Fiorido v Northern Territory of Australia & Ors [2005] NTSC 28

PARTIES:	FIORIDO, Giuseppe v NORTHERN TERRITORY OF AUSTRALIA AND KARPATHOUS, Angela AND KARPATHOUS, Stavrola
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA of 2004 (20209296)
DELIVERED:	14 June 2005
HEARING DATES:	4 April 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES

Local Court Appeal – whether Magistrate erred in interpretation of Act – crimes victims assistance – summary offences – substantial annoyance

EVIDENCE

Judicial discretion to admit or exclude evidence – error of law and error of fact – exclusion of oral testimony where no sworn affidavit obtained

Crimes (Victims Assistance) Act s 5, s 15, s 15(3) and s 17(3); *Local Court Act* (NT) s 19; *Summary Offences Act* s 47 and s 47(e)

Balenzuela v De Grail (1959) 101 CLR 226; *Stead v State Government Insurance Commission* (1986) 60 ALJR 662, followed

REPRESENTATION:

Counsel:

First Respondent	W Priestley

Solicitors:

Appellant:	A McLaren
First Respondent	C Spurr
Second Respondent	Self represented
Third Respondent	Self represented

Judgment category classification:	B
Judgment ID Number:	Sou 0504
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Fiorido v Northern Territory of Australia & Ors [2005] NTSC 28
No. LA 14 of 2004 (20209296)

BETWEEN:

GIUSEPPE FIORIDO
Appellant

AND:

NORTHERN TERITORY OF AUSTRALIA
First Respondent

AND

ANGELA KARPATHOUS
Second Respondent

AND

STAVROLA KARPATHOUS
Third Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 14 June 2005)

Introduction

[1] This is an appeal from a decision of the Local Court that was delivered by Dr Lowndes SM on 15 September 2004. The learned Magistrate rejected the appellant's claim for an assistance certificate pursuant to s 5 of the Crimes (Victims Assistance) Act in respect of injuries he claimed to have suffered

as a result of offences alleged to have been committed by the second and third respondents.

[2] The grounds of appeal contained in the Amended Notice of Appeal dated 29 March 2005 are:

1. The learned Magistrate erred in law by wrongfully excluding and alternatively rejecting evidence called and presented by the appellant.
2. The learned Magistrate erred in law by failing to follow the proper process of making the findings, giving proper weight to and or drawing proper inferences from the evidence.
3. The learned Magistrate erred in law by concluding that no offence was committed under the Crimes (Victims Assistance) Act (NT).
4. The learned Magistrate erred in law by concluding that the appellant did not suffer an injury under the Crimes (Victims Assistance) Act (NT).
5. The decision of the Lower Court is unsafe and unsatisfactory.

[3] Grounds 2, 4 and 5 were utterly unsustainable as they allege errors of fact and the appeal is confined to errors of law: s 19 Local Court Act (NT). Further, the learned Magistrate made no ultimate findings as to whether the appellant had suffered an injury or not as a result of the conduct of the second and third respondents.

The issues

[4] There are three principal questions in this appeal. First, did s 17(3) of the Crimes (Victims Assistance) Act prevent the appellant from leading oral testimony from Andrew McGrath, Katherine Gordon, Salvia Salvar, and Elizabeth Leahy in circumstances where he had not obtained a sworn affidavit from each of these witnesses because each of them refused to make an affidavit? Secondly, should the learned Magistrate have considered whether the first and second respondents had breached s 47(e) of the Summary Offences Act? Thirdly, even if grounds one and three of the Amended Notice of Appeal were made out, should the Supreme Court intervene and overturn the decision of the Local Court?

[5] In my opinion the appellant could have led oral testimony from Andrew McGrath, Katherine Gordon, Salvia Salvar and Elizabeth Leahy. Section 17(3) of the Crimes (Victims Assistance) Act is directory not mandatory. The learned Magistrate should have also considered whether the second and third respondents had breached s 47(e) of the Summary Offences Act. However, the appeal should be dismissed because no real injustice was occasioned to the appellant: *Stead v State Government Insurance Commission* (1986) 60 ALJR 662.

Section 17 of the Crimes (Victims Assistance) Act

[6] It is an error of law to wrongly exclude material evidence: *Balenzuela v De Grail* (1959) 101 CLR 226. Further, if evidence is wrongly rejected the

onus of showing that it did not influence the result of the trial is on the party showing cause against the new trial. At common law it is necessary to grant a new trial unless the court feels some reasonable assurance that the error of law at the trial whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result: *Balenzuela v De Grail* (supra) at 234-35.

[7] Prior to the hearing in the Local Court the appellant had subpoenaed several witnesses including three police officers and his previous solicitor to give oral testimony at the hearing of his application for an assistance certificate. The three police officers were able to give evidence about the complaints that the appellant had made to them about the alleged offending conduct of the second and third respondents and about the reaction of the second and third respondents to the complaints made against them. The police officers were not eye witnesses to any of the alleged offending conduct that was the subject of the application before the learned Magistrate.

[8] The following is of particular significance. On 3 March 2002 the appellant had complained to police that on that day there had been an argument between himself and the second and third respondents about the manner in which they had used a hose to water cement paving at the block of units where all three of them lived. The appellant had complained to police that the second respondent had threatened him with a knife and that the third respondent had threatened him with a stick. This was categorically denied

by each of the respondents. The second respondent said that she had been peeling potatoes in her kitchen. She had heard a ruckus and she went outside to stop the appellant taking the hose which she and her mother used to water the garden and to clean their veranda. When she did so, she absentmindedly took the potato peeler, not a knife, with her. There was then a struggle between her and the appellant over the hose which he was attempting to remove. The struggle ended up in her dropping the potato peeler and the appellant going off with the hose. Andrew McGrath was one of the police officers who attended the premises on 3 March 2002.

Ms Salvar was the other officer who attended. Andrew McGrath was able to give evidence about what the respondents said to him about the incident, whether he saw any evidence that the second respondent had been peeling potatoes, whether the respondents complained to him about the appellant's conduct in taking the hose, whether there was evidence that the third respondent had been working on curtains on that day, whether the neighbours were having a barbecue for which the second respondent was preparing a potato dish and the state of the premises. Presumably Ms Salvar could have given similar evidence. Ms Elizabeth Leahy was able to give evidence about a discussion that she had with the second respondent during which the second respondent stated to her that her mother had been deliberately over watering with the hose so as to interfere with the appellant's enjoyment of his premises.

[9] Each of the witnesses referred to above had refused to provide the appellant with an affidavit. Despite this fact, the learned Magistrate ruled that the effect of s 17(3) of the Crimes (Victims Assistance) Act was that all evidence in a proceeding under the Act was to be given by affidavit and consequently oral testimony could not be led from the witnesses who had been subpoenaed by the appellant.

[10] Section 17 of the Crimes (Victims Assistance) Act provides as follows:

> "(3) In proceedings under this Act, all evidence other than the evidence referred to in subsection (4) is to be given by affidavit."

[11] The provisions of s 17(3) of the Crimes (Victims Assistance) Act were wrongly assumed by the learned Magistrate to be mandatory. The subsection is a procedural section that is directory or discretionary. That this was so was correctly conceded by the first respondent. The purpose of s 17(3) is twofold, namely, to make proceedings for an assistance certificate more efficient and thereby minimise court time and to provide details of an application for an assistance certificate which does not require an applicant to formally plead a claim. It is an essentially facultative provision that overcomes the usual requirement that evidence is to be given orally. The legislature has chosen not to use affirmative words such as "shall" or "must". The section must be read with the whole of the Act and in particular with the other provisions contained in Part III of the Act. The principal section in Part III is s 15. Section 15(3) provides, "The hearing of an application under s 5 shall be conducted with as little formality and

technicality, and with as much expedition, as the requirements of this Act **and a proper consideration of the application permit** (emphasis added)**.**" Subsection 15(3) of the Act provides, "Subject to this Act, the Court is not bound by any of the rules of evidence **but may inform itself on any matter in such manner as it thinks fit** (emphasis added)." It was not the intention of the legislature to defeat an applicant's claim where he or she is unable to compel witnesses, who could give relevant evidence, to make an affidavit.

[12] There is an onus on a party, who wishes to lead oral testimony from a witness, to satisfy the Local Court that there are reasonable grounds why the Court should dispense with the usual requirement that evidence is to be given by affidavit. Such an onus was met by the appellant in this case as he had no way of compelling the witnesses who he had subpoenaed to make an affidavit and the learned Magistrate erred in law in excluding their oral testimony on the ground that their evidence should be given by affidavit.

[13] However, the evidence which Ms Leahy was capable of giving was inadmissible in any event. It was not direct evidence of an admission by the third respondent. It was hearsay evidence against the third respondent which was of little probative value. Likewise the evidence of the police officers about the appellant's complaints was also inadmissible. It was merely hearsay evidence of self serving statements made by the appellant. It did not corroborate the appellant's evidence as it was not independent of him. It would have been unfair to admit such evidence and it would have been of little assistance to the Court in overcoming the conflict of evidence

between the appellant and the first and second respondents. Its admission would not have led to a different result. This was a "hard swearing" case and the learned Magistrate had carefully analysed the evidence of the appellant and of the second and third respondents. He preferred the evidence of the respondents. He was entitled to do so. He was best placed to assess such evidence.

[14] Nor would the evidence of Andrew McGrath and Salvia Salvar about what they observed and were told by the respondents on 3 March 2002 have led to a different result. Although no oral evidence was led from these two witnesses, the record they made of the incident when they returned to the police station was tendered in evidence. It is apparent from that evidence that they could find no evidence to corroborate the allegations of assault that had been made by the appellant and that they were disinclined to accept his version of events.

[15] In the circumstances no real injustice was done to the appellant by the exclusion of the oral testimony of the witnesses that he had subpoenaed.

Section 47(e) of the Summary Offences Act

[16] Counsel for the appellant correctly argued that the appellant did not merely allege that the second and third respondents had committed various criminal offences against him. The appellant also alleged that the second and third respondents had engaged in a course of conduct of harassing him and of unreasonably and deliberately causing him substantial annoyance (see pages

12 and 13 of the transcript of proceedings in the Local Court on 9 September 2004). Counsel for the appellant also correctly submitted that the learned Magistrate had only given consideration to the individual incidents about which the appellant gave evidence in his affidavit and that he had failed to consider whether the appellant's evidence about the conduct of the second and third respondent as a whole established that an offence had been committed. In accepting this submission it must be acknowledged that the appellant appeared in person in the Local Court and he was unable to give the learned Magistrate much assistance at all.

[17] In the context of what was essentially a dispute between neighbours it is obvious that regard should be had to nuisance type offences. Such offences are found in s 47 of the Summary Offences Act. Subsection 47(e) provides:

> "47. Offensive, &c., conduct
>
> Every person who is guilty –
>
> (e) of unreasonably causing substantial annoyance to another person; or
>
> shall be guilty of an offence.
>
> Penalty: $2,000 or imprisonment for 6 months, or both."

[18] However, the appellant only gave evidence of nine incidents involving the second and third respondents. He asserted that he was continually harassed by the second and third respondents but gave no detailed evidence about such harassment beyond the nine incidents to which he deposes in paragraphs 10 to 88 inclusive of his affidavit sworn on 11 March 2004. The

appellant's evidence about those nine incidents was carefully analysed by the learned Magistrate. When the appellant's evidence is analysed it does not establish that the second and third respondents unreasonably caused substantial annoyance to the appellant.

[19] The evidence of the appellant reveals that the first incident involved the second respondent playing loud music on her birthday. The second incident was a single incident of verbal abuse on 4 March 2001 after the appellant had complained to police about the birthday party music. The third incident was an argument over the hose which was started by the appellant when he attempted to remove the hose from the tap near the second and third respondents' back door. The fourth incident involved a complaint to police about the appellant taking photographs of children. The fifth incident involved an assault of the appellant by three men. There was no evidence connecting the three men to the second and third respondents. The sixth incident involved the appellant going onto the second and third respondents' front veranda to complain about the amount of water that was being sprayed onto the driveway when the second and third respondents were cleaning their unit because they were moving out and the third respondent striking the appellant with a curtain rod. The seventh incident involves a complaint against police for not taking the appellant's complaints sufficiently seriously. The eighth incident involves the second and third respondents cleaning up a clay pot which had broken outside the appellant's front door. The ninth incident again involves a complaint against police.

[20] In the circumstances no real injustice was done by the learned Magistrate's failure to consider whether the second and third respondents had breached s 47(e) of the Summary Offences Act.

Orders

[21] The appeal is dismissed. I will hear the parties as to costs.
