(tho95006)

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

SC No. 225 of 1994

BETWEEN:

PETER LANGLOIS GEISZLER
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND:

CRAIG GEOFFREY BOJCZUK
Second Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 31 March 1995)

This is an appeal from a decision of a stipendiary magistrate delivered on 30 September 1994 pursuant to the *Crimes (Victims Assistance) Act*.

On 30 September 1994, the learned stipendiary magistrate found that, pursuant to section 12(b) of the *Crimes (Victims Assistance) Act*, the matter was not reported to the police within a reasonable time and therefore:

> "(i) An Assistance Certificate shall not issue pursuant to Section 8(1) of the said Act; and
>
> (ii) The Applicant shall pay the First Respondent's costs to be agreed or taxed, this order being stayed for 28 days."

The grounds of appeal area that:

> "1. The learned magistrate erred in law in that he found the appellant's notification of police on 20 July 1993 of the incident of 16 May 1993 fell outside the provisions of Section 12(b) of the Crimes (Victims Assistance) Act.

2. The learned magistrate erred in law in that he had regard to irrelevant considerations in arriving at his decision.

3. The learned magistrate erred in law in that he failed to accept the uncontradicted evidence of the applicant's solicitor.

4. The learned magistrate erred in law in that he took into account extraneous considerations in arriving at his decision that were unsupported by the evidence before the Court."

The background to this matter is that on 16 May 1993 the appellant was at the Karama Tavern, Kalymnos Drive, Karama. He played eight ball with a man called "Bongo". At 8.00 pm the appellant left the hotel. As he was leaving, "Bongo" grabbed him from behind in a bear hug around the shoulders and upper arms. The appellant lost his balance and fell to the ground with "Bongo" on top of him. The appellant suffered a broken left ankle which required surgery. He remained in hospital until 29 May 1993 and subsequently returned to hospital for outpatient treatment and physiotherapy. It appears to have been accepted by the appellant that the injury he suffered was not maliciously inflicted but was as described by the learned stipendiary magistrate (transcript p 35) "a non malicious piece of physical horse play". The appellant consulted a solicitor, Mr Cameron Stuart, of Mildrens Solicitors on 18 June 1993 and was advised by Mr Stuart that the actions of the assailant may amount to a dangerous act under s154 Criminal Code and that the appellant could apply for compensation pursuant to the *Crimes (Victims Assistance) Act*. This advice was confirmed by letter from Mr Stuart dated 21 June 1993 (affidavit of Cameron Kingston Stuart sworn 28 September 1994). Mr Stuart and Mr Geiszler made efforts to ascertain the true name of "Bongo". When this was achieved the appellant reported the incident to police on 20 July 1993.

It appears the police file went missing and nothing was done by police for some weeks. Annexure "K" to affidavit of Cameron Stuart sworn 28 September 1994.

On 9 September 1993, the Officer in Charge at Casuarina Local Police Office advised Mr Stuart that the matter was being handled

by Senior Constable Wardrope (annexure "L" to the affidavit of Cameron Stuart sworn 28 September 1994). By letter (undated) from Senior Constable Wardrope to the office of Mildrens Solicitors apparently received on 22 November 1993, Constable Wardrope advised he had interviewed Mr Bojczuk in relation to the complaint made against him by Peter Geiszler. He further advised the matter had been forwarded to the Prosecution Section for a decision (annexure "M" to affidavit of Cameron Stuart sworn 28 September 1994). On 25 November 1993 the Police Prosecutions Unit advised Mr Stuart by letter that no charge would be laid as a result of the incident (annexure "N" to the affidavit of Cameron Stuart sworn 28 September 1993).

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

The evidence before the learned stipendiary magistrate was the affidavit of John James Howard sworn 13 July 1994, affidavit of Cameron Kingston Stuart sworn 28 September 1994 and oral evidence given to the Local Court by Acting Senior Sergeant Stephen John Wallace. Acting Senior Sergeant Wallace's evidence to the court on that date was that he is the officer in charge of the communications centre. He gave evidence to the effect that there are a number of ways members of the public can lodge a complaint with the NT Police Force. These include contact by telephone, arranging for another person to make contact with the police, or arranging for police to attend either their home or whilst they are in hospital to enable them to make the complaint.

The evidence referred to above which was before the learned stipendiary magistrate, is the evidence on which the appellant relies in the appeal.

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

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

Pursuant to s19(1) of the *Local Court Act* the appeal is limited to a question of law. Section 19(1) provides:

> " (1) A party to a proceeding (other than a small claim proceeding) may -
>
> (a) within 28 days; or
> (b) with the leave of the Supreme Court, after the expiration of 28 days,
>
> after the day on which the order complained of was made, appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding."

The learned stipendiary magistrate in his reasons for decision stated that he accepted there was good reason why the appellant did not report the matter prior to 18 June 1993 when he received certain advice from his solicitor as to his rights. The magistrate found that it was unreasonable to delay the report much beyond 18 June 1993 and "certainly unreasonable by say 1 July in the circumstances of this case, let alone 20 July" (transcript p 37). Accordingly, the magistrate made an order that pursuant to s12b of the *Crimes (Victims Assistance) Act* that the matter was not reported to the police within a reasonable time and that therefore an assistance certificate shall not issue.

The essential argument by the appellant is that the learned stipendiary magistrate made an error in law in that he made a finding of fact which is not supported by any evidence. The appellant relied on the principle expressed by Kearney J in *John Holland v Hall* (1987) 45 NTR 11 at 26.05: "The question whether there is any evidence to support a finding of fact is always a question of law"

and Gallop J in the matter of *Tiver Constructions v Clair NT* CofA 22 October 1992 at p3-4:

> "The case on appeal to the Supreme Court was not that there was no evidence to support the decision made, or one in which the evidence was inconsistent with and contradictory of the decision, or one in which the true and only reasonable conclusion contradicted the decision. If any of those alternative sets of circumstances had existed, it would be correct to say that the decision was a question of law (*Edward (Inspector of Taxes) v. Bairstow* [1956] AC 14 per Lord Ratcliffe at 36). ..."

and Martin and Mildren JJ at p 29:

> "It was not argued that there was no evidence of a particular fact as found. If such an argument had been raised then a question of law would have arisen (*McPhee v S Bennett Limited* (1934) 52 WN (NSW) 8 per Jordan CJ at 9)."

With respect, I accept that an argument that there is no evidence of a particular fact is a question of law.

The sole ground of appeal pursued by the appellant is that the magistrate had no evidence before him about the essential matter that he made his decision upon. Namely, that the late reporting of the matter to the police prejudiced the police inquiries into the matter and based upon that His Worship concluded that the matter had not been reported to police within a reasonable time.

Mr Reeves, counsel for the appellant, took this court to passages from the transcript of the reasons for decision by the learned stipendiary magistrate. At transcript page 35 in his reasons for decision the learned stipendiary magistrate said:

> " In terms of the two separate purposes served by this (incomprehensible) which I regard as credible, it seems to me that in the circumstances of this case the delay occasioned by the defendant has been sufficient so as to prejudice the proper inquiry by the police and that the matter when reported was no longer sufficiently assessed that the matter could be properly investigated. That the police would be, and by then the first respondent would be, unduly and unfairly hampered in finding out

what's at the bottom of this case in relation to what the second respondent did. ..."

On page 36 the learned stipendiary magistrate said:

" Furthermore, had the applicant reported the matter to police around about 18 or 20 June, the police would've been in some position to make further inquiries at the Karama Tavern in relation to other witnesses to the event. And, although I don't know what inquiries they did make, I can say as a matter of course that those inquiries would've been more likely to bear fruit in June than they were or would've been in November.

Indeed, Mr Geiszler himself in his statement in paragraph 7 speaks of Peter Chetchus (?) and his girlfriend. 'Peter and this lady are no longer in Darwin'. That is as at 21 July. I'm not informed as to whether they were still in Darwin on 20 June. I'm not informed who or what efforts were made to identify the couple at the table under which the defendant fell. But it is quite apparent that all such details, if discoverable, would've been much more easily discovered in June than they could've been in November and many details pertaining to the event would've been discoverable in June or shortly thereafter which would've been lost entirely by November."

It is the submission of counsel for the appellant that the magistrate had no evidence before him on which to make findings that in the one months delay, between 18 June and 20 July 1993, police investigations were unduly and unfairly hampered, or that police would have been in a better position to make inquiries in June, or that details would have been more easily discovered in June than in November. The appellant submits there was no evidence before the learned stipendiary magistrate on which he could base the findings as quoted above from transcript pages 35 and 36. The argument for the appellant is that this was sheer speculation on the part of the magistrate and his conclusion is not supported on the evidence. There is in fact no evidence to support such a conclusion.

Accordingly, on the appellant's submission, there is an error in law and this matter should be remitted to the learned stipendiary magistrate for hearing of the substantive application.

I do not accept this submission.

I was informed the only other decision in respect of the provisions of s12(b) of the *Crimes (Victims Assistance) Act* is a decision of McGregor SM, *Peter Marshall & Northern Territory of Australia*. Mr McGregor SM ruled that a report to police on 4 November 1992, in respect of an assault which occurred on 22 September 1991, was well outside the reasonable time as required by s12(b). Mr McGregor SM stated in the course of his reasons for decision at p 3:

> " ..... I thought a few minutes ago that Mr Grant was perhaps arguing that, if he hadn't reported it until after he went to Tasmania, that might still have been a reasonable time. I don't believe it was. I believe that, at the very latest, a reasonable time would have been soon as this man was able to get up out of bed.
>
> This is the sort of offence, it seems to me, where a trail gets cold very quickly. I am certainly not going to say with any definitiveness that a reasonable time ended in this case at a certain point, but I am clear that report on 4 November 1992 was well outside that time ....."

The decision of Mr McGregor SM was drawn to the attention of the learned stipendiary magistrate in these proceedings and I note the following exchange between counsel and the magistrate as set out at transcript pp 22-23:

> "HIS WORSHIP: McGregor SM's reference to 'the trail going cold', Mr Howard, would seem to have some bearing on why this provision is there in the first place wouldn't it?
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> MR HOWARD: Exactly, Your Worship, exactly. I raise it because - I mean I had to, I came across the decision. So it's only fair that I raise it. But he goes onto - -
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> HIS WORSHIP: If this legislation extended to frauds, which of course it doesn't, I wouldn't be too worried about a failure to report for a year or 2 provided the paperwork was still intact.
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> MR HOWARD: But it also I think points to I mean - -
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> HIS WORSHIP: If one's talking about an affray which is left drift for a few months and questions arising from the nature of the offence are such that the applicant may have made a large contribution to his own downfall. That sort of thing. That the delay impedes investigation in some substantial way.

MR HOWARD: As was the case in this application, Your Worship.

HIS WORSHIP: In McGregor SM's case.

MR HOWARD: I mean he concludes that 'There is nothing here which prevented the report and the application in my view must fail'. He refers to the South Australian decision of Schmidt which I will return to Your Worship. And he 'Was guided by it'. But he distinguishes the local situation and the application was dismissed.

Your Worship, I accept that with the passage of time and where inquiries become more difficult for the police to pursue, then yes that's obviously a valid ground. But too particularly valid I submit, Your Worship, is if someone realises they're bona fide, they should pursue due diligence and at least report to someone. As I say it's the concern of the first respondent that you can, with 2 months hindsight, reconstruct an offence and say 'Let's go and make an application', Your Worship.

In that circumstance, Your Worship, I'm very concerned that due diligence should have been shown by the applicant. Your Worship, I'll not formal (sic) tender these cases, but give them to Your Worship."

The learned stipendiary magistrate had before him the fact that an alleged offence took place on 16 May 1993 and was not reported to police till 20 July 1993. The magistrate had already ruled that the first month to 18 June 1993 was reasonable because the appellant did not become aware until that date that the actions of the second respondent may amount to an offence for which he had a claim under the *Crimes (Victims Assistance) Act*. The effect of the learned stipendiary magistrate's ruling is that he found the appellant's failure to report the offence between 18 June and 20 July 1993 meant he had not reported within a reasonable time in accordance with the provisions of s12(b) of the *Crimes (Victims Assistance) Act*.

In my opinion, the learned stipendiary magistrate made certain inferences from the fact that the appellant delayed reporting the matter to police until 20 July 1993. I consider that without further evidence the learned stipendiary magistrate was quite justified in coming to the conclusion that a delay in reporting an offence makes its difficult for police to properly investigate the allegation and that is the whole purpose of having s12(b) in the legislation.

I do not agree with the submission made by Mr Reeves, that the magistrate was not entitled to come to this conclusion without actual evidence before him that because the appellant delayed in reporting the incident problems had arisen in the police investigation.

I adopt, with respect, the comments of Bollen J in *Schmidt v. South Australia* 119 LSJS 417 at 421:

> "... Parliament intends that where possible the State should have recourse against the offender. Often that recourse will be an empty remedy but in the hope that the State will sometimes recover some of its disbursement Parliament wants every effort made to identify each offender. I think it axiomatic that the early giving of information is likely to be most helpful to police investigation. ..."

Bollen J then made reference to certain evidence given by Detective Lewandowski who gave evidence to the effect that an early complaint of an offence would have enabled the police to identify and apprehend the offender. Bollen J then stated at 422.7:

> "... Standing unchallenged I think this evidence would have justified the learned trial Judge's decision. He did not find it necessary to base his decision on this evidence. He treated the delay of nearly six months as something which obviously hindered the investigations. I think he was right."

In the matter which is the subject of this appeal, the learned stipendiary magistrate found that the consequence of failing to report the incident to police until 20 July 1993 would be to prejudice a proper inquiry by police. The magistrate reasoned that had the applicant made a report to police around about 18 or 20 June, the police could have made inquiries at Karama Tavern in relation to other witnesses to the event. The magistrate also made reference to a statutory declaration made by the appellant dated 21 July 1991. The appellant stated at paragraph 7 "In due course I was driven to the hospital by Peter Cecis and his girlfriend. Peter and this lady are no longer in Darwin". The magistrate in his reasons for decision stated that he was not informed whether they were still in Darwin in June. He also stated he was not

informed what efforts were made to identify the couple at the table under which the defendant fell. He then stated such details were more easily discoverable in June. I consider those inferences were open to the magistrate and that it is "axiomatic" that the necessity to report an offence within a reasonable time after the offence is to enable police to make the necessary inquiries and investigations into the allegations. Failure to report a matter of this nature to police within a reasonable time necessarily hinders police in their ability to investigate the offence.

The provisions of s12(b) require the learned stipendiary magistrate to exercise a discretion. This court should only interfere with the discretion if there is a demonstrated error of law. I am not persuaded the learned stipendiary magistrate did make an error in law. The notice of appeal is drawn in general terms and states four grounds. However, the only matter argued on appeal was the one issue which I have addressed.

I did initially have some concern as to the magistrate's remarks to the effect "that those inquiries would be more likely to bear fruit in June than they were or would've been in November." The essential test it seems to me is not the delay between June and November but the delay between on or about 18 June and 20 July. It is not the appellant's responsibility because police files went missing or for some other reason within the Police Force inquiries were not initiated until much later than 20 July 1993.

However, it is clear on a complete reading of the learned stipendiary magistrate's reasons for decision that he made his findings that the appellant had not complied with the provisions of s12(b) by not reporting the commission of the offence until 20 July 1993. The magistrate also satisfied himself that there were no circumstances which existed which prevented the reporting of the commission of the offence within a reasonable time after the commission of the offence.

I am not persuaded the learned stipendiary magistrate made an error in law and I dismiss the appeal.