

PARTIES: NORTHERN TERRITORY OF AUSTRALIA

v

EDEN FRANK PICKERING

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY exercising Territory jurisdiction

FILE NO: LA24/2001 (20015917)

DELIVERED: 9 May 2002

HEARING DATES: 2 April 2002

JUDGMENT OF: THOMAS J

**CATCHWORDS:**

CRIMES VICTIMS ASSISTANCE

Offence to be reported to police – within a reasonable time.

*Crimes (Victims Assistance) Act 1983* (NT) s 12(b)

*Wilson v Lowery* (1993) 110 FLR 142; *Geiszler v NT of Australia* (unreported NT Court of Appeal, 3 April 1996); *Kinsella v Solicitor for the Northern Territory* (1997) 138 FLR 213, applied.

**REPRESENTATION:**

*Counsel:*

Appellant: M. Grant  
Respondent: I. Rowbottom

*Solicitors:*

Appellant: Halfpennys  
Respondent: Hunt & Hunt

Judgment category classification: C

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

*Northern Territory of Australia v Pickering* [2002] NTSC 28  
No. LA24/2001 (20015917)

BETWEEN:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Appellant

AND:

**EDEN FRANK PICKERING**  
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 9 May 2002)

- [1] The appellant appeals from a decision delivered in the Local Court on 17 October 2001. The appeal involves a consideration of the provisions of s 12(b) of the Crimes (Victim's Assistance) Act 1983. The appeal is from the learned stipendiary magistrate's determination to the effect that a reasonable time for reporting the commission of the subject offence had not expired.
- [2] The grounds of appeal are as follows:
- “1. The learned Magistrate erred in finding that the appellant had failed to discharge the onus of establishing that the commission of the offence had not been reported to a member of the Police Force within a reasonable time.

Particulars

- 1.1 The learned Magistrate applied the wrong test in determining whether the onus had been discharged by asking whether the delay has prevented investigation of the matter.
2. The learned Magistrate erred in finding that the commission of the offence had been reported within a reasonable time.

Particulars

- 2.1 There was no evidence on which to find that police could properly investigate the matter.
- 2.2 There was no evidence upon which to find that the offender could be identified by attendance at football clubs.
- 2.3 The learned Magistrate's consideration whether the police's case would have been advanced had there been a contemporaneous report was irrelevant.
- 2.4 The learned Magistrate inferred from the matters at 2.1, 2.2 and 2.3 that a reasonable time had not expired, which inference was not reasonably open."

[3] The orders sought by the appellant are as follows:

- "1. That the Judgment of the Local Court delivered 17 October 2001 in Local Court proceeding number 20015917 in favour of the applicant be set aside.
2. That the matter be remitted to the Local Court for reassessment.
3. That each party bear their own costs of and incidental to the within notice of appeal."

[4] Section 12(b) of the Crimes (Victims Assistance) Act 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; ....."

- [5] Section 19 of the Local Court Act limits appeals of this nature to questions of law. There will only be an appellable error of law if:
- (1) there was no evidence on which a finding of fact could be made;
  - (2) the finding was inferentially made, which inference was not reasonably open on the primary facts found; or
  - (3) the magistrate applied the wrong legal test in determining what was a reasonable time in the circumstances see *Wilson v Lowery* (1993) 110 FLR 142 at 146.
- [6] The construction of s 12(b) of the Crimes (Victims Assistance) Act has been the subject of a number of decisions of this court (*Geiszler v Northern Territory of Australia* (unreported Northern Territory Court of Appeal, 3 April 1996) and *Kinsella v Solicitor for the Northern Territory* (1997) 138 FLR 213).
- [7] The principles established in these decisions which are applicable in this matter are:
- (1) The onus is upon the Solicitor for the Northern Territory to show the offence was not reported within a reasonable time.
  - (2) What is reasonable within s 12(b) is to be considered from the perspective of police receiving a report and the time it is received.

[8] It is not in dispute that the respondent was assaulted on 25 October 1999.

The learned stipendiary magistrate found that (t/p 2):

“Mr Pickering suffered grievously as a result of the blow. He sustained a broken jaw and fractured teeth. I do not propose to repeat or set out or state the manner in which he suffered as a result of the assault and injury, and still suffers as a result of the assault and injury. In place of doing that I refer to the material in his affidavit from paragraphs 15 to 18 inclusive.”

There is no challenge to this finding. The assault had serious consequences for the respondent Mr Pickering.

[9] It is further agreed that the respondent did not report the assault to police until 22 September 2000. The report to police was made approximately 11 months after the assault had taken place. The respondent gave this evidence before the learned stipendiary magistrate on the first day of the hearing which was 25 September 2001 (t/p 13):

Q: “Can you tell the Court what was the date that you reported the incident to the police?”

A: “September 22<sup>nd</sup> 2000.”

[10] The hearing of this application commenced on 25 September 2001. The applicant, Eden Pickering, and his de facto wife Catherine Delacruz, gave evidence in support of the application. Evidence was given for the Northern Territory of Australia by Acting Sergeant Hill.

[11] On 25 September 2001, being the first day of the hearing, Acting Sgt Hill stated that following receipt of the complaint of an offence, a statement had

been taken from the respondent. Several days later on 31 October 2000, Acting Sgt Hill seized a recording of surveillance tape from MGM Grand Darwin Casino. The incident, which was the alleged offence the subject of complaint, was not shown on the tapes. Acting Sgt Hill gave evidence that the period of time that had elapsed between the commission of the offence and the date it was reported made any investigation of the offence more difficult. He went on to state that if the offence had been reported at the time it would have been possible to speak with security personnel and other persons who were in “Sweethearts” at the time. His evidence at t/p 28 before the learned stipendiary magistrate is as follows:

“Had the offence been reported at the time of its commission, what would you have done to identify the offender?---Obviously viewing the tapes at the scene, at the MGM Grand, and seize – seizing the tapes, speaking with security personnel and possibly any other persons who were in Sweethearts at the time of the incident.”

and t/p 29:

“Were you able to charge an offender with the offence?---No.

Why could you not do that?---We did not have a nominated offender or a suspect for the offence.

Did Mr Pickering provide any names of witnesses to you?---No, other than Catherine.

Did that witness provide a statement to you?---No, not at the time.

HIS WORSHIP: This was an investigation you didn’t spend much work on, wasn’t it?---I spent some time on it, Your Worship, but not too much time obviously. There was not much to go on.

That’s the reason why there wasn’t much to go on, reported too late?---Yes.”

[12] From the transcript of proceedings on 25 September 2001, the learned stipendiary magistrate was clearly concerned about the delay that had occurred in reporting the incident. The hearing was adjourned to 28 September 2001.

[13] On 28 September 2001, the learned stipendiary magistrate invited counsel appearing for the Northern Territory of Australia to produce further evidence in support of their submission that the matter was not reported within a reasonable time. The learned stipendiary magistrate referred to some unsatisfactory aspects of the appellant's case in establishing that a reasonable time had elapsed. His Worship referred to what he described as the "scrappy" and "not precise" evidence of Acting Sgt Hill. On 28 September 2001, the application was adjourned to 8 October 2001.

[14] On 8 October the appellant called evidence from Mr Roger Quilliam. Mr Quilliam is the executive manager of the security and surveillance at the MGM Grand Darwin Casino. Mr Quilliam produced a video tape relating to 25 October 1999. Mr Quilliam gave evidence that this tape was made because persons in the surveillance room were notified that an eviction was taking place. It is Mr Quilliam's evidence that the three persons shown on the video were believed by him to have been involved in a fight in "Sweethearts". Following behind these three persons on the tape was Eden Pickering and a security guard Frank Palazollo and the shift manager Neil Sammy. He also gave evidence that it is his belief the three men shown on the tape had an involvement with the incident in Sweethearts when Mr

Pickering suffered a broken jaw. Mr Quilliam gave further evidence that there was no video footage of the actual assault because of the position of the cameras in relation to where the incident took place. The assault was not captured on video. It is Mr Quilliam's evidence that if the cameras had caught the actual assault upon Eden Pickering, it was the policy of the Casino to keep the tape regardless of police involvement. Mr Quilliam gave further evidence that he was not aware until 25 September 2001 that Eden Pickering had suffered a broken jaw as a consequence of the assault upon him on 25 October 1999. His evidence is he may have heard a passing mention of the incident when a police officer obtained a copy of the tape about 11 months after the incident. Mr Quilliam named two persons who were employed in the security section at the MGM Grand Darwin Casino on the night of the assault who were still members of the security staff at Casino and had viewed the tape. On Mr Quilliam's evidence two of these persons, a Mr Frank Palazollo and a Mr Neil Sammy also appeared on the tape. The respondent, Eden Pickering, was also shown on tape going towards the first aid room.

[15] On 8 October 2001, the appellant called evidence from Commander McAdie. Commander McAdie gave evidence as follows (t/p 57):

“Commander McAdie, in your experience as a police officer, in your 26 years as a police officer, does delay in reporting an offence hinder police investigations?---Yes, in – in reading this particular case I was struck by the fact that it – there was approximately a 12 month delay before this particular offence was reported. The – there's a number of difficulties which arise from such a delay, principally it's in determining who was there at the time the offence was committed,

that is who were the witnesses to the offence, and in identifying the offender in this particular case as the offender apparently wasn't known to the victim."

and at t/p 58 – 59:

"If there is video footage of people who – persons who may or may not have been the perpetrators of an offence, will that footage assist the police in identifying those persons?---Up to a point. There's several difficulties which arise from it, one of which is if the video footage doesn't capture directly the assault then it's really a means of identifying the assailant, which has to be then applied essentially to the victim' the victim has to identify the assailant from the video tape. That – that can be problematic, it depends on the nature of the video tape and the nature of the circumstances, whether – whether it would even be sensible to show the video tape to the victim because one of the important things, of course, is we're trying to identify a potential assailant and the identification must be ultimately fair to the – to any alleged offender.

In your experience is 11 months, or approximately 11 months, a long time after an offence to record an offence?---It certainly is, most offences are reported within – within the first hour or two after the offence has occurred.

If the offence had have been reported as you say 24 hours after the commission of the offence, would this have assisted the police?---It would've been more helpful. In these particular circumstances probably the most useful time to report the offence would've been immediately after the offence had occurred whilst most of the people who were present during the – during the course of the offence occurring were still on the premises, because it would've made it easier to identify the – the assailant. Or it would've increased the chances of being able to identify the assailant because you're talking to a wider number of people and therefore increasing the possibility that one of those people knew who the assailant was, and saw the offence.

Can you advise is there some specific point when an investigation – when it becomes too late to report an offence?---It depends really on the nature of the offence. A lot of this has to do with the balance of the application of police resources against the likelihood of getting some sort of result. For instance, the more serious the offence the more resources we're likely to put into the – into the investigation and therefore a later – a later reporting may still result – may still result in a – in a person being apprehended. But there's not a

specific time, it depends on the facts of the case and what evidence – what various forms of evidence might be available.

Has the delay in this instance impeded police investigation?---Almost certainly. Had it been reported a short time after the – after the offence occurred, say on the – during the course of the same night, there would've been what I describe as a good chance of identifying the assailant and prosecuting someone. At the point at which it was reported I would've said the chances of identifying the assailant and prosecuting someone were pretty remote.”

[16] Counsel for the appellant Mr Grant, submitted that the learned stipendiary magistrate erred when he stated in his reasons for decision delivered on 17 October 2001 (t/p 3) “... I do not have evidence from police to say that a reasonable time had expired”.

[17] I accept the submission by counsel for the appellant that there was no need for express evidence to the effect that a reasonable time had expired. This was ultimately a matter for his Worship to decide based on the evidence. Both Commander McAdie and Acting Sgt Hill gave evidence to the effect that the delay in reporting the assault had impeded the proper investigation of the offence.

[18] The question of what is a reasonable time was considered in *Geiszler v Northern Territory of Australia* (supra). Mildren J stated at p 7:

“11. 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.

12. 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.

13. 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. ...”

[19] In this case, I consider it is relevant that following further probing by the learned stipendiary magistrate as recorded in the transcript of events on 25 and 28 September, further evidence was called on 8 October 2001.

[20] The respondent was recalled to give evidence on 8 October 2001. He gave evidence he had viewed the video tape produced by Mr Quilliam earlier that day. The respondent, Mr Pickering, identified one of three men shown on this video as being his assailant. The respondent gave evidence he did not know the name of the man, nor did he know the name of the other two men who were in company with the man who had assaulted him. This was apparently the first time the respondent had seen the video. Mr Pickering gave evidence that he had never been asked by police to identify any of the persons in the tape that had just been played. On 8 October 2001, the

respondent gave evidence (t/p 72) that he did not report the offence earlier because he did not think there was anything the police could do to catch the offender. The respondent gave further evidence that he did not report the incident at an earlier stage “because I was in shock. I was in shock that the casino security had not detained the person themselves, being a surveillance security manager I would’ve undertaken those actions to detain those people and to report it to the police straight away.” Ms Delacruz also gave evidence on 8 October 2001 after viewing the video tape for the first time on that date. Ms Delacruz was with Mr Pickering at Sweethearts bar when the assault occurred. Ms Delacruz identified the same person on the tape as the assailant. She did not know his name. She described him as being solid in build, like a rugby player.

[21] Importantly, a video of three persons evicted from the Casino on the night of the assault was played to the Court on 8 October 2001. This was the first time the respondent and his de facto wife had seen the video. They were both able to identify one of those persons as the assailant. Mr Quilliam gave evidence about two security staff who are still employed at the Casino and had an involvement with these three persons. The assault was serious resulting as it did in substantial injury to the respondent.

[22] Analysing the evidence of Acting Sgt Hill and Commander McAdie, their evidence is in general terms to the effect that the delay of 11 months in reporting the incident makes it more difficult to obtain evidence. I accept that as a general proposition is correct. However, Commander McAdie did

agree in the evidence he gave on 8 October 2001 that “there are cases where people’s recollections have not faded over time and successful prosecutions can result” (t/p 65). Commander McAdie could not have been aware when he gave evidence that Mr Pickering, who was recalled by the defence immediately following Commander McAdie’s evidence, saw the video for the first time on that date and was able to identify one of the three men depicted on that video as his assailant. Similarly, Acting Sgt Hill, who had given evidence on 25 September 2001 would not have been aware of the subsequent evidence of Mr Pickering and Ms Delacruz in which they identified a person as the offender on the tape produced by Mr Quilliam and played to the Court on 8 October 2001.

[23] The evidence of Acting Sgt Hill and Commander McAdie is of a general nature about the effect of delay in reporting an offence. Neither of the officers deals with the specific facts in this case. For the reasons already stated neither of the police officers knew that Mr Pickering and Ms Delacruz actually identified a man depicted on this video as the offender.

[24] At p 4 of the learned stipendiary magistrate’s reasons for decision delivered on 17 October 2001, he states:

“The Northern Territory does not discharge the onus that reposes in it for this reason. There is video footage of a person identified by Mr Pickering and his de facto spouse as the offender. That video footage also shows two of the offender’s companions. This footage provides the tool for police to pursue investigations.

Police have a little work to do but I apprehend that attempts could be made to identify the offender by attending, at the very least, the

officials of the various football clubs in Darwin: the Australian Football clubs; the Rugby League Football clubs; and the Rugby Union Football clubs and inquiring of staff whether or not the three men depicted in the footage are known to them.

If recognition is achieved either of the friends or the offender, the offender can possibly, ultimately, be approached. If a friend is identified, the friend can be approached to ascertain the identity of the offender. If the offender is identified, the offender can be approached and then interviewed.”

[25] I agree with the criticism made by Mr Grant, on behalf of the appellant, that there is considerable speculation by the learned stipendiary magistrate as to how police could further their investigation. I agree there is no evidence that the offender could be identified by attendance at football clubs. The only evidence was that given by Ms Delacruz to the effect that the offender had the physique of a rugby player. Though this was speculation, it was not the crux of the learned stipendiary magistrate’s decision. His Worship was endeavouring to give examples of how the evidence he heard on 8 October 2001 formed a basis for further investigation by police. I also agree with Mr Grant’s criticism of the learned stipendiary magistrate’s comments to the effect that had police attended the scene on the night of the assault, they may not have been able to progress the matter. This again was pure speculation on the part of the learned stipendiary magistrate. However, I am in agreement with the core decision of his Worship that the evidence on the video produced by Mr Quilliam for the first time on 8 October 2001 and the identification made by the respondent and Ms Delacruz, on the same date, has a substantial effect on the issue of whether the report to a member of the police force was made within a reasonable time. There is no satisfactory

evidence as to why this video was not shown to the respondent and his de facto wife who was a witness to the assault, prior to 8 October 2001. This identification having been made there are further inquiries the police could pursue, not limited to, but including with the security personnel present at the Casino that night and still in the employment of MGM Grand Darwin Casino.

[26] In many cases a lapse of 11 months between the date of the offence and the report of such offence to police could not be considered to be within a reasonable time. However, in the circumstances of this case and the evidence that is now available, I do not consider the learned stipendiary magistrate was in error in finding that a reasonable time had not elapsed.

[27] Accordingly I would dismiss the appeal.

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