

SUPREME COURT OF QUEENSLAND

CITATION: *Pettingill v Minister for Justice & Attorney-General* [2003] QSC 385

PARTIES: **NOELA ANN PETTINGILL**
(applicant)
v
THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL
(respondent)

FILE NO: S9221 of 2001

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 14 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2003

JUDGE: Mullins J

ORDER: **Application dismissed**

CATCHWORDS: CRIMINAL LAW – CRIMINAL COMPENSATION – where applicant applied for review of decision of the Governor in Council to refuse the applicant’s application for compensation pursuant to s 33 of the *Criminal Offence Victims Act 1995 (Q)*– where application refused on the basis that it was not made within the three year limitation period provided for in s 40(2) (a) of the Act – whether the Minister erred in not considering whether to extend the time in which the application could be brought pursuant to s 41(1) (b) – Minister not bound to consider s 41(1) (b) without an application for an extension being made by applicant

Criminal Code
Criminal Offence Victims Act 1995
Judicial Review Act 1991
Limitation of Actions Act 1974

Byles v Palmer [2003] QSC 295
Jacob v Roberts [2002] QCA 87
R v Callaghan and Fleming, ex parte Power [1986] 1 QdR 457
Knight v R (1992) 175 CLR 495
Summers v Dougherty & Anor [2000] QSC 365

COUNSEL: AJ Kimmins for the applicant
JA Logan SC and KA Mellifont for the respondent

SOLICITORS: Tony Bailey for the applicant
Crown Solicitor for the respondent

- [1] **MULLINS J:** The applicant applies for review of the decision of the Governor in Council made on 9 August 2001 refusing the applicant's application for an ex gratia payment of criminal injury compensation pursuant to s 33 of the *Criminal Offence Victims Act 1995* ("the Act"). Under s 53 of the *Judicial Review Act 1991* the respondent as the Minister responsible for the administration of the Act under which the decision of the Governor in Council was made is the appropriate respondent for this application.

Background

- [2] On 31 March 1997 the applicant was living in a de facto relationship with one Richard August Dobrowolski at Mackay. On that evening the applicant heard her two dogs growling in the backyard. The applicant took a torch with her to investigate. She noticed the dogs were barking from behind the back of the boat in the yard. With the torch on, the applicant walked alongside the boat towards the back of the boat. The applicant looked under the boat trailer and saw a person crouching and sitting with his legs bent and facing her but behind the boat and trailer. The applicant could not see his face. The applicant then rushed back to the house taking her dogs with her.
- [3] The applicant told Mr Dobrowolski what she had seen, he walked down the back stairs and the applicant followed him. Mr Dobrowolski called out to the dogs at the bottom of the stairs "skitch em" which was an instruction to chase things out of the yard. The dogs ran to the back of the boat and again growled and barked. Mr Dobrowolski shone the torch under the boat and crouched down to look. The applicant heard him say twice "come on out before I set the dogs on you". He then said to the applicant "get inside quick". They both rushed towards the house. The applicant can recall Mr Dobrowolski close behind her and pushing her to go faster. As they got to the bottom of the stairs, Mr Dobrowolski said in a panicking voice "get inside quick". Mr Dobrowolski pushed the applicant as they went up the stairs. When they were half way up the stairs, the applicant heard a voice saying "you bastard" and "you deserve it". As the applicant got onto the landing at the top of the stairs, she heard a loud bang, she turned around and she saw Mr Dobrowolski stop about three or four steps from the top and he said "I've been shot, I'm dying" and he collapsed on the stairs. Mr Dobrowolski died, before the ambulance arrived.
- [4] Police investigations were unable to establish a motive for the killing of Mr Dobrowolski or to reveal the identity of the offender. They established that the weapon which fired the fatal shot was a 12 gauge shotgun. It is accepted by the applicant that only one shot was fired which was the shot that connected with Mr Dobrowolski.

Legislation

- [5] The relevant definition of "victim" for the purpose of this application is that contained in para (a) of s 5 of the Act:

“A “**victim**” is a person who has suffered harm from a violation of the State’s criminal laws-

- (a) because a crime is committed that involves violence committed against the person in a direct way;”

[6] Part 3 of the Act deals with compensation for personal injury from indictable offences. Relevantly s 19(1)(a) of the Act which can be linked with the definition of “victim” in para (a) of s 5 of the Act provides:

“(1) This part establishes a scheme for the payment of compensation to a person (the “**applicant**”)-

- (a) for injury suffered by the applicant caused by a personal offence committed against the applicant;”

[7] The definition of “personal offence” is found in s 21 of the Act, as follows:

“A “**personal offence**” is an indictable offence committed against the person of someone.”

[8] Section 33(1)(c) of the Act provides:

“(1) This section applies to anyone who has suffered injury because of any of the following acts committed against the person-

...

- (c) a personal offence for which someone would have been tried on indictment, but for the fact that the person cannot be identified or found after appropriate inquiry and search.”

A person to whom s 33(1) applies is then empowered by s 33(2) of the Act to make an application for payment of an amount by the State for the injury. Section 33(3) and (4) then provide:

“(3) An applicant relying on an offence mentioned in subsection (1)(c), if the person who did the act was never charged because the person was never identified or found, must show that the act was reported, as soon as possible having regard to all the circumstances, to-

- (a) a police officer; or
- (b) for a sexual offence-a police officer, doctor or an appropriate agency.

(4) The State may pay all or part of the amount requested up to the amount that could have been ordered to be paid to the applicant under a compensation order if the person who committed the act or offence were convicted on indictment of the act or offence.”

The condition provided for in s33(3) of the Act was satisfied in this matter.

[9] Section 40(2) of the Act provides:

“(2) An application to the State under section 33, 34 or 35 must be made-

- (a) within 3 years of the time when the relevant event happens; or
- (b) if the applicant is a child when the relevant event happens-before the end of 3 years after the child becomes an adult; or
- (c) with the Minister’s order under section 41-at any other time.”

The term “relevant event” is defined in s 40(3) of the Act to mean “the act, offence, helping of a police officer, murder or manslaughter to which an application relates”. In this matter, the relevant event was the offence which the applicant claims was committed against her on 31 March 1997.

- [10] By virtue of s 41(1) of the Act, ss 30 and 31 of the *Limitation of Actions Act 1974* apply to an application under s 40(2) of the Act. The Minister is permitted under s 41(1)(b) of the Act to make an order extending the period of limitation for making an application under s 40(2) of the Act.

Application for compensation for injury for personal offence

- [11] On 18 May 2000 the Department of Justice and Attorney-General (“the Department”) received from the solicitor for the applicant an application for compensation under the Act in respect of the offence committed on 31 March 1997. The application was made on the basis that, although the applicant did not suffer from any physical injuries, she did suffer from chronic post traumatic stress disorder, as outlined in the report of counselling psychologist, Ms Lib Heyward dated 9 December 1999. The letter from the applicant’s solicitor dated 8 May 2000 which accompanied the application stated:

“Because of the shocking nature of her own near death experience and the killing of her husband in her presence, it has left our client understandably with a very deep and severe psychological disorder.”

- [12] By letter dated 19 December 2000 the Department queried whether the applicant was the victim of a personal indictable offence and invited the applicant’s solicitors to make submissions. By letter dated 29 March 2001 the applicant submitted that there was prima facie evidence of an offence committed against the applicant under s 75 of the *Criminal Code* (“the Code”).
- [13] Acceptance of that submission was conveyed by the Department to the applicant’s solicitor by letter dated 2 April 2001, but the issue was raised whether the misdemeanour committed under s 75 of the *Code* could be considered a personal offence against the applicant. A submission in response was made by the applicant’s solicitor by letter dated 3 July 2001.
- [14] By letter dated 4 July 2001 the Department pointed out that the application was not lodged within 3 years of the relevant event occurring on 31 March 1997 and that it was possible the Governor in Council may refuse the application.
- [15] The Department prepared the submission for the Governor in Council in respect of the application and that was signed by the respondent on 23 July 2001. The

recommendation made in that submission was that the application be refused, as it was not made within the 3 year limitation period provided for in s 40(2)(a) of the Act and, on the balance of probabilities and based on the information which the Department had, it appeared the applicant was not the victim of a personal indictable offence. That recommendation was accepted by the Governor in Council on 9 August 2001.

- [16] The applicant's solicitor was advised by the Department of the refusal of the application by letter dated 16 August 2001. The applicant's solicitors requested a statement of reasons which were provided on 18 September 2001. The reasons reflect the basis for the recommendation to the Governor in Council. The application to review the decision was filed on 15 October 2001.

Time limitation for bringing application

- [17] It was common ground that the compensation application was made outside the time prescribed by s 40(2)(a) the Act. The question arose whether it was necessary for an application for extending the time for making the compensation application to be made by the applicant. It was submitted by the applicant that the respondent had erred in not considering s 41(1)(b) of the Act, but the respondent submitted that the respondent was not bound to consider whether an extension of time should be ordered under s 41(1)(b) of the Act without an application for an extension being made by the applicant.
- [18] That point is disposed of, by applying the decision of the Court of Appeal in *Jacob v Roberts* [2002] QCA 87. That decision was concerned with the nature of the period of limitation under s 41(1)(a) of the Act in respect of an application for compensation made to the court. It was held that the right to bring an application for compensation to the court is conditional upon it being made within the limitation period. The reasoning can be applied by analogy to an application for compensation made to the respondent pursuant to s 33 of the Act. The right to apply for compensation under that provision must be subject to the limitation period contained in s 40(2) of the Act.
- [19] Under s 41(1)(b) of the Act, the respondent's discretion to consider extending time for the making of an application to which s 40(2) of the Act applies arises only "on application". As there was no application made by the applicant to the respondent for an extension of time before the making of the decision by the Governor in Council in respect of the applicant's application for compensation, there was no obligation on the respondent to consider whether or not to exercise the discretion to extend time.
- [20] It therefore follows that the applicant cannot successfully pursue the review of the decision of the Governor in Council, as the decision is supported by the reliance on the application for compensation being made out of time. It follows that the application must be dismissed.

Personal offence

- [21] The issue raised by the decision of the Governor in Council of whether there was an offence against the person committed against the applicant was, nevertheless, argued before me. Although not strictly necessary, I will record my observations in respect of that issue.

- [22] The acceptance by an officer of the Department of the applicant's contention that a personal offence was committed against her could not, in the circumstances, bind the Governor in Council.
- [23] In construing what is meant by "a personal offence" under s 19(1)(a) of the Act, as defined further by s 21 of the Act, it is relevant that the Act is remedial legislation and should be given a benign construction: *R v Callaghan and Fleming, ex parte Power* [1986] 1 QdR 457, 458. In that case the offenders were charged with armed robbery with violence at a bank which involved the use of a pistol and a knife and money was taken from a particular teller who was threatened with the knife. Power was another teller and he was threatened with the pistol. The legislative scheme for compensation of victims was at that time found in the *Code*. Section 663B(1) of the *Code* provided:

"Where a person is convicted on indictment of any indictable offence relating to the person of any person, the Court on the Application by or on behalf of the person aggrieved by the offence, may, in addition to any other sentence or order it may make, order him to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by him by reason of the offence of which the offender is convicted."

Connolly J read s 663B(1) as referring to an indictable offence which, on its facts, related to the person of any person. It was held that on the material before him the offence related to the persons of two people, the first being the particular teller from whom the money was taken and the second being Power. Connolly J stated at 458:

"It follows from what I have said that in my opinion it would not be sufficient for a bystander to whose person no violence was even offered to say that he had suffered a nervous disorder as a result of having witnessed the offence."

- [24] This approach was applied in *Summers v Dougherty & Anor* [2000] QSC 365. The offenders pleaded guilty to armed robbery in company with personal violence and assault occasioning bodily harm whilst armed and in company. The indictment named Mr Summers as the person against whom actual violence was perpetrated. Mrs Summers and two of the children of Mr and Mrs Summers applied for compensation on the basis that violence was specifically offered to each of them personally in the course of the offenders carrying out the robbery. Even though s 663B of the *Code* was differently worded to the relevant provision found in s 24 of the Act, White J relied on the decision in *R v Callaghan and Fleming* to conclude that Mrs Summers and the children were not excluded from applying for compensation, because they were not named in the indictment. It was held that they were not mere bystanders and compensation was ordered to be paid to each of them.
- [25] In *Byles v Palmer* [2003] QSC 295 the offender was found guilty that he attempted unlawfully to kill one McMillan or another. The evidence was that the offender fired a shot whilst he was in a moving car at a police car driven by Byles in which McMillan was a passenger. The jury's verdict amounted to a finding that the offender attempted to murder McMillan or another (being Byles). It was not necessary to determine which occupant of the police car the offender intended to kill, provided the jury was satisfied that there was an intention to kill one of the

police officers. Helman J concluded that the verdict was of an offence committed against both police officers, each of whom was under fire. Helman J postulated that it would be an absurd result to characterise the jury's verdict as not excluding the possibility that there had been an attempt to murder McMillan and not Byles and, if McMillan were to apply for compensation, as not excluding the possibility that there had been an attempt to murder Byles and not McMillan. That approach would result in neither police officer being awarded compensation which was the absurd result referred to.

[26] The applicants submitted that the nature of the personal offence that was committed by the offender against the applicant was one of the offences pursuant to ss 75, 306, 317 or 345 of the *Code*.

[27] There was no violence offered to the applicant when she first investigated the barking of the dogs. It does not appear that the applicant saw the weapon at any time or the weapon being fired. On the applicant's statement, the only gesture or act of violence that occurred was the firing of the one shot that killed Mr Dobrowolski. It is likely that either something which Mr Dobrowolski saw or something that was said to him by the offender caused Mr Dobrowolski to cause the applicant to rush back into the house. As the applicant was being pushed up the stairs and therefore in front of Mr Dobrowolski, it can be inferred that when the gun was fired, it was pointing in the direction of both Mr Dobrowolski and the applicant.

[28] Section 75(1) of the *Code* provides:

“(1) Any person who-

- (a) with intent to intimidate or annoy any person, by words or conduct threatens to enter or damage a dwelling or other premises; or
- (b) with intent to alarm any person, discharges loaded firearms or does any other act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to property;

commits a crime.”

[29] It was submitted by the respondent that s 75(1) did not provide for an offence which could be characterised as an offence committed against the person of someone. It is not necessary to determine that question on this application. Even if s 75(1) of the *Code* did provide for an offence against the person of someone, I do not consider that, in the circumstances, the applicant can show on the balance of probabilities that the one shot that struck Mr Dobrowolski was fired with intent to alarm the applicant as a person in the vicinity when the shot was fired. As the one shot was fired after Mr Dobrowolski had come into the backyard and the shot struck him, the specific intention of the offender in discharging the firearm which is able to be inferred from the circumstances is an intention to kill or injure Mr Dobrowolski. The applicant is in a different position to the two police officers in *Byles v Palmer*, as the circumstances of the firing of the shot in the applicant's case are not equally consistent with an intention to alarm or harm both the applicant and Mr Dobrowolski.

- [30] Under s 306 of the *Code*, any person who attempts unlawfully to kill another is guilty of a crime. To establish this offence, it is necessary for the prosecution to prove that the offender had the intent to kill the victim: *Knight v R* (1992) 175 CLR 495, 501. The applicant could not on the balance of probabilities show that that was the intent which the offender had, when he fired the one shot, because of the circumstances outlined above.
- [31] The applicant sought to rely on the offence provided for under s 317 of the *Code* that any person who, with intent to maim, disfigure or disable, any person unlawfully strikes, or attempts in any way to strike, any person with any kind of projectile is guilty of a crime. The applicant relies on that aspect of the offence which makes it unlawful to attempt to strike a person with a projectile (i.e. bullet) and submits that in the circumstances where the gun was fired when pointing in the direction of both the applicant and Mr Dobrowolski that, even though only one shot was fired, there was an attempt to strike the applicant. That act however has to be coupled with an intent to strike i.e. maim, disfigure or disable the applicant. The circumstances outlined above do not support the inference of the intention required on the part of the offender to injure the applicant.
- [32] The offence of an assault under s 335 of the *Code* is based on the definition of “assault” in s 245 of the *Code* which provides:

“245 Definition of “assault”

(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person’s consent, or with the other person’s consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person’s consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person’s purpose, is said to assault that other person, and the act is called an **“assault”**.

(2) In this section

“applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.”

- [33] The bodily act or gesture relied upon by the applicant is the pointing of the gun in the direction of both the applicant and Mr Dobrowolski, before it was fired. It is difficult to conclude in the circumstances that the pointing of the firearm was an attempt to apply force to the applicant, when the shot struck Mr Dobrowolski and the inference which can be drawn from the circumstances was that it was intended to strike Mr Dobrowolski.

Order

- [34] It follows that the application must be dismissed.
- [35] I will hear submissions on costs.