Brown v Northern Territory of Australia & Brown [2005] NTSC 26

PARTIES:	BROWN, Eileen v NORTHERN TERRITORY OF AUSTRALIA and BROWN, Albert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 76 of 2001 (20116294)
DELIVERED:	15 June 2005
HEARING DATE:	9 June 2005
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Applicant:	E.J. Sinoch
First respondent:	M. Heitmann
Second respondent:	No appearance

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
First respondent:	Mark Heitmann

Judgment category classification:	B
Judgment ID Number:	ril0510
Number of pages:	10

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

Brown v Northern Territory of Australia & Brown [2005] NTSC 26
No JA 76 of 2001 (20116294)

IN THE MATTER OF an application for leave to appeal under the *Local Court Act*

BETWEEN:

BROWN, Eileen
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First respondent

AND:

BROWN, Albert
Second respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 June 2005)

[1] This is an application for leave to appeal against a decision of the Local Court refusing to allow the applicant an extension of time in which to apply for a compensation certificate pursuant to the provisions of the Crimes Compensation Act 1982.

[2] The applicant claims that on 31 May 1984 she was stabbed by her then husband, Albert Jungari Brown. In her affidavit filed in support of her application she stated that she was stabbed several times "to the rear of my right arm, my stomach, the upper abdomen and the back of my right chest". She and her husband separated after the offence.

[3] On 4 February 1986, in the Supreme Court, the offender pleaded guilty to the offence of causing grievous harm to Ms Brown and was sentenced to imprisonment for a period of three years. The sentence was wholly suspended.

[4] On 9 August 1991 the son of Ms Brown died as the result of an assault. Some time after his death she was informed that she may be entitled to compensation as a consequence of the death. In November 1997 she saw a solicitor from the Central Australian Aboriginal Legal Aid Service regarding the death of her son and she was referred on to a solicitor from the Northern Territory Legal Aid Commission. She saw that solicitor on 15 December 1997 but only has a vague recollection of the discussions. She said in her affidavit that "I believe that when I told the solicitors about the death of my son I also told them about me being stabbed by the offender". That belief is not supported by reference to the relevant files.

[5] The applicant saw solicitors from the Legal Aid Commission on a number of occasions in 2000 and, eventually, on 14 September 2000 spoke with Mr Goldflam, a solicitor with that service. During the discussion, which

occurred with the assistance of an interpreter, Ms Brown revealed that she had been the victim of a stabbing offence in 1984. The solicitors then carried out some further investigations in relation to the events of 1984 and, on 22 May 2001, made application on behalf of Ms Brown for an extension of the period within which to make an application for compensation under the Crimes Compensation Act 1982 (NT). That legislation has subsequently been replaced by the Crimes (Victims Assistance) Act, however, by virtue of the transition provisions, the earlier legislation continues to have effect in relation to this claim.

[6] Included in the material provided to the Local Court on the hearing of the application for an extension of time was an affidavit from Ms Brown in which she said:

> "I do not understand about legal procedures because I am a traditional Aboriginal woman and have had little involvement with the legal system. I was born at Murray Downs Station and grew up there. That is my country. Alyawarre is my first language. My schooling was at the station and very limited. I can only speak a little bit of English. I cannot read or write, except to write my name."

[7] The matter came before the Local Court and on 13 September 2001 the application for an extension of time to apply for a compensation certificate was dismissed. The applicant now seeks leave to appeal from that decision. The second respondent was served with relevant documents but did not appear on that occasion and did not appear on the hearing before this Court.

Leave to appeal

[8] The applicant has sought leave to appeal pursuant to the provisions of s 19 of the Local Court Act. Section 19(3) of the Act is in the following terms:

> "(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."

[9] It was the written submission of the applicant that the order from which the applicant wished to appeal was a final order and therefore s 19(1) of the Local Court Act applied. This submission is not sustainable in light of the settled law concerning the point: *Hall v The Nominal Defendant* (1966) 117 CLR 423; *Carr v Finance Corporation of Australia Ltd (No. 1)* (1980-81) 147 CLR 246. It was not pressed at the hearing. In the circumstances, the only avenue for appeal available to the applicant is to obtain leave pursuant to the provisions of s 19(3) of the Local Court Act. There is no dispute that the applicant sought leave within the period of 14 days as required by the section.

[10] In deciding whether to grant leave to appeal the discretion of an appellate court is unfettered. However, as a general guide an applicant will be required to show that the interests of justice make it desirable to grant leave: *Nationwide News Pty Ltd (trading as Centralian Advocate)& Others v Bradshaw & Anor* (1986) 41 NTR 1. There is a presumption in favour of the correctness of the decision in question. It is assumed that there has been a

proper exercise of discretion by the primary judicial officer and the court will not interfere unless a prima facie case for interfering with the exercise of the discretion has been made out. If it appears, prima facie, that the order from which it is sought to appeal is clearly wrong, then leave will be granted. On the other hand, if the appellate court forms a view that the appeal could not succeed then leave will generally be refused. It will be sufficient to obtain leave if the correctness of the primary decision is called into question and the appellate court entertains real doubt as to its correctness and forms the view that, in the event that the decision is wrong, substantial injustice may or will flow if leave to appeal is not granted.

[11] It must be borne in mind that we are concerned with the decision being wrong rather than whether there is error in the reasoning process by which that decision was reached. As Nader J observed in *Nationwide News* (at 14):

> "An order that is not wrong cannot be the cause of a party to the proceedings suffering injustice merely because it was made for the wrong reasons. The possibility of a right order for the wrong reasons is a real one because, in many cases, the primary judge is presented with only two alternative decisions with the consequence of a high statistical possibility of a right answer irrespective of the way that he has tackled the problem."

[12] In this case application for leave to appeal is from a discretionary interlocutory decision, namely whether or not to order an extension of the period in which an application for an assistance certificate may be made. Section 5 of the Crimes Compensation Act 1982 provides that, within 12 months after the date of an offence, a victim may apply to a court for a

compensation certificate in respect of an injury suffered as a result of the offence. Section 5(3) permits the court "as it thinks fit" to extend the period within which an application may be made. The learned magistrate, in the exercise of his discretion, refused to extend the relevant period.

[13] If leave to appeal be granted, the approach to be adopted by the Supreme Court on appeal is to be found in the oft quoted principles expressed by the High Court in *House v R* (1936) 55 CLR 499 at 504-505:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for so doing. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[14] Further guidance is to be found in the observations of Kitto J in *Australian Coal and Shale Employees' Federation & Anor v The Commonwealth & Ors* (1953) 94 CLR 621 at 627:

> " … the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that

> decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

An extension of time

[15] The nature of an application to extend time in circumstances similar to the present was considered in the matter of *Drover v Northern Territory of Australia and Ebatarinja* [2004] NTCA 11. In that case the Court of Appeal made reference to the judgments of members of the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. It was noted that where a provision confers a discretion to extend time, the discretion should only be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing. The onus of satisfying the court that the discretion should be exercised in favour of the applicant lies on the applicant. The enactment of a limitation period represents the judgment of the legislature that the welfare of society is best served by causes of action being litigated within the limitation period. The legislature having selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the respondent who would otherwise have the benefit of the limitation. The applicant seeking an

exercise of the discretion to extend time is to be regarded as endeavouring 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. A positive burden is imposed upon the applicant. A primary consideration will be whether, by reason of the time that has elapsed, a fair trial is likely. In *Brisbane South Regional Health Authority v Taylor* (supra) McHugh J said 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 …
>
> 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."

[16] In the present case, in rejecting the application for an extension of time, his Worship recounted the history. He noted that the incident occurred some 17 years prior to the application. That period has now blown out to 21 years. In his Worship's view there was no satisfactory explanation for the delay. Whilst ignorance may have caused a lack of action between 1984 and 1991 this did not extend up to the time of the application in 2001. In 1991, or at some unidentified time thereafter, Ms Brown became aware of an entitlement to compensation arising in circumstances where injury or death results from a criminal act. The only explanation for inaction after her son died was that "some time after I lost my son, somebody told me I could

claim compensation for his death. I don't remember who told me or what they told me". Notwithstanding that information, she did not see a solicitor until November 1997. She did not make application for an extension of time until May 2001. There is no explanation for her failure to do so.

His Worship expressed the view:

> "It is reasonable in this context to question, if not assume, that the reason she saw fit to mention the assault upon her in November 1997 and December 1997 was because, as a result of the conversation with the unknown person some time between 1991 and 1997, she believed she might be in line for some compensation in respect of that incident. If so, there is no satisfactory explanation for the delay since 1997."

[17] In his reasons for decision the learned magistrate also emphasised the obvious difficulties that arise from the delay that has occurred. He found that irremediable prejudice would flow to the respondents because of the lengthy delay and, inter alia, he pointed to the apparently declining health of the second respondent and, in particular, to concern regarding his mental status. The learned magistrate commented that the declining mental state of the second respondent, as it was understood, made "it difficult if not impossible to get meaningful instructions or evidence from the second respondent". His Worship pointed out that in assessing the amount of compensation payable under the earlier legislation the court was required to have regard to any conduct on the part of the victim that contributed directly or indirectly to her injury. There was some suggestion that this may have been an offence arising out of jealousy and his Worship advised that the involvement of the victim was "next to impossible to unravel after almost 20

years". Further, he pointed to difficulties in determining what psychological problems were suffered by the applicant as a result of the conduct of the second respondent and what resulted from the death of her son in 1991. The evidence of the applicant suggested psychological consequences arising from both. The problem for the respondents is that it is now unlikely to be possible to ascertain what, if any, psychological consequences flowed from the assault, or to properly test the claim of the applicant in that regard.

[18] His Worship also observed that the impact of the delay is not just upon the claim by the applicant against each of the respondents but also upon the ability of the first respondent to execute its rights of recovery (if any) against the second respondent.

[19] The applicant has not been able to demonstrate error on the part of his Worship in concluding that the delay has not been explained and, more importantly, that in the circumstances the delay has made the chances of a fair trial unlikely. His Worship determined that prejudice to the respondents is readily apparent and he so concluded based upon his assessment of the evidence available to him. No error having been demonstrated and in circumstances where it cannot be said that the decision is clearly wrong or unreasonable or unjust, the application for leave to appeal must be rejected.

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