Northern Territory of Australia v Herbert & Anor [2002] NTSC 4

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v HERBERT, Aloysius Joseph AND: WILLIAMS, Donald George
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA6 of 2001 (9828201)
DELIVERED:	10 January 2002
HEARING DATES:	8 November 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Local Court – whether magistrate erred in finding offender had committed an offence under s 154 of the Criminal Code 1995 (NT) – whether magistrate erred in issuing an assistance certificate pursuant to the Crimes (Victims Assistance) Act 1982 (NT).

Local Court Act 1989 (NT)
Crimes (Victims Assistance) Act 1982 (NT), s 8, s 12(e), s 15(3) and s 17
Criminal Code 1995 (NT), s 154

Voltz v The Queen (1990) 100 FLR 393, followed.
Sanby v The Queen (1993) 117 FLR 218, referred to.

Pearce v Button (1986) 65 ALR 83, considered.
Briginshaw v Briginshaw (1938) 60 CLR 336, followed.

REPRESENTATION:

Counsel:

Appellant:	M Grant
Respondent:	D Francis

Solicitors:

Appellant:	Withnall Maley
Respondent:	David Francis & Associates

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Herbert & Anor [2002] NTSC 4
No. LA6 of 2001 (9828201)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

ALOYSIUS JOSEPH HERBERT
First Respondent

AND:

DONALD GEORGE WILLIAMS
Second Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 10 January 2002)

[1] This is an appeal under s 19 of the Local Court Act 1989 (NT) against the issuing by the Local Court sitting at Darwin of an assistance certificate to the first respondent ("the victim") pursuant to the provisions of the Crimes (Victims Assistance) Act 1982 (NT) ("the Act").

[2] The Act provides that the Local Court may issue such a certificate to a person who is injured or who dies as a result of the commission of an offence by another person (s 8 and definition of "victim" in s 4). An

offence constituted by s 154 of the Criminal Code 1983 (NT) was found to have been committed by the second respondent ("the offender") which resulted in injury for which the certificate specifying a sum of $25,000 was issued. The appellant ("the Territory") was required by s 28 of the Act to pay the amount specified to the victim.

[3] An appeal may be brought pursuant to s 19 of the Local Court Act 1989 (NT) on a question of law. The grounds of appeal are:

"1. The learned Magistrate erred in law in finding that the Respondent is entitled to an award of assistance under the Crimes (Victims Assistance) Act.

1.1 There was no evidence before the learned Magistrate on which to find that the offender was in breach of s154 of the Northern Territory Criminal Code in any manner material to the issue of an assistance certificate.

1.2 There was no evidence before the learned Magistrate on which to find that the respondent's injuries were caused by or arose out of a breach of s154 of the Northern Territory Code.

1.3 There was no evidence before the learned Magistrate on which to find that the respondent was injured as the result of a breach of s154 of the Northern Territory Code.

1.4 The learned Magistrate inferred that the offender was in breach of s154 of the Northern Territory Criminal Code, which inference could not reasonably be drawn from the primary facts found.

1.5 In concluding that "the applicant's (respondent's) injuries arose out of the driving of a motor vehicle on the night in question", the learned Magistrate applied the wrong test in determining whether an assistance certificate should issue.

1.6 The learned Magistrate applied the wrong test in finding that the respondent was not required to establish that his injuries were as the result of some discrete act on the part of the offender.

2. The learned Magistrate erred in law in finding that the offender was asleep at the wheel immediately prior to the collision.

PARTICULARS

2.1 There was no evidence to support that finding.

2.2 The finding was one inferentially made, which inference could not reasonably be drawn."

[4] As the grounds of appeal show the principal contention of the Territory is that his Worship erred in law in finding the offender had committed an offence under s 154 of the Code, which, relevantly, provides:

> "(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.
>
> …
>
> (4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years."

[5] In order to succeed in an application for an assistance certificate it is not necessary for the victim to show that injury or death resulted from an offence from which an offender had been found guilty. Evidence of such a finding, if there is one, may be proved pursuant to s 32 of the Evidence Act 1939 (NT). Sometimes, however, the person who committed the offence can not be identified or found, in which case the victim must prove the commission of the offence on the application to the Local Court.

[6] The Local Court is not bound by any rules of evidence, but may inform itself on any matter in such manner as it thinks fit, s 15(3). A fact to be proved by an applicant shall be sufficiently proved when proved on the balance of probabilities (s 17(1)). The Court may receive in evidence any transcript of evidence in proceedings in any other court, and may draw any conclusion of fact therefrom as it thinks proper, s 17(2). These provisions may be taken to be in aid of the more general direction to the court to conduct the hearing of an application with as little formality and technicality and as much expedition as the requirements of the Act and proper consideration of the application permit.

[7] All that leads to the conclusion that none too strict a view should be taken of what are the commonly acknowledged forms of evidence and rules relating to its being adduced in a tribunal bound by those rules.

[8] There was before the Local Court a transcript of the whole of the proceedings before the Court of Summary Jurisdiction in which the offender was convicted, upon his plea of guilty, for that on 1 August 1998 he drove a motor vehicle, namely a Holden Jackaroo, on Bagot Road whilst under the influence of intoxicating liquor or drug or a psychotropic substance to such an extent as to be incapable of having proper control of that motor vehicle (contrary to s 19(1) of the Traffic Act).

[9] It is common ground that the victim was injured when the motor vehicle then being driven by the offender collided with a motor vehicle being driven

by the victim at or in the vicinity of the intersection of Bagot Road and McMillans Road, Darwin. However, the finding of guilt in respect of that offence does not assist the victim because an assistance certificate is not to be issued in respect of injury caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code (s 12(e)).

[10] In the Local Court upon the application for the assistance certificate, the victim set out to prove that the offence under s 154 of the Criminal Code had been committed by the offender and that the injury sustained by him was caused by or arose out of the use of the motor vehicle by the offender.

[11] The victim's evidence in the Local Court comprised an affidavit sworn by him on 15 June 2000 and oral evidence. It is clear from the affidavit that the victim recalled nothing at all as to the circumstances of the accident. He deposed to having been informed of details as to what occurred, but does not disclose the identity of the informant. He gave a description from his personal knowledge of the features of the intersection in question. Consistent with his lack of recollection of events, he was unable to say whether the traffic lights facing him as he drove along the road were green or red.

[12] Objection was taken to the Court receiving the hearsay material, but if the Court decided to receive it, then it was submitted that it should carry little weight. Reminding himself of the provisions of s 15(3), his Worship having

noted the hearsay material, nevertheless decided to admit it in light of the evidence of Senior Constable Barrett, with which it was consistent.

[13] The Senior Constable's evidence before the Local Court comprised photographs and a diagram which he had prepared and his oral evidence in relation to the features shown therein. The photographs showed that the full impact of the collision was taken on the passenger's section of the Holden Statesman. The Senior Constable's reconstruction of what had occurred was that the Holden Jackaroo was travelling south along Bagot Road, the Holden Statesman was making a right turn from Bagot Road into McMillans Road across the path of the Jackaroo and the Jackaroo collided with it. The Senior Constable had not observed any skid marks on the roadway which he was able to isolate as coming from either vehicle. No challenge was made to the Senior Constable's qualifications to give his opinion. He was cross-examined and was of the opinion that the damage to the vehicles was inconsistent with an alternative view of the circumstances of the collision that was put to him.

[14] The transcript of the proceedings in the Court of Summary Jurisdiction revealed, as was customary, that the prosecutor read a precis of facts detailing the offender's intake of alcohol during the period prior to the collision and a version of the circumstances of the collision consistent with the evidence given by Senior Constable Barrett. The precis alleged that when the offender was spoken to about the accident "he stated that he was sleeping".

[15] The learned Magistrate in the Local Court went on to record what was said in the Court of Summary Jurisdiction when counsel for the offender was asked whether the facts alleged in the precis were admitted. Counsel had replied: "Yes sir. There are some exceptions which might affect the pleas but I'll address you on those as I go through". The reasons for judgment in the Local Court proceed to review the remainder of the proceedings before the Court of Summary Jurisdiction during which counsel for the offender informed that Court that:

> "His client approached an intersection, he had no reason to anticipate that there's going to be another vehicle in front of him. He has a green traffic control light. Another vehicle appears in front of him. A collision occurs. It is speculation only, sir, that his state of intoxication contributed in any way".

[16] I pause to observe that such a statement, if accepted or otherwise proved, would be totally inconsistent with the proposition that the offender was asleep at the time of the collision.

[17] After further discussion in that Court concerning the circumstances of the collision, the offender's responsibility for it and the injuries suffered by the victim, the offender gave sworn evidence which was quite different to that which his counsel had put in answer to the precis. The offender's evidence was that he was driving down McMillans Road towards Bagot Road, he got to the intersection intending to turn right into Bagot Road, the light was green, he entered the intersection and from out of no where the private hire car was in front of him and they collided. When asked if he had any

recollection of the direction from which the private hire car approached the intersection, the offender replied: “I’d be ninety percent sure it was from my left.”

[18] His explanation in cross-examination for the obvious differences between his statement to police and his evidence was that his memory had changed.

[19] The learned Magistrate in the Local Court then said in so far as it was intended to be alleged on behalf of the offender that the admission of the police precis was to be qualified by his oral evidence, the Local Court rejected it: “That is, the Court rejects his version of what he gave evidence about as occurring on the day of the accident … .” That rejection appears to have been arrived at upon consideration of the transcript of the proceedings in the Court of Summary Jurisdiction.

[20] The learned Magistrate in the Local Court then proceeded to make his findings on the balance of probabilities. They were in accordance with the reconstruction of the accident conveyed by Senior Constable Barrett. It included that the Jackaroo was travelling “at least 80 kilometres an hour”, notwithstanding that, in relating the evidence of the Senior Constable, his Worship had said that the Senior Constable estimated the pre-collision speed of the Holden Jackaroo at 80 kilometres an hour from the damage, “but conceded that that estimate was not reliable and was solely based on that premise”.

[21] Relying upon the conviction in the Court of Summary Jurisdiction his Worship found that given the quantity of alcohol ingested by the offender, he was so intoxicated, "as to be incapable of having proper control of that motor vehicle." His Worship went on to find that the offender was asleep at the wheel immediately prior to the collision as a consequence of his excessive alcohol consumption.

[22] His Worship was unable to make a finding as to whether either vehicle entered the intersection in contravention of a traffic signal.

[23] As to the offence alleged to have been committed, the Court found that:

> "The conduct of the (offender) immediately prior to the collision and for that matter leading up to that moment in time was such as to constitute the elements necessary to found a formal finding of guilt on a balance of probabilities, a dangerous act as defined in s 154(1) of the Criminal Code."

His Worship went on to find that:

> "No matter what the circumstances in fact were, there is no doubt that the incapability as a consequence of the intoxication, in any event, must have diminished the second respondent's ability to react, to brake, to stop, swerve or otherwise avoid the collision".

[24] His Worship then considered submissions going to causation and concluded his reasons in the following manner:

> "In the circumstances it is this Court's decision that it is not incumbent on the applicant to demonstrate that the injuries sustained by him were due to some discreet blameworthy foreseeable act by the second respondent and consequently that the applicant is entitled to an assistance certificate in an appropriate sum."

[25] The Territory submits that his Worship erred in his findings of fact which led to his finding that an offence under s 154 had been proved. Firstly, it is put that intoxication of itself is not a dangerous act, next, that there was nothing before his Worship which could support a finding that the offender was asleep at the time of the collision, and, thirdly, that his reference to the offender's failure to "brake, to stop, swerve or otherwise avoid the collision" amounted to inconsistent findings none of which could be supported on the material before the Court. It was put that those findings were based upon a false assumption that the offender was at fault.

[26] As to the fact of intoxication, reliance was placed on the decision of the Court of Criminal Appeal in *Voltz v The Queen* (1990) 100 FLR 393. In that case I expressed the view at p 401, with which Asche CJ agreed:

> "… intoxication may provide a reason or explanation as to why something otherwise extraordinary and dangerous occurred, and assist a jury in determining whether the accused had acted or failed to act as alleged. However, if to be taken into account in that way in relation to proof of an offence under s 154, it must be pointed out clearly that intoxication of itself is not the dangerous act nor part of it. It is a state of being, not of doing or of failing to do something. Concentration must be directed squarely on the dangerous act or omission alleged and its proof, not what may have caused it".

And at p 403:

> "Section 154(4) draws the distinction I have been trying to demonstrate. It refers to the doing of an act whilst under the influence of the intoxicating substance. The state of being under such an influence is not a dangerous act. Evidence of whether a person is under the influence of an intoxicating substance at the time of doing the act or making the omission complained of is relevant

only to explain the reason why the act or omission took place and as going to proof of that aggravating circumstance."

[27] I adhere to those views. I do not think it advances the victim's case that the offender had been found guilty of the offence under the Traffic Act 1949 (NT). It is not enough to prove the offence under s 154 to simply assert that because a driver was incapable of controlling the motor vehicle being driven by him or her, it caused a danger to a particular person. That was the way in which it was advanced in the Local Court. An act or omission on the part of the offender must be proved to have caused the particular danger to the particular person, in this case, the victim. Furthermore, such an approach overlooks that what happened is only half of the equation going to make up the offence.

[28] The objective test must also be satisfied. Take the offender out of the scenario and put a sober driver in his place. The applicant must show what the circumstances were prior to the collision and that the sober driver would have foreseen the serious danger, which implies the driver having the opportunity to foresee the danger and evaluate it, and had the opportunity to not have done the act or not have made the omission.

[29] As to the constituent elements of an offence under s 154 of the Criminal Code see generally *Sanby v The Queen* (1993) 117 FLR 218 and especially per Mildren J commencing at p 231.

[30] In this case the circumstances of the collision are largely unknown, and in my opinion it can not be held upon application of the statutory test, even on the balance of probabilities, that the collision would not have occurred if the offender had been sober.

[31] There was a bare minimum of material before the Local Court suggesting that the offender was asleep. That is what the prosecutor told the Court of Summary Jurisdiction the police told him as to what the offender told them. It was not accepted by the offender before the Court of Summary Jurisdiction. The offender's case before that Court was contrary to that alleged in admission to police. Variously, through his counsel and in his sworn evidence, he clearly advanced versions of the events which were to the contrary. The learned Magistrate in the Court of Summary Jurisdiction rejected the offender's evidence, but there was then no evidence upon which he could base a finding that the offender was asleep. The only basis for it was the assertion from the Bar table by the prosecutor which was not unequivocally admitted on behalf of the offender. It was not evidence.

[32] No evidence was called from the investigating police as to that admission either before the Court of Summary Jurisdiction or in the Local Court.

[33] Notwithstanding the provisions to which reference has been made, I do not consider that it was open to the Local Court to make that finding. There must be limits as to the manner in which the Local Court may inform itself

on any matter relevant to an application under the Act. There is a range of matters which may be relevant. Some are of lesser consequence than others.

[34] However, when it comes to liability, it seems to me that the court should require a higher standard to be met than was the case here. There was a real dispute: "about matters which go to the heart of the case". *Pearce v Button* (1986) 65 ALR 83 per Lockhart J at p 97 and the cases there referred to. I appreciate that in that case the Court was considering rules of the Federal Court which enabled the Court to dispense with compliance with the rules of evidence for proving any matter which was not bona fide in dispute or to dispense with the compliance with rules of evidence where such compliance might occasion or involve unnecessary or unreasonable expense or delay, etc.

[35] Here there is no judicial dispensing power. The Parliament has said that the Local Court is not bound by any rules of evidence, but may inform itself on any matter in such manner as it thinks fit. That does not override the rules of evidence, but calls for the Court to exercise its judgment as to the manner in which it will inform itself of any matter in dispute before it. It may apply the rules of evidence or it may not, and where it decides to not strictly apply the rules of evidence it should ensure that no real injustice will result (see unreported judgments of the Supreme Court of the Australian Capital Territory in *A and B v Director of Family Services*, Higgins J, 31 May 1996 and the Land & Environment Court of NSW in *Bennett Taylor v North Sydney Municipal Council*, Hemming J, 5 October 1988).

[36] I note that s 15(3) is "subject to this Act" and accordingly the requirement of proof on the balance of probabilities, a rule of evidence, applies.

[37] In *Briginshaw v Briginshaw* (1938) 60 CLR 336 Sir Owen Dixon observed at p 36:

> "The truth is that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It can not be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality … except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of the allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proof, indefinite testimony, or indirect inferences."

[38] I consider that his Worship misdirected himself as to the elements of the offence constituted by s 154 of the Criminal Code. Furthermore, there was not before the Local Court evidence or other material upon which the court could rely in making the findings as to what the offender did or did not do causing the vehicle he was driving to collide with that being driven by the victim.

[39] The appeal must be allowed. The issue of the assistance certificate is set aside.
