Drover v Northern Territory of Australia & Anor [2003] NTSC 55

PARTIES:	SERENA DROVER v NORTHERN TERRITORY OF AUSTRALIA and ROLAND EBATARINJA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	72/02 (20207688)
DELIVERED:	26 May 2003
HEARING DATES:	24 March 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

LIMITATION OF ACTIONS - Crimes Victims Assistance - extension of time to commence actions - appeal against discretionary order of magistrate

Crimes (Victims Assistance) Act 2002 NT, s 12(ba)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, *House v R* (1936) 55 CLR 499, applied

REPRESENTATION:

Counsel:

Appellant:	G Green
1st Respondent:	M Heitmann
2nd Respondent:	Not represented

Solicitors:

Appellant:	Povey Stirk
1st Respondent:	Mark Heitmann
2nd Respondent:	Not represented

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

Drover v Northern Territory of Australia & Anor [2003] NTSC 55
No. 72/02 (20207688)

BETWEEN:

SERENA DROVER
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

and:

ROLAND EBATARINJA
Second Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 26 May 2003)

[1] This is an application for leave to appeal from a decision of a stipendiary magistrate sitting in the Local Court at Alice Springs. The judgment was delivered on 18 December 2002.

[2] The application for Leave to Appeal is in respect of 14 applications made by the appellant to the Local Court pursuant to the Crimes (Victims Assistance) Act for an extension of time to commence such applications.

[3] On 18 December 2002, the application to commence proceedings out of time was refused. The learned stipendiary magistrate delivered written reasons for his decision, copy of which is Annexure "A" to the affidavit of Rennie Douglas Anderson sworn 20 December 2002 (Exhibit 12).

[4] The relevant Local Court file numbers are as follows:

> "(i) 20207699;
> (ii) 20207697;
> (iii) 20207696;
> (iv) 20207678;
> (v) 20207695;
> (vi) 20207694;
> (vii) 20207684;
> (viii) 20207685;
> (ix) 20207690;
> (x) 20207686;
> (xi) 20207689;
> (xii) 20207700;
> (xiii) 20207682; and
> (xiv) 20207688."

[5] On 20 December 2002 a Form 83C application for Leave to Appeal was filed and served on the first respondent. On 20 December 2002, the solicitor for the first respondent wrote to the Registrar of the Supreme Court in which he stated inter alia (Annexure "A" to the affidavit of Mark Friend Heitmann sworn 25 March 2003):

> "I made the following preliminary observations;
> 1. Notwithstanding that the decision from which Application for Leave to Appeal is made was given in respect of 14 individual

proceedings, Application for Leave to Appeal has only made in one of the proceedings namely No. 20207688:

2. The Second Respondent to the proceeding Roland Ebatarinja has not been named as a party to the Application for Leave to Appeal as commenced."

[6] Solicitors for the appellant filed an amended application for Leave to Appeal which was filed on 17 January 2003 to include Roland Ebatarinja as the second respondent.

[7] The affidavit of Omar Armani Khan affirmed 7 March 2003, deposes to the fact that the amended application for Leave to Appeal showing the date for hearing as 10.00 am on Tuesday 25 March 2003, together with supporting documentation was served on Ms Sue Woods, delegate of the Public Guardian, Adult Guardian for Roland Ebatarinja.

[8] At the hearing of this application on 25 March 2003 there was no appearance for or on behalf of the second respondent.

[9] Arising from certain matters set out in the appellant's written submissions, Mr Heitmann tendered an affidavit sworn 25 March 2003 (Exhibit 11). There is no dispute between the parties that the matters set out in par 3 of this affidavit (which are set out hereunder) accurately reflect what occurred when solicitor for the appellant attended the Alice Springs Registry Office on 20 December 2002 concerning the application for Leave to Appeal:

"3. Upon receipt of the said Outline yesterday I spoke with the Alice Springs Registry Manager Ms Cornock and the Darwin Registry Manager Ms Keyte as to the events of 20 December 2002 concerning the filing of the Application for leave to

Appeal herein. I am advised by the said Registry Managers and verily believe as follows:

(a) When Mr Anderson of Povey Stirk, solicitors for the Applicant attended to file the said Application he brought with him only one set of process to make Application for leave to Appeal and requested that same be issued in respect of all 14 of the proceedings referred to in the said Outline.

(b) Mr Anderson was informed that separate process was required to be filed to make Application for leave to Appeal in respect of each of the 14 proceedings referred to in the said Outline.

(c) Mr Anderson and Mr Stirk who was also spoken with via telephone disputed the advice and in the course of which referred to the decision of Davies v Lewis [2001] NTSC 105.

(d) Ms Keyte referred the matter to Registrar Rischbieth who directed that whilst a stay of payment of the filing fees could be applied for, separate process was required to be filed by the Applicant to make Application for leave to Appeal in respect of each of the 14 proceedings referred to in the said Outline. This was advised to Mr Anderson and Mr Stirk.

(e) Mr Anderson proceeded to file the one set of process being the Application herein and nominated that the proceeding number for same be 20207688."

[10] Accordingly, there is a threshold issue between the parties as to whether this Court can deal with an application for Leave to Appeal in respect of 14 applications under the Crimes (Victims Assistance) Act. Mr Green, on behalf of the appellant, contends that notwithstanding a particular file number has been attributed to this appeal that the appeal is in respect of the decision of the learned stipendiary magistrate on the totality of the 14 applications. It was submitted on behalf of the appellant that if the applicant were required to pay a separate filing fee on each application and a separate hearing fee on each application, the total fees for filing and hearing the appeal would be in the sum of $11,200 and this would be a gross unfairness to the appellant. The submission for the appellant is that the

Court can rule the entirety of the 14 applications for Leave to Appeal were filed on 20 December 2002 and proceed to deal with all of them on the basis that the appeal is from the one decision of the learned stipendiary magistrate to refuse an extension of time. I was referred to the decision of *Davies v Lewis* NTSC 23 November 2001.

[11] Mr Heitmann, on behalf of the first respondent, submits the payment or otherwise of the fees is not a relevant consideration. The fact is only one application for leave to appeal has been filed. That is in respect of application 20207688. It is Mr Heitmann's submission that, that is the only application that can be considered on this application for leave to appeal.

[12] It is relevant here to note that counsel for the appellant advised two of the applications under the Crimes (Victims Assistance) Act were now withdrawn. This means there are now twelve applications the appellant seeks to have considered. The argument for the first respondent is that the appellant cannot amend the application for leave to appeal to include all twelve of the applications.

[13] Mr Heitmann stated the appellant chose to ignore the advice given by solicitor for the first respondent and elected to file only one process. Accordingly, the first respondent is facing one application for leave to appeal and not twelve as the appellant maintains. On this submission the sole matter for consideration by this Court is the application for leave to appeal in respect of file 20207688.

[14] I agree with the submission made by counsel for the first respondent that the decision in *Davis v Lewis* (supra) is not relevant to the issue to be decided here. In the matter before this Court there has been only one application for leave to appeal filed. I am not concerned with the payment or otherwise of the filing fees.

[15] Counsel for the appellant relied on a decision of Martin J (as he was then) in *J-Corp Pty Ltd (trading as Perceptions) v Peter Ingram* No. 52 of (1988) NTSC 14 delivered 7 March 1988 at par 11 which states:

> "11. The procedure in relation to appeals under the Local Court Act shall be in accordance with that Act (O.83.02) and O.82 applies to an appeal to the Supreme Court to the extent that no other procedure is provided under the Local Court Act (O.83.03(a))."

[16] Section 19(3) of the Local Court Act provides as follows:

> "(3) A party to a proceeding may, within 14 days after the day on which the order complained of was made, appeal to the Supreme Court from an order of the Court, (other than a final order) in that proceeding, with the leave of the Supreme Court."

[17] Order 83.02 of the Supreme Court Rules provides as follows:

> "The procedure in relation to appeals under the Acts shall be in accordance with those Acts."

The definition of Acts includes Local Court Act.

[18] I agree with the submission by counsel for the appellant that the time limit which applies in Supreme Court Rule 83.23 does not apply to the present application for leave to appeal as the procedure in the Local Court Act

(s19(3)) specifies 14 days and there is no absence of a procedural rule which requires reference to Order 83.23.

[19] The original application for leave to appeal was filed on 20 December 2002, ie. within 14 days of the interlocutory order refusing an extension of time for commencement of applications for assistance under the Crimes (Victims Assistance) Act. I did not consider the amended application for leave to appeal subsequently filed on 17 January 2003, renders the application for leave to appeal on file 20207688 out of time. It is however, still only an application for leave to appeal in respect of that one matter.

[20] Mr Heitmann for the first respondent referred to Williams on Civil Procedure Rule 64.01, par [I 64.01.85] and *Ah Toy v Registrar of Companies for the Northern Territory* (1985) 61 ALR 583.

[21] Subsequent to the hearing of this appeal, Mr Greene and Mr Heitmann made written submissions regarding a decision of the Federal Court of Australia *McDermott Industries (Aust) Pty Ltd and Commissioner of Taxation of the Commonwealth of Australia* heard in the Federal Court of Australia W51 of 2002, delivered on 31 March 2003.

[22] This decision involved the provisions of Order 29.5 of the Federal Court Rules which are equivalent to Rule 9.12 of the Supreme Court Rules (NT). However, this provision deals with the consolidation for hearing of two or more proceedings. It does not resolve the issue of whether those

proceedings should be commenced by a separate application for leave to appeal.

[23] I do not consider there is power to amend the single application for leave to appeal to include the other 11 applications that the appellant still wishes to pursue. There is no power to extend time for leave to appeal under s 19(3) of the Local Court Act - see *Patterson v Northern Territory of Australia* (2001) 165 FLR 296.

[24] Accordingly, I agree with counsel for the first respondent that I can only grant leave to appeal and proceed to hear the appeal in respect of the one matter which is the subject of the application for leave to appeal.

[25] The application for leave to appeal and the appeal itself in respect of all twelve of the applications were heard together in the Supreme Court at Alice Springs on 25 March 2003.

[26] In the event that I may be wrong in my ruling that there is only one application for leave to appeal on foot i.e. on file 20207688, I have considered the merits of the appeal in respect of all twelve of the applications.

[27] The further and better particulars of grounds of appeal as set out on the notice of appeal, are as follows:

> 1. That the learned Magistrate erred as a matter of law in failing to consider relevant materials in coming to decision.

1.1 The learned Magistrate erred in failing to consider the Affidavit of Alison Phillis sworn 13 August 2002 at paragraphs 14 to 19 to explain the delay from 5 September 2001 to 17 May 2002.

2. The learned Magistrate took into account irrelevant considerations in coming to his decision.

2.1 The learned Magistrate erred in taking into account whether the Applicant was in a de facto relationship with the Second Respondent at the time of the offence.

2.2 The learned Magistrate erred in finding that the precise facts are not ascertainable when there was no evidence before him regarding this.

2.3 The learned Magistrate erred in finding, despite the evidence of Ms Jo Delahunty to the contrary, that the Applicant is a person who is able to function. In coming to this finding he relied upon assumptions as to circumstances in which Ms Drover attended various appointments, which matters were not in evidence.

2.4 The learned Magistrate erred in considering whether the Applicant was in a sexual relationship with the Second Respondent at the time of the assault.

3. The learned Magistrate misdirected himself on the exercise of this discretion in failing to grant an extension of time to file an Application for an Assistance Certificate under the Crimes (Victims Assistance) Act (NT).

3.1 The learned Magistrate erred in failing to apply the tests identified in *Solomon v Webb* [1993] NTSC 4.

3.2 The learned Magistrate erred in finding that where an offender is nominated, it is necessary to prove on the balance of probabilities that they were the person who committed the offence, which is the subject of the Application.

3.3 If the learned Magistrate was correct in 3.2 above, then the learned Magistrate erred in finding that it is necessary to show this on the balance of probabilities in order to show a prima facie case.

3.4 The learned Magistrate erred in finding that it was necessary to satisfy the Court that circumstances existed which prevented the reporting of the commission of offence in order to show a prima facie case."

[28] The learned stipendiary magistrate delivered written reasons for his decision on 18 December 2002. His Worship commenced with an introduction which I set out hereunder.

> "This is a series of applications for an extension of time for commencement of applications for assistance under the Crimes (Victims Assistance) Act.
>
> Altogether there are 14 such applications.
>
> In her Affidavit of 12 September 2002 the applicant states:-
>
> > 'I am the former partner of Roland Ebatarinja. Since about 1996 Roland has repeatedly assaulted me.'
>
> In her psychological report dated 29 October 2002, Ms Delahunty says:-
>
> > 'Ms Drover has been in a de facto relationship with Roland Ebatarinja from 1998 until approximately the middle of 1999 and lived with his family at Larapinta Valley Camp. Ms Drover then apparently lived with her mother at Hidden Valley Camp, and had described her relationship with him as his 'girlfriend' (although they had periods of separation up until approximately 2000).'
>
> There is, therefore, at once a disagreement between the applicant and her psychological adviser. Ms Delahunty took her instructions from the applicant, with the aid of a very experienced interpreter, and formed the view that the relationship between the applicant and Roland Ebatarinja commenced only in 1998, whereas the applicant asserts it commenced in 1996. There is other evidence to which I shall refer that the relationship only commenced in 1998.
>
> This is of some importance in this case - some of the claims go back to 1996. As will be seen, the evidence to support these early attacks is scanty, and evidence to support the assertion that it was Roland Ebatarinja who perpetrated these earlier attacks is even scantier. As to this, the applicant's submission is that [it] doesn't really matter who assaulted the applicant. When it comes, however, to considering prejudice to the respondents, the identity of the offender is important. If Roland Ebatarinja is not the offender, the first respondent has lost the opportunity of obtaining instructions from the offender and thereby suffered irreversible prejudice because of the long delay in bringing the applications. The fact remains that a party is bound by her or his pleadings, and it is a sine qua non to the success of each matter, as the proposed pleadings stand, that Roland Ebatarinja be the 'offender'.

> Roland Ebatarinja is a deaf mute, and has caused legal difficulties in the past being declared unfit to plead (see *Ebatarinja -v- Deland* [1998] HCA 62).”

[29] He then lists the 14 applications before him in chronological order, stating the proceeding number, the date of the incident and the description given in the draft application. The date of the incidents are from 15 April 1996 to 28 October 1999. His Worship then made reference to the fact that there were other applications that had been bought within time arising from three incidents in June 2000 and further applications that had been verbally foreshadowed arising out of an Ex Officio Indictment in the Supreme Court following incidents alleged on 28 January 2002 and 8 February 2002.

[30] The learned stipendiary magistrate then set out the criteria for bringing an application out of time which are set out as follows on p 3 - 4 of his decision:

> “As with most applications caused by a party becoming out of time, there are four main things to consider:-
>
> 1. The reason for the getting out of time;
> 2. Any delay since the discovery of the omission;
> 3. Whether the party out of time has an arguable case;
> 4. Any prejudice caused to the other party or parties by the omission.
>
> The onus of proving that an application an extension of time should be granted is on the person who seeks the extension:-
>
> *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866.
>
> Ultimately, it is important for matters such as these to be conducted in such a way that the truth can be ascertained. It is only if that occurs that justice can be done. In *Brown v Native Title Act & Brown* 13 September 2001, I said:-

> ‘The more time that goes by between the event and the determination of the claims, the more difficult it is to know precisely what happened in the event under consideration, in what motivated the offender, in any conduct on the part of the applicant which may have contributed to the motivation, and to the quantification of a certificate based on the physical and psychological consequences.
>
> The possibility of prejudice to the respondents increases proportionately to the delay. Prejudice to the second respondent is passed on to the first respondent.’

Delay has a similar significance in this case. In the first place, the passage of time will make it difficult, if not impossible to ascertain precisely what happened. If the brief description given in each matter (eg., 20207697: ‘offender assaulted the applicant’) is as good as it gets, justice is impossible to achieve. The precise facts are unascertainable. Any contribution to the offending by the applicant is unmeasurable. The guilt or innocence of the offender, where as in most of these cases, no conviction has been recorded, is impossible to discover. This is particularly so, given the offender’s cognitive difficulties. The physical and psychological consequences can not be ascertained. The psychologist Ms Delahunty makes no effort to disentangle the effect each incident has had on the applicant’s psychological condition. The applicant has made no contribution thus far in defining the precise physical effects of each incident. And yet, in the end, if each application is granted, the Court will be obliged to make some sort of guesstimate of these matters and place a monetary value upon each matter. There is a difference between making an assessment of damages, as the Court is required to do, and a guess.”

[31] His Worship considered the evidence with respect to each of the criteria. He then embarked on an examination of the individual applications and concluded with this (p 19 - 20):

> “Further general observations:
>
> While Ms Delahunty is prepared to state that ‘the applicant displays psychological injury symptoms consistent with Post Traumatic Stress Reactions following the various assaults perpetrated upon her by Mr Ebatarinja over a number of years’, she may well have more difficulty in coming to the conclusions if confronted with the hard facts that most of the assaults seem to have occurred in the pre-Ebatarinja era.

> She is undoubtedly a lady who has suffered much at the hands of others and herself as well. Several times she has been brought into the hospital in police custody, and intoxicated. Many of her admissions have nothing to do with assaults.
>
> For reasons already given, her failure to bring all of these actions within time is either contumelious or the delay inordinate. No satisfactory explanation has been given for her failure to report matters to the police, or for not bringing these actions straight away, once she was told of her right to do so.
>
> The court is put in an invidious position in endeavouring now, years after the events, in trying to quantify any one of them.
>
> The respondents are put in an impossible situation in trying to verify or refute the applicant's claims. This is because of the delay (in most cases) in reporting to the police and in the bringing of these claim[s] within time, or as soon as she was advised of her rights.
>
> For these reasons, the application to commence proceedings out of time will be refused."

[32] The order sought on behalf of the appellant is:

[33] That the decision of the Local Court be quashed and the appellant be granted an extension of time to file her applications for Crimes Victims Compensation under the Crimes (Victims Assistance) Act.

[34] This is an appeal from a discretionary order. The position of an appellate court in determining an appeal from a discretionary order or judgment are as expressed in the High Court decision in *House v R* (1936) 55 CLR 499 at 504 - 505.

[35] I will turn to consider each of the grounds of appeal.

Ground 1. That the learned magistrate erred as a matter of law in failing to consider relevant materials in coming to decision.

1.1 The learned magistrate erred in failing to consider the affidavit of Alison Phillis sworn 13 August 2002 at paragraphs 14 to 19 to explain the delay from 5 September 2001 to 17 May 2002.

[36] Mr Green, on behalf of the appellant, refers to the following passage of the learned stipendiary magistrate's reasons for decision (p 8):

> "There is no note beyond that date, and no explanation is offered for the delay from 5 September 2001 to 17 May 2002 for the failure to lodge the various applications to extend. In the context of everyone knowing about the time limits, the delay is not only unexplained, it is inordinate."

and says at p 20:

> "For reasons already given, her failure to bring all of these actions within time is either contumelious or the delay inordinate. No satisfactory explanation has been given for her failure to report matters to the police, or for not bringing these actions straight away, once she was told of her right to do so."

[37] Counsel for the appellant submits that the affidavit of Alison Phillis sworn 13 August 2002 (Exhibit 4) on this appeal at par 14 to par 19 explain the delay in that they refer to matters with respect to attendances of the applicant at Povey Stirk in an effort to progress the matters. Counsel for the appellant refers to the fact that on the application for extension of time for commencement of the application, the issue was raised by counsel for the first respondent that there were no file notes after 5 September 2001. It is the submission for the appellant that Ms Phillis who represented the appellant in the Local Court, clarified this issue when she submitted at p 46

of the transcript of the proceedings before the learned stipendiary magistrate:

> "MS PHILLIS: That's the affidavit with the file notes annexed. Now my friend point out that the file notes annexed to that only go up until 5 September 2001. And Your Worship will recall the reason that that affidavit was prepared was my friend indicated, and Your Worship agreed with him, that paragraph 13 of my previous affidavit, sworn 13 August 2002, was a bit vague
>
> The following paragraphs in that affidavit list the attendances following 5 September 2001, list the attendances on Ms Drove up until - well they actually go up until 24 June 2002, but it's my submission, Your Worship, that the relevant period is until 17 May 2002 when the applications for extension of time were filed.
>
> And so that's the reason I've only annexed file notes up until 5 September 2001. It's certainly not that there weren't attendances after that time.
>
> HIS WORSHIP: Was that when the applications for extension of time were filed?
>
> MS PHILLIS: 17 May 2002. But the attendances - - -
>
> HIS WORSHIP: So why didn't they go up to that date then?
>
> MS PHILLIS: Because those attendances refer - are set out in paragraph - in the affidavit of Alison Phillis, sworn 13 August 2002. Paragraphs 14, 15, 16.
>
> HIS WORSHIP: I see. Yes."

[38] It is the submission for the appellant that this established there were file notes beyond 5 September 2001. It is contended that his Worship overlooked those submissions when he states: "There is no note beyond that date".

[39] I am not persuaded there has been any error on the part of the learned stipendiary magistrate. His Worship had referred to an affidavit of Alison Phillis sworn 31 October 2002 and the source material for notes contained in

Annexure “A” to this affidavit. Annexure “A” is a copy of a series of file notes. The last note is dated 5 September 2001. These file notes contained in Annexure “A” were summarised by his Worship. The summary concluded with the note dated 5 September 2001. I have had the opportunity to read paragraphs 14 to 19 inclusive of the affidavit of Alison Phillis sworn 13 August 2002. This affidavit in particular the paragraphs referred to were drawn to the attention of the learned stipendiary magistrate.

[40] I do not consider the matters deposed to therein take the matter any further with respect to the issue of the delay. They do document certain attendances and difficulties experienced in obtaining instructions. I am satisfied after reviewing the transcript that the learned stipendiary magistrate was aware of the contents of the affidavit dated 13 August 2002 and sworn by Alison Phillis. I also find that it was within the scope of the learned stipendiary magistrate’s discretion to find that the material contained in the affidavit of Alison Phillis did not adequately explain the delay. After reviewing this affidavit I would also support this conclusion. I am not persuaded that the failure by the learned stipendiary magistrate to mention the matters attested to in this affidavit amounts to an error.

[41] I do not consider this ground of appeal has been substantiated.

Ground 2: The learned magistrate took into account irrelevant considerations in coming to his decision.

2.1 The learned magistrate erred in taking into account whether the applicant was in a de facto relationship with the second respondent at the time of the offence.

[42] The submission on behalf of the appellant is that at page 1 of his decision, the learned stipendiary magistrate pointed out the inconsistencies in the evidence of the applicant with respect to the time in which a de facto relationship began between the applicant and the nominated offender. The findings of the learned stipendiary magistrate on this issue are set out at par 28 of these reasons for decision. It is the submission for the appellant that the learned stipendiary magistrate erred in his assessment of the relationship.

[43] I do not accept this submission. There was evidence before the learned stipendiary magistrate to support his findings. The relationship between the appellant and the second respondent was a relevant consideration in view of the fact the appellant has nominated the second respondent as her attacker.

2.2 The learned magistrate erred in finding that the precise facts are not ascertainable when there was no evidence before him regarding this.

[44] Counsel for the appellant submits that at page 4 of the magistrate's reasons for decision, he states that the precise facts of the alleged assaults are unascertainable. It is the contention for the appellant that it is possible that further inquiries by the lawyers for the appellant may have been able to

discover further details of the assaults. Issue is also taken with the learned stipendiary magistrate's statement that "any contribution to the offending by the applicant is immeasurable". Counsel for the appellant states that any issue of contribution is for the substantive hearing and not a relevant factor with respect to an extension of time application.

[45] The comments of the learned stipendiary magistrate referred to above need to be read in the context of his Worship's analysis of the criteria for bringing an application out of time which I have already set out in par 30. His Worship is not attempting to make any findings on the issue of the facts in support of each of the charges or whether or not there is contribution by the applicant. He is making this comment in the context of noting the effect that delay in filing the application has on the resolution of these issues.

[46] His Worship did not embark on a hearing as to the merits of the applications. He stated at p 8 - 9:

> "**Whether the applicant has an arguable case: General Observations:-**
>
> Ms Phillis for the applicant argued that it ought to be left to the actual hearing of the application before adjudicating in the applicant's case, and this is of course true. But one of the criteria that has always been applicable to an application such as this is to gauge whether there is an arguable case. The court ought not to attempt to try the ultimate issues, but it is proper to screen the applications to calculate the prospects of success."

[47] His Worship was well aware that the applicant only had to demonstrate she had an arguable case.

[48] I am not persuaded that he has been shown to be in error on this issue.

2.3 The learned magistrate erred in finding, despite the evidence of Ms Jo Delahunty to the contrary, that the applicant is a person who is able to function. In coming to this finding he relied upon assumptions as to circumstances in which Ms Drover attended various appointments, which matters were not in evidence.

[49] At p 11 of his reasons for decision, the learned stipendiary magistrate refers to the appellant's deficit in intellectual functioning. He notes that Ms Delahunty does not say "that the deficit would have prevented the reporting to the police". From a total reading of the reasons of the learned stipendiary magistrate, there is evidence to support the findings he has made. I do not consider that an error has been demonstrated.

2.4 The learned magistrate erred in considering whether the applicant was in a sexual relationship with the second respondent at the time of the assault.

[50] There are a number of other matters canvassed in his Worship's reasons for decision affecting the validity of the first eight claims. His Worship's comments as to whether or not the applicant was in a sexual relationship with the second respondent prior to 1998, do not really add a great deal and may not have been necessary. In view of the other factors addressed by the learned stipendiary magistrate, I do not consider the comments as to the sexual relationship has led to error on his part.

2.5 The learned magistrate erred in application of the requirements of the Act with respect to reporting to police.

[51] Counsel for the appellant refers to the following comments made by his Worship at p 19 of the reasons for decision:

> "Dealing with this case is complicated by the question of its being reported to police. The way I read the notes is that nursing staff made a report, and extracted a 'promise' number ('Promise" is the police computer system for reporting offences). The applicant herself may or may not have followed the matter up with the police."

[52] This comment is made in respect of certain findings relating to file 20207688 28 October 1999. His Worship goes on to say (p 19):

> "Certainly there are no copies of statements proffered at this stage. There is no evidence whatsoever of the circumstances surrounding the claim. There is no evidence that the assailant was the second respondent. It is difficult to quantify the applicant's claim due to the paucity of medical information."

[53] Counsel for the appellant submits that it is well settled law that it does not matter who makes the report to police as long as the matter is reported.

[54] The learned stipendiary magistrate is not stating that a particular person had to make a report to police. He had already documented the applicant's attendance at the hospital on 27 October and 30 October. He had referred to the social worker's note of 1 November which the magistrate found may or may not relate to this incident. His Worship noted there was no note from police to support the fact that a report had been made. The comments complained of by counsel for the appellant is in the context of a finding as

to the dearth of information relating to the alleged incident on 28 October 1999.

[55] I do not consider they disclose error.

Ground 3. The learned magistrate misdirected himself on the exercise of this discretion in failing to grant an extension of time to file an application for an Assistance Certificate under the Crimes (Victims Assistance) Act (NT).

3.1 The learned magistrate erred in failing to apply the tests identified in *Solomon v Webb* [1993] NTSC 4.

[56] Counsel for the appellant made submissions relating to the legal principles relevant to the exercise of a discretion to extend time to grant the application for leave to appeal. These principles are set out in the decision of Mildren J in *Commonwealth of Australia v DKB Investments Pty Ltd* No. 644 of 1999, Mildren J at p 4. These principles were followed in the decision of *Solomon v Webbe* (1993) NTSC 4. His Worship referred to these cases. It is submitted for the appellant that the learned stipendiary magistrate did not apply his mind to the question of hardship between the parties but rather focused exclusively on the prejudice to the respondent and made no attempt to weigh that against the hardship likely to be suffered by the applicant if her applications were refused.

[57] The learned stipendiary magistrate made reference to the test to be applied as set out in the High Court decision of *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. I have set out hereunder relevant extracts from this authority. Dawson J at 544:

> "…. The onus of satisfying the court that the discretion should be exercised in favour of tan applicant lies on the applicant. To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant. I agree with McHugh J that once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation. …."

Toohey and Gummow JJ at p 548 - 549:

> "… A material consideration (the most important consideration in many cases) is whether, by reason of the time that has elapsed, a fair trial is possible. Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application. It is no sufficient answer to a claim of prejudice to say that, in any event, the defendant might have suffered some prejudice if the applicant has not begun proceedings until just before the limitation period had expired."

McHugh at 551:

> "… An applicant for an extension of time who satisfies those conditions is entitled to ask the court to exercise its discretion in his or her favour. But the applicant still bears the onus of showing that the justice of the case requires the exercise of the discretion in his or her favour.
>
> The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law as been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitation has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates' [*R v Lawrence* [1982] AC 510 at 517, per Lord Hailsham of St Marylebone Local Court]. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realise that it exists. …. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now 'knowing' that it ever existed. ….

> The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

McHugh at 553 - 554

> "… The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. …"

McHugh at 555

> "… But the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of delay in commencing the action, is unable to fairly defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action.
>
> … When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. …"

[58] I am not able to find that in the circumstances of this case his Worship applied the wrong test or proceeded on a wrong principle.

[59] Counsel for the appellant challenges the concept of contumelious with respect to the appellant herself and criticises his Worship's reference to contumelious. However, his Worship did not make a finding that the appellant was contumelious, he noted the test was whether the appellant was contumelious or there had been inordinate delay. The whole tenor of his

Worship's reasons for decision is that the important factor in this case was the inordinate delay.

3.2 The learned magistrate erred in finding that where an offender is nominated, it is necessary to prove on the balance of probabilities that they were the person who committed the offence, which is the subject of the application.

[60] It is correct that the Crimes (Victims Assistance) Act does not require a finding as to an offender. The Act does require a finding that there has been an offence and that the applicant suffered injury as a result of the office and consequently is a victim under the Act.

[61] In these applications the second respondent has been nominated by the applicant as the offender. It is not an application to the effect that the applicant has suffered an injury as the result of an offence by an unknown or unidentified offender. In these circumstances the learned stipendiary magistrate was not in error to find that there must be a prima facie case in each application that the second respondent was the offender.

3.3 If the learned magistrate was correct in 3.2 above, then the learned magistrate erred in finding that it is necessary to show this on the balance of probabilities in order to show a prima facie case.

[62] The learned stipendiary magistrate noted at p 9 of his reasons for decision that the applicant did not suggest there was some other offender or seek to amend the application to nominate another offender or indicate the offender was unknown. The learned stipendiary magistrate does not make a reference

to a finding on the balance of probabilities. He was attempting to ascertain if there was an arguable case and came to the conclusion there was not.

3.4 The learned magistrate erred in finding that it was necessary to satisfy the Court that circumstances existed which prevented the reporting of the commission of offence in order to show a prima facie case.

[63] Counsel for the appellant asserts the learned stipendiary magistrate paid no regard to all of the provisions of s 12 of the Crimes (Victims Assistance) Act, in particular s 12(ba). Section 12 of the Crimes (Victims Assistance) Act provides as follows:

> "12. Assistance certificate not to be issued in certain circumstances
>
> The Court shall not issue an assistance certificate –
>
> (a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act;
>
> (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;
>
> (ba) where the commission of the offence has not been reported to a member of the Police Force before the date on which the Court considers the issuing of the assistance certificate, unless the Court 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;
>
> (d) where it is satisfied that the applicant has made the application in collusion with the offender;
>
> (e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code; or

(f) in respect of an injury or death that occurred during the commission of a crime by the victim."

[64] It appears the learned stipendiary magistrate did not have regard to the provisions of s 12(ba) of the Crimes (Victims Assistance) Act which only came into effect 1 November 2002. This provision does not appear to have been referred to by counsel for the applicant in the Local Court.

[65] In view of the fact that 10 of the alleged offences had never been reported to police, the applicant would be expected to raise on the application that the applicant had an arguable case that circumstances existed which prevented the reporting of the commission of the offence. This did not occur. I do not consider the failure by the learned stipendiary magistrate to refer to the provisions of s 12(ba) of the Crimes (Victims Assistance) Act means in the circumstances of this application, that he has fallen into error.

[66] For these reasons I would dismiss the appeals.

[67] I grant leave for the parties to apply on the question of costs.

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