finding that the police were prejudiced in their enquiries, whether by the delay in making the report, or otherwise. Thomas J found that there was in fact no evidence to support any finding of prejudice to police enquiries, but that the learned magistrate was justified, without evidence, in reaching the conclusion that the delay made it difficult for the police to properly investigate the allegations, it being axiomatic that the delay must have prejudiced the enquiry. In arriving at this conclusion, her Honour relied on certain observations in *Schmidt v South*

Australia (1985) 119 L.S.J.S. 417 (where the delay had been one of 6 months) where Bollen J approved a finding made by the District Court that a delay of 6 months was something which `obviously' hindered an investigation. Thomas J concluded that "a failure to report a matter of this nature to police within a reasonable time necessarily hinders police in their ability to investigate the offences". Accordingly, the appeal was dismissed.

The grounds agitated by the appellant before this Court were essentially that her Honour's conclusion that the learned magistrate's findings of unreasonable delay based on a finding of prejudice to police enquiries for which there was admittedly no evidence was wrong in law. Clearly an ultimate finding of fact which is based on findings of primary facts which are incapable of being supported by any evidence at all, is an error of law: see proposition No.3 in *Wilson v Lowery* (1993) 110 FLR 142 at 146.

The first respondent's argument, in short, was that

(a) there were facts upon which the inference of unreasonable delay was able to be drawn by the learned magistrate.

(b) Thomas J was right in concluding that it was axiomatic that the delay would prejudice police enquiries.

(c) the burden of proof rested upon the appellant before the learned magistrate to show that there had been a

report made to the police within a reasonable time, and therefore the onus fell upon the appellant to show that there was no prejudice to the police enquiries.

The *Crimes (Victims Assistance) Act* is remedial legislation. Accordingly, where there is ambiguity, the construction most favourable to an applicant is to be preferred: see *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335; *Dodd v Executive Air Services Pty Ltd* [1975] VR 668 at 679, 682. Section 12 of the Act does not make it entirely clear where the onus lies in relation to proof that the report of the offence was made to the police within a reasonable time. In my opinion the wording of s12 does not clearly make proof of that matter a condition precedent to the issuing of a certificate. It is equally open to the interpretation that it is a matter, which if raised by a respondent to the application, places the burden on that respondent; and if the applicant asserts that the Court ought to be satisfied that circumstances existed which prevented the reporting of the commission of the offence, the burden of proof in respect of that matter then rests with the applicant. Our attention was directed to s12(a) where it was submitted that logically the applicant should bear the onus in respect of proving that the relevant person was a victim, as defined. Even if that be so, it does not necessarily follow that the

onus in respect of any of the other matters in s12 which operate to preclude the issuing of a certificate ought to be construed in the same way. Section 12(a) precludes the issue of a certificate where the Court is *not* satisfied that the person killed or injured was a victim, and because of this, it is easy to conclude that that casts upon an applicant a matter about which there must be proof. The other subparagraphs of s12 are not worded in this fashion. I consider that the correct conclusion is that the burden of proving that the offence was not reported within a reasonable time rested with the first respondent.

The question of what is a reasonable time depends on the circumstances of the case; there is no such thing as a reasonable time in the abstract: see *Hick v Raymond and Reid* [1893] AC 22 at 28-29, 37; c.f. *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 116, 117; *Waters and Others v Public Transport Corporation* (1991) 103 ALR 513 at 529, 535, 538-539, 547-548, 559.

The question is then which circumstances are relevant, and which are not. I accept the view of the learned magistrate that to ascertain the relevant circumstances, one should have regard to the purposes of the subsection. I accept also his Worship's view that these appear to be to assist in the early investigation of claims so that false claims may be rejected, and any contributing conduct on the part of the victim, which,

by s10(2), is to be taken into account, may be investigated. A relevant circumstance would be, therefore, whether or not the police investigation into the alleged offence had been prejudiced to such a degree that the matter in some relevant respect was not able to be properly investigated. However mere delay may not necessarily prejudice an investigation; it must always be a question of fact and degree.

I therefore disagree with the learned magistrate and with Thomas J that there was anything axiomatic about the period of delay in this case which necessarily lead to the conclusion that there had been unreasonable delay. The first respondent called no evidence to show that by the time the alleged offence had been reported to the police, there were any difficulties caused by that delay in the investigation by police. In the absence of evidence, in my opinion no such conclusion was open. To the extent that Bollen J's judgment in *Schmidt v South Australia* is authority to the contrary, I consider it ought not to be followed. As that conclusion was the foundation upon which the finding of unreasonable delay was made, it follows that the learned magistrate's decision was wrong in law.

As to the respondent's submission that there were other facts relied upon by the learned magistrate from which the inference of unreasonable delay was drawn, the facts relied upon are not evidence upon which such an inference can be

drawn. The first matter relied upon was that if the offence had been reported sooner, witnesses at the Tavern may have been located. There was no evidence as to whether or not there were any witnesses located. The second matter was that the learned magistrate inferred that certain information from two potential witnesses was more readily discoverable in June than in July. No evidence was called to support that conclusion. I consider that these inferences could not be drawn as there was no evidence to support them. This is also an error of law.

I would allow the appeal, set aside the learned Magistrate's order that an assistance certificate not issue, and his order for costs, and remit the matter to the Local Court for hearing before a differently constituted Court. The first respondent is to pay the appellant's costs in defending the first respondent's application in the Local Court, the appellant's costs of the appeal before Thomas J, and the costs of this appeal.
