Weir v Northern Territory of Australia [2004] NTSC 58

PARTIES:	JOHN ANTHONY WEIR
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE LOCAL COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 16 of 2004 (20016214)
DELIVERED:	26 October 2004
HEARING DATES:	22 October 2004
JUDGMENT OF:	RILEY J

CATCHWORDS:

APPEAL – *Crimes (Victims Assistance) Act* 1983 (NT) s 12(b) – where offence not reported to police – whether the learned magistrate erred in finding that the "reasonable time after the commission of the offence" pursuant to s 12(b) of the Crimes (Victims Assistance) Act (NT) expired on the death of the offender.

CRIMINAL LAW AND PROCEDURE – Criminal injuries compensation - whether circumstances existed which prevented the reporting of the commission of the offence within a reasonable time.

LEGISLATION:

Crimes (Victims Assistance) Act – s 5(1), s 10 and s 12(b)

CASES:

Woodruffe v The Northern Territory of Australia (1999-2001) 10 NTLR 52
Kinsella v Solicitor for the Northern Territory (1997) 138 FLR 213
Geiszler v Northern Territory of Australia & Anor (unreported NTCA 3 *April 1996)*

HELD:

Appeal dismissed.

REPRESENTATION:

Counsel:

Appellant:	M. Spiers Williams
Respondent:	M. Heitmann

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Mark Heitmann

Judgment category classification:	B
Judgment ID Number:	ril0425
Number of pages:	10

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Weir v Northern Territory of Australia [2004] NTSC 58
No JA 16 of 2004 (20016214)

IN THE MATTER OF the *Crimes (Victims Assistance) Act*

AND IN THE MATTER OF an appeal against decision handed down in the Local Court at Alice Springs

BETWEEN:

JOHN ANTHONY WEIR
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 26 October 2004)

[1] The appellant appeals from a decision of the Local Court declining to issue an assistance certificate pursuant to the provision of s 5(1) of the Crimes (Victims Assistance) Act.

[2] The appellant was injured on 7 October 1999 as the result of what he claimed to be an assault upon him. The alleged offender was Wilfred Brown who died on 12 November 1999. The assault was reported to police on 10 January 2000 and the police records note that "no charges laid against offender … the offender is now deceased".

[3] Although his version of events varied from time to time, the appellant claimed that the injury occurred when he was struck on the arm by a chair that had been thrown by Mr Brown at Mr Brown's auntie, Susan White. Ms White had taken refuge behind the appellant. He did not think that he had suffered a significant injury and it was not until the following day that he attended at the Alice Springs Hospital. He attended at Accident and Emergency but left after a period because he was "sick of waiting". He returned to the hospital on 10 October 1999 and was then admitted and operated upon. He was diagnosed as suffering from "compartment syndrome". He was transferred to the Royal Adelaide Hospital on 23 October 1999. There was no dispute before the Local Court or this Court that the injury suffered by the appellant was serious, if eligibility was established, and warranted an award of the maximum amount available under the Act unless that amount was to be reduced by operation of s 10 of the Act.

[4] The court below declined to issue an assistance certificate holding that 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. Section 12(b) of the Crimes (Victims Assistance) Act is in the following terms:

> "12 The court shall not issue an assistance certificate –
>
> (a) …
>
> (b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;"

[5] The question for the Local Court was identified by her Worship as being "what is a reasonable time" in all of the circumstances of the case. Her Worship referred to *Woodruffe v The Northern Territory of Australia* (1999-2001) 10 NTLR 52 where the Court of Appeal said (par 20):

> "Section 12(b) of the Crimes (Victims Assistance) Act (the Act) provides that the court shall not issue an assistance certificate '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'. On the plain reading of the subsection, it provides for a period in relation to which a failure to report the offence is to be considered beginning with the date of the commission of the offence and ending at a time which is a reasonable time thereafter (which we will call 'the relevant period'). The subsection has nothing to say about whether or not the offence is reported at some later time. Consequently, the enquiry as to whether circumstances existed which prevented the reporting of the offence, is limited to the relevant period and it is irrelevant to that enquiry that there was no report at all and that circumstances existed or did not exist, which prevented the reporting of the offence after the relevant period."

[6] Her Worship set out the reasons provided by the appellant for his failure to report the matter in the following terms:

> "The applicant has set out in paragraphs 18 and 19 of his affidavit, exhibit A5, as to why he had not reported the matter prior to January 2000. He deposes that he thought Susan White had told the police about the assault because he said he remembered "her telling me she had done so". He also said that he did not want to get Wilfred into trouble. The applicant stated that he knew if he reported the matter to the police he might get in trouble from Wilfred's family and he did not want this to happen. He said he did not want to get assaulted again. I do not know who he believes may have assaulted him (paragraph 18 of exhibit A5). In paragraph 19 he said that he was in hospital from three days after the assault until after Wilfred passed away and after that time it did not occur to him to report the matter to police as Wilfred had died. An inference can be drawn from the material before me that had the second respondent not died, the applicant may not have gone to the police station to report the offence at all, irrespective of the serious nature of the injury."

[7] Her Worship noted that the date of the report was "not an inordinate time after the date of the offending" and went on to conclude that "the relevant period" was from the date of the offence (7 October 1999) to the date of the death of the offender, namely 12 November 1999. She considered only that period in relation to the application of s 12(b) of the Act. She provided no explanation as to why the death of the offender should be regarded as the expiration of the relevant period. She noted that the reporting of the offence did not occur within that period.

[8] In considering this issue her Worship proceeded on the basis that s 12(b) acts as a bar to the issuing of an assistance certificate and she treated the onus of overcoming that bar as resting upon the applicant in the proceedings before her.

[9] As the respondent correctly concedes, her Worship erred in this regard. Her approach was inconsistent with the decision of the Court of Appeal in *Woodruffe v The Northern Territory of Australia* (supra) at par 27. In that case the court concluded that compliance with s 12(b) is not a condition precedent to recovery and the onus of raising the statutory bar rests upon the defendant. The court went on to say:

> "Consequently, the respondent had the onus of establishing, by calling evidence, or by eliciting evidence from the appellant and her witnesses, what was a reasonable time in all the circumstances and the fact that no report to the Police was made within that time: see *Geiszler* (supra); *Kinsella v Solicitor for the Northern Territory* (1997) 138 FLR 213. The learned Magistrate made no finding as to what was a reasonable time after the offence within which the matter had to be reported. Absent such a finding, strictly speaking, a consideration of the proviso to s 12(b) did not arise. More to the point, no evidence whatsoever was called by either party before the learned Magistrate in relation to that question, a situation which is identical to the situation which arose in *Geiszler*(supra). Consequently, in the absence of evidence, the appellant was entitled to succeed on the point."

[10] Her Worship having approached s 12(b) of the Crimes (Victims Assistance) Act on the basis that the appellant bore the onus of establishing that the offence was reported within a reasonable time, was in error in this regard. I am invited by the parties to consider the matter afresh on the basis of the materials before her Worship.

[11] The issue of what is a reasonable time for the purposes of s 12(b) of the Act was discussed in *Geiszler v Northern Territory of Australia & Anor* (1996) 1 NTJ 250. In that case Kearney J said (page 252):

> "The effective requirement that there be a report within a reasonable time is, I think, imposed to enable Police properly to investigate the allegation. Where the allegation is of conduct such as that alleged here, the lack of any report until a long time has elapsed may in itself suffice to establish without more, as a matter of common sense, that the allegation could no longer be properly investigated.
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> …
>
> What is a "reasonable time" for the purposes of s 12(b) is to be assessed objectively: what would a reasonable person regard as a time in all the circumstances of the case within which the Police could properly investigate the allegation. That is a question of fact and degree, involving an evaluation on which minds may reasonably differ; it was in that sense, I think, that her Honour characterised the decision as discretionary."

[12] In that case Angel J noted that in considering the meaning of "within a reasonable time" it is necessary to consider all the relevant circumstances of the case including the nature of the offence, the circumstances of its commission, its consequences and its aftermath. Mildren J said (page 266):

> "The question of what is a reasonable time depends on the circumstances of the case; there is no such thing as a reasonable time in the abstract … . The question is then which circumstances are relevant, and which are not. I accept the view of the learned magistrate that to ascertain the relevant circumstances, one should have regard to the purposes of the subsection. I accept also his Worship's view that these appear to be to assist in the early investigation of claims so that false claims may be rejected, and any contributing conduct on the part of the victim, which, by s 10(2) is to be taken into account, may be investigated. A relevant circumstance would be, therefore, whether or not the police investigation into the alleged offence had been prejudiced to such a degree that the matter in some relevant respect was not able to be properly investigated. However mere delay may not necessarily prejudice an investigation; it must always be a question of fact and degree."

[13] *Geiszler v Northern Territory of Australia* was reviewed in *Kinsella v Solicitor for the Northern Territory* (1997) 138 FLR 213. The Court of Appeal said in that case (220):

> "The proviso enabling an applicant to produce evidence of circumstances preventing the applicant from reporting the commission of the offence (before it was reported) demonstrates that it is not for the applicant to show that the commission of the offence was reported within a reasonable time but that it is for the Northern Territory to show that it was not. Reasonableness is to be assessed taking into account circumstances other than the reason for the delay in reporting, which may be permitted to override a finding that the time after the commission of the offence within which it was reported was unreasonable. What is 'reasonable' must be looked at from the perspective of the police receiving a report and the time it is received. The factors which may be relevant in deciding the point are not for this Court presently to decide."

[14] In the present case the injury to the appellant occurred on 7 October 1999. He did not report the claimed assault to the police until 10 January 2000, some three months later. By that time the alleged offender had died.

[15] In the circumstances the police investigation into the alleged offending must have been prejudiced. The death of Mr Brown meant that his version of events was not available to the investigating officers. The version of events provided by the appellant could not be challenged by Mr Brown's evidence. The appellant acknowledged that at the time of the incident he had been drinking but said he was "not really drunk". Notwithstanding that, the objective evidence shows that he was an unreliable historian and her Worship so found. Examples of his unreliability are provided by her Worship in par 17 of her reasons for decision and relate to how he got to

the hospital, whether he was hit with a stick, a chair or an iron bar and whether the assault took place at 27 Charles Creek Camp or at Hoppy's Camp. The circumstances of the alleged assault, including the location of that assault and the nature of the weapon used, are far from clear. What occurred from Mr Brown's point of view cannot be known. Whether issues of provocation, self-defence or accident arose cannot be known. Significant aspects of the allegations could no longer be investigated.

[16] In my view, as her Worship found, the reasonable period expired with the death of Mr Brown on 12 November 1999. It follows that the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence.

[17] It then becomes necessary to consider whether circumstances existed which prevented the reporting of the commission of the offence within a reasonable time. The appellant was injured in the course of the incident but had no appreciation of the nature or extent of his injuries. He did not go to the hospital until the following day and then left the hospital after a period of time because of the delay involved. It was not until 10 October 1999 that he realised he had a significant injury to his arm and he returned to the hospital for treatment. He was immediately admitted to hospital and operated upon. He remained in hospital in Alice Springs until he was transferred to the Royal Adelaide Hospital on 23 October 1999. He remained there until 25 November 1999 when he was discharged. This was at a time subsequent to the death of the alleged offender on 12 November 1999. Although, for

present purposes, it was beyond the relevant period, even then it did not occur to the appellant to report the matter to the police once the offender had passed away. He eventually reported the assault to police when he received legal advice upon his return from Royal Adelaide Hospital to Alice Springs.

[18] In explaining why he had not reported the assault to the police on an earlier occasion the appellant acknowledged that he was reluctant to do so. The alleged assailant was his stepson and he did not want to get him into trouble. He also said that if he reported the matter to the police he might himself "get into trouble from Wilfred's family and I did not want this to happen. I did not want to get assaulted again". Notwithstanding his own reluctance to report the matter to police he thought the matter had, in any event, been reported to the police because he claimed that he was informed by Susan White that she had done so. The information from the police is that there was no record of a report prior to 10 January 2000. The appellant was not cross-examined on his affidavit and Ms White was not called by either side.

[19] In my opinion there were no circumstances that prevented the appellant from reporting the offence to a member of the Police Force within the reasonable time referred to above. He was able to do so in person prior to his entry to hospital on 10 October 1999. Whilst in hospital, and apart from times when he was undergoing medical procedures, there was no suggestion that he was unable to arrange for a report to be made to police. There was no medical evidence that suggested he was suffering from any incapacity relevant to his

ability to report during this period. He had access to nurses and social workers.

[20] The effect of the evidence of the appellant was not that he was prevented from reporting the matter to police but rather that he chose not to do so for reasons associated with his relationship with the alleged offender and concerns about the reaction of members of his wider family. He did not seek confirmation from Ms White that she had reported the matter to the police and, in any event, did not act upon the assumption that she had reported it. When he received the appropriate advice he reported the matter to the police himself. The prospect that Ms White may have reported the matter did not prevent him from doing so himself.

[21] Section 12 of the Crimes (Victims Assistance) Act has application to the circumstances of this matter. The section provides that the court shall not issue an assistance certificate 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 and I have found that to be the case here. I have also concluded that I am not satisfied that circumstances existed which prevented the reporting of the commission of the offence. In those circumstances an assistance certificate should not be issued.

[22] Notwithstanding the identified error on the part of her Worship the correct conclusion was reached. The appeal is dismissed.

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