

CITATION: *Rice v The Territory* [2006] NTMC 100

PARTIES: THOMAS RICE

v

THE TERRITORY

TITLE OF COURT: Crimes (Victim's Assistance)

JURISDICTION: Local Court - Alice Springs

FILE NO(s): 20420234

DELIVERED ON: 19 December 2006

DELIVERED AT: Alice Springs

HEARING DATE(s): 11 December 2006

JUDGMENT OF: M Little SM

CATCHWORDS:

Crimes (Victim's Assistance) Act claim – Whether bar to assistance certificate being issued. Section 12(c) of the Crimes (Victim's Assistance) Act.

REPRESENTATION:

Counsel:

Applicant: J McBride

Respondent: J Stirk

Solicitors:

Applicant: John McBride

Respondent: Povey Stirk

Judgment category classification:

Judgment ID number: [2006] NTMC 100

Number of paragraphs: 32

IN THE CRIMES (VICTIM'S ASSISTANCE) COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20420234

BETWEEN:

THOMAS RICE
Applicant

AND:

THE TERRITORY
Respondent

REASONS FOR JUDGMENT

(Delivered 19 December 2006)

Ms M LITTLE SM:

1. This is an application for an assistance certificate to be issued pursuant to the Crimes (Victim's Assistance) Act. The matter proceeded as a hearing on 11 December 2006. The applicant filed an affidavit dated 4 October 2006 in support of the claim and this became exhibit A1. The respondent filed three letters which became exhibit R2 as a bundle. While all matters relating to whether an assistance certificate is issued will be canvassed, the two primary questions in this matter are quantum and material raised with respect to s.12(c) of the Crimes (Victim's Assistance) Act. Save and except for the s.12 issue, the burden of proof rests with the applicant and matters must be proved on the balance of probabilities.
2. A summary of the events leading up to the claim will be made first. The applicant claims that on 22 April 2004 he was assaulted by Peter Tex. The applicant is an elder of the Yuendumu Community and also works with the night patrol on a volunteer basis from time to time. On 22 of April 2004 he was working with other elders trying to resolve a community dispute. A dispute had flared up and members of the Gibson family were at Peter Tex's home. Someone had burnt all of Peter Tex's belongings. The applicant travelled by car to the house and whilst

he was still seated in the drivers seat Peter Tex walked up to him, carrying a nulla nulla, and hit the applicant on his right arm between the shoulder and elbow area with the nulla nulla. The applicant was hit once and he felt immediate pain. He was treated at the clinic for a broken right arm and then sent to the Alice Springs Hospital for further treatment. He gave no permission to be assaulted. He was involved in trying to stop the trouble with the family who had burnt Peter Tex's belongings when he was assaulted.

3. He made a statutory declaration with the help of the police. In paragraph 10 of the statutory declaration of Thomas Rice, which is annexed to his affidavit A1, the applicant says in part "I am related to Peter but want this matter to go to Court". There was no application to cross-examine the applicant.
4. I am satisfied that the applicant is a victim as defined by the Crimes (Victim's Assistance) Act and in particular that he was injured as a result of the commission of an offence by another person. I find that Peter Tex committed an offence of aggravated assault (pursuant to s.188 (2) of the Criminal Code) upon the applicant and as a consequence the applicant received a broken right arm. This is an injury within the meaning of the Crimes (Victim's Assistance) Act. This occurred on 22 April 2004.
5. **Section 12 (c) issues.**

The matter was reported to the Police on or around May 2004 at the Yuendumu Police Station. A charge was laid against Mr Peter Tex and this became file number 20413763. This file number is gleaned from a reference number in the letter from the Office of the Director of Public Prosecutions dated 9 November 2006 and now part of R2. A claim for Crimes Victim's Assistance was filed on 1 September 2004 by the office of John G. McBride on behalf of the applicant. The charge of aggravated assault as against Mr Tex had been adjourned for mention at the Yuendumu Court of Summary Jurisdiction and was next listed for 15 September 2004. That Court date had been provided by the Office of the Director of Public Prosecutions (DPP) by way of letter dated 25 August 2004 addressed to Mr John McBride. The respondent in the Crimes Victim's Assistance claim is The Territory. The Officers working for the Office of the Director of Public

Prosecutions are not one and the same as the Officers of The Territory in a Crimes Victim's Assistance claim. The applicant had provided a statutory declaration to the Police and had had his photograph taken showing his broken arm. Copies of the statutory declaration and photos were sent by the DPP to Mr McBride, in the letter of 25 August 2004 (now part of exhibit A1).

6. On 21 September 2004 a solicitor from the Central Australian Aboriginal Legal Aid Service (CAALAS) forwarded a letter to Yuendumu Police. They were acting for Mr Peter Tex. They referred to the case where Mr Peter Tex was the defendant charged with assaulting the applicant. Part of the letter sets out:

“Our understanding is that the parties have resolved the matters between themselves and that Mr Rice may no longer wish for the prosecution to proceed. We request that you take instructions from Mr Rice as to whether or not he wishes to pursue the matter and consider withdrawing it if he does not”.

7. No written reply was sent to CAALAS. There is no evidence before me of any response to that letter. The charge of assault was withdrawn as against the defendant Peter Tex on 10 November 2004. This information was provided to the solicitors for the Respondent in this matter by way of letter from the Office of the DPP dated 9 November 2006 and which forms part of exhibit R2.
8. In exhibit A1 the applicant has addressed this issue:

“5. My assailant Mr Peter Tex is well known to me. He approached me and offered to compensate me for my injuries as I believe he felt bad about hurting me. He made a monetary offer which I thought was good of him. I informed the Yuendumu Police Officer of Mr Tex's offer to compensate me as I believed this was the right thing to do. I did not understand that the Police might take this information from me as a basis not to pursue the Criminal charges against Mr Tex laid on the 22nd of April 2004. I have been informed by my Solicitor that the charge against Peter Tex for aggravated assault causing bodily harm on me has not been proceeded with. My recollection is that I was not requesting a withdrawal of the Police Prosecution against the defendant. The offer

made by Peter Tex to compensate me for my injuries as a result of him assaulting me was never honoured. I believed that the Northern Territory Police would in any event prosecute my assailant in the Criminal Court, based on the evidence to hand including my Statutory Declaration made on the 9th of August 2004. I say the assailant Peter Tex did the wrong thing in assaulting me and I have never attempted to hide this fact from the authorities nor have I in any way prejudiced the Police inquiries into this matter. It appears now that had I not disclosed to Police the hollow offer to compensate me made by Peter Tex they may well have proceeded to secure a conviction.

6. I am an elder of the community of Yuendumu. I have been actively involved for many years in the men's night patrol. I do not drink alcohol and try and discourage people from drinking grog because of all the trouble it brings. I do not believe Peter Tex did the right thing in assaulting me and left me in a lot of pain and discomfort for many weeks."
9. There is no indication on the material before me that the offer of compensation by the defendant Peter Tex to the applicant was a matter which was considered by the Police prosecutions when they were exercising their discretion and withdrew the charge of aggravated assault as against Peter Tex. The material before me does not disclose any basis for the exercise of the discretion to withdraw the charge.
10. It is trite to say that there can be no interference with the exercise of the discretion by prosecutions as to whether a charge is laid or is withdrawn. Once a person makes a complaint of assault to the Police it is for prosecutions as to whether a charge of assault is laid. At bush stations the Police lay the charge themselves, and it is then (usually though not always) overseen by prosecutions. In this case the terms Police and prosecutions are interchangeable. A victim or complainant can do no more than make the complaint and seek that the charge be laid. If they report the matter and request a charge be laid, and if it is decided not to lay a charge, the applicant has usually done all they can to assist the Police when considering their Crimes Victim's Assistance claim. They cannot ensure a charge is laid unless they, through a private prosecution, lay a charge. Not only is

that extremely rare, beyond most people and expensive, the Crimes (Victim's Assistance) Act operates on the premise that Police undertake both the investigation and Prosecution of an alleged offence.

11. In this case a complaint has been made to the Police and originally a charge had been laid. It was then for prosecutions and/or the police to exercise their discretion as to how the charge proceeded. The letter which was sent to Yuendumu Police by defence counsel raises matters which do not appreciate the independent nature of the prosecutorial process and the discretion to be exercised. In particular I quote:

“Our understanding is that the parties have resolved the matters between themselves and that Mr Rice may no longer wish for the prosecution to proceed.”

12. A prosecution of a matter is not akin to a civil matter. Mr Tex and Mr Rice cannot come to a resolution as “between themselves” for a prosecution, laid by Police, not to proceed. Further the parties are not Mr Rice and Mr Tex. The charge was laid by the Police. The Police and the defendant Mr Tex are the parties in that case. An issue also arises as to the status of the attitude of Mr Rice as to whether the prosecution proceeds or not. Mr Rice's attitude may have some bearing on whether or not a prosecution proceeds but is in no way determinative of the question. As with the decision whether to prosecute or not, the decision to withdraw a charge or not is entirely in the hands of prosecutions. It should not be based upon arbitrariness on the part of a complainant or as a result of pressure being exerted onto a complainant. Pressure can be directly or indirect though, for example, family members. Pressure can be physical or verbal.
13. Family relationships between complainants and defendants often raise complex issues when considering the exercise of the discretion. It is arguable that when those family members come from tight knit, small Aboriginal communities, the issues have their own set of complexities. At times it appears that complainants feel they bear the entire responsibility as to whether a charge proceeds or not and they are subject to family pressures based on this false premise. This reveals no

appreciation of the fact that ultimately the question is one for prosecutions and they alone.

14. Prosecutions and Police are experienced and trained to consider approaches they receive from a complainant after a charge is laid. They then consider the approach and whether the charge is to be withdrawn or not. The decision is based on a range of factors and the discretion must be exercised in a proper fashion.
15. In this case the Office of the Director of Public Prosecutions were aware that Mr McBride had been acting in a Crimes Victim's Assistance claim on behalf of Mr Rice with respect to the alleged assault by Peter Tex. They had forwarded to the applicant's solicitors a statement to Police and photographs. This occurred on 25 August 2004. On 21 September 2004 a letter was sent by CAALAS to Yuendumu Police acting on behalf of the defendant Mr Tex. This Court is not able ascertain why the charge against Mr Tex was withdrawn on 10 November 2004.
16. It is surmised that the charge may have been withdrawn as a consequence of the conversation that the applicant had with Yuendumu Police about an offer of compensation being made by Mr Tex to the applicant. It should first be noted that there was never any approach by the applicant to Mr Tex for compensation. This is an important point. Mr Rice had elected to seek compensation under the Crimes (Victim's Assistance) Act and did not seek to make a private arrangement with Mr Tex whether by way of a civil claim or even less formally. Even if he did make, for example, a claim in torts, that would not necessarily be a bar to a claim under the Crimes (Victim's Assistance) Act. An injury may be so serious that the maximum award under the Crimes (Victim's Assistance) Act may not fully compensate a victim. A person could seek compensation through a civil claim against the offender for the difference. Further there may be heads of damages available at common law that are not encompassed in a Crimes (Victim's Assistance) Act claim. There would be nothing improper about that.
17. A defendant charged with an offence who offers compensation to the victim may have one of a number of motivating factors. For example, it may be an attempt to pervert the course of justice by way of a bribe, it may be out of a consciousness of guilt or a sense of remorse. It may be that, in the culture that a defendant comes

from, that an exchange of money is considered unremarkable. It was for the Police to consider how they would respond to the advice about the offer. In this case we have no explanation as to why the defendant approached the applicant in this way. It is not helpful to speculate as to why the approach was made by the defendant. Without an exploration of the circumstances of the offer, based upon evidence, I cannot come to a finding as to why this offer had been made by the defendant.

18. It remains necessary to consider the applicant's response to that offer. The applicant has said that he advised the Yuendumu Police about this offer of compensation as he believed it was the right thing to do. The applicant saw this as a significant development in the case and one which he believed he should advise the Police. I accept the applicant's account.
19. There is no evidence before me that the applicant ever asked for the charge to be withdrawn. There is no explanation as to why the charge was withdrawn. There is no evidence before me which I can assume that the person or persons who became aware of Mr Tex's offer of compensation to the applicant were the same person or persons who reviewed the letter from CAALAS and indeed were the same person or persons who decided to withdraw the charge. There is simply no material before me as to whether there were any investigations or enquiries made by the Police or as to how the charge came to be withdrawn.
20. Section 12 of the Crimes (Victim's Assistance) Act has a range of matters which will act as a complete bar to the issuing of an assistance certificate. Section 12 (c) of the Crimes (Victim's Assistance) Act is the only relevant paragraph to be considered in this case.
21. Section 12 (c) of the Crimes (Victim's Assistance) Act sets out as follows:

“12. The Court shall not issue an assistance certificate –

...

- (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence.

...”

22. There is now a considerable body of case law with respect to the operation of s.12 (c) of the Crimes (Victim's Assistance) Act and I have been referred to some of those cases.

23. The matter of *Masters v Northern Territory of Australia* [2006] NTMC 038 summarises some of the principles relating to s.12 (c) of the Crimes (Victim's Assistance) Act in paragraph 7 of that decision. The principles which are relevant to this case are as follows:

“(a) The Act is remedial and should be construed beneficially although excepting provisions in a remedial Act do not necessarily have to be given a liberal interpretation (*Woodruffe v Northern Territory of Australia* [2000] NTCA 8)

(b) The Applicant need not take a proactive role in the investigation or prosecution (*Wolfe v Northern Territory of Australia* [2002] NTSC 26)

(c) The Applicant's role is secondary to the police (*Wolfe's case*)

(d) The onus is upon the Respondent to prove the failure to assist (*Wolfe's case*)

(e) Prejudice to police enquires is properly considered under section 12 (c) (*Geisler v Northern Territory of Australia* [1996] NTSC 19”

24. These principles guide a case where s.12 (c) of the Crimes (Victim's Assistance) Act is being considered. I am not aware of any decided cases that have the type of issues raised in this case. Section 12 (c) says an assistance certificate shall not be issued where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence. I do not believe that it can be said, that in the circumstances of this case, the applicant failed to assist the Police Force in the investigation or prosecution of the offence. The report was made to the Police and the applicant assisted as requested and in particular by the preparation of a statutory declaration. The charge was laid and there is no

evidence that the applicant failed to assist the police in either the investigation or prosecution of the offence from that point.

25. The applicant advised the Yuendumu Police that Mr Tex had approached him with respect to payment of money. Had the prosecution proceeded, the defendant pleaded not guilty and given evidence in a hearing it is extremely likely that the offer of compensation would have been put to the defendant in cross-examination. This could well have been a damaging series of questions and answers in defence of the case. It could also have come out in the applicant's evidence – once again potentially very damaging for the defendant. In either scenario, the provision of the information by the applicant to the Police would have assisted in the prosecution of the case.

26. Based on the principles of *Woodruffe v Northern Territory of Australia* and *Wolfe's Case* I find that an assistance certificate should not be declined on the basis of s.12 (c) of the Crimes (Victim's Assistance) Act. The Act is remedial and should be construed beneficially. I can find no criticism in the way that the applicant has acted in the matter. At all times he has been frank and open with the Police in the investigation and prosecution of the matter. At no stage has he requested the matter be withdrawn or done anything to place the prosecution of the matter in jeopardy. He has not provided false or inaccurate information to the Police as in the case of *Masters*. Whilst an applicant does not need to take a proactive role in the investigation or prosecution, this applicant has been proactive and has sought to keep the Police informed about the matter. The Police did not consult with the applicant upon receipt of the letter from CAALAS. The applicant's role is secondary to the Police. He can not by his own actions withdraw the charge. That is a matter entirely for the exercise of the prosecutorial discretion. Despite the assertion by the solicitors acting for the defendant that such an arrangement had been made, the complainant could not come to an arrangement as between himself and the defendant for the prosecution not to proceed. Such an arrangement is denied by the applicant in any event. There is no evidence before me, other than as assertion attributed to the defendant in correspondence, that such an arrangement was made. I find no such arrangement was made.

27. It was the decision of the prosecution to withdraw the charge. *Wolfe's case* sets out that the onus is on the respondent to prove the failure to assist. I decline to find that the applicant has failed to assist the Police Force in the investigation or prosecution of the offence. Section 12 (c) of the Crimes (Victim's Assistance) Act does not act as a bar to this claim.
28. There being no other bars to the issue of an assistance certificate, an assistance certificate will be issued.
29. The material before me fails to disclose any matters which relate to the conduct of the victim which would have contributed to the injury such as to reduce the amount of assistance.

30. **Quantum**

The next issue is one of quantum. The affidavit and annexures in A1 set out the matters with respect to the injury sustained. The applicant was 65 years of age at the time of the offence. He received a fracture of his right humerus (the bone of the upper arm). A humeral brace was fitted by a physiotherapist and he was discharged from the Alice Springs Hospital. The injury caused him a great deal of pain and discomfort and also caused inconvenience. His arm was in plaster for a few months. He attests that he had pain and discomfort for many weeks. He attended at follow up out-patient clinics and did all that was required of him with respect to recovery from the injury. There is no evidence of ongoing disabilities with respect to this injury. I do not regard a broken arm as a minor injury nevertheless this matter does not reveal the type of ongoing problems which would warrant an award in the upper end of awards for injuries of this type.

31. An assistance certificate will be issued in the sum of \$9,000.
32. I issue an assistance certificate in the sum of \$9,000 and order that costs of the applicant be paid by The Territory to be agreed or taxed. I publish these reasons.

Dated this 19th day of December 2006.

Melanie Little
STIPENDIARY MAGISTRATE