

CITATION: *Doherty v Victim Assist Queensland* [2012] QCAT 137

PARTIES: Liam Gerald Doherty
(Applicant/Appellant)
v
Victim Assist Queensland
(Respondent)

APPLICATION NUMBER: APL380-11

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Michelle Howard, Member

DELIVERED ON: 27 June 2012

DELIVERED AT: Brisbane

ORDERS MADE: **1. The appeal is dismissed.**

CATCHWORDS: APPEAL – QUESTION OF LAW – GENERAL ADMINISTRATIVE REVIEW – EXTERNAL REVIEW OF REVIEWED DECISION – where appellant sought assistance under the *Victims of Crime Assistance Act 2009* – where assessor refused the application – where assessor relied upon s 80 of the *Victims of Crime Assistance Act 2009* – where appellant sought internal review of the decision – where the original decision was confirmed – where appellant sought external review of the decision in QCAT – where QCAT Tribunal Member confirmed the original decision – whether there was sufficient evidence to justify a conclusion that the main reason the appellant was shot was his involvement in criminal activity

Queensland Civil and Administrative Tribunal Act 2009, ss 32, 142(3)(b)
Victims of Crime Assistance Act 2009, ss 80, 66, 124, 125, Chapter 3 Part 19

Hope v Bathurst City Council (1980) 144 CLR 1

cited

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of *Queensland Civil and Administrative Tribunal Act 2009* ("QCAT Act").

REASONS FOR DECISION**JUSTICE ALAN WILSON**

- [1] Mr Doherty was shot by Jayde Schackow outside his house at Loganlea on 23 February 2008. Schackow subsequently pleaded guilty to criminal charges arising from that incident (and other offences) and was sentenced to six years imprisonment by his Honour Judge O'Brien on 25 November 2009.
- [2] Mr Doherty sought assistance under the *Victims of Crime Assistance Act 2009* ("the Act"), for financial assistance with legal, counselling, report, medical and other expenses, loss of earnings, damage to clothing, special assistance, and incidental travel.
- [3] In February 2011 an Assessor appointed under the Act refused his application with a Statement of Reasons to the effect that:

"...on the balance of probabilities, ...the main reason that the act of violence was committed against you was due to your involvement in criminal activity."
- [4] In reaching that conclusion, the Assessor relied upon s 80(1) of the Act, which provides that an Assessor can not grant assistance to a primary victim of an act of violence if the Assessor is satisfied, on the balance of probabilities, that the only reason or the main reason that the act of violence was committed against the primary victim was because the victim was involved in criminal activity when the act of violence happened, or because of the victim's previous involvement in criminal activity, whether or not the victim was currently involved in the criminal activity.
- [5] The Act allowed Mr Doherty to seek an "internal review" of the Assessor's decision.¹ He did so. The decision was reviewed by an "Assessment Team Leader, Victim Assist Queensland" who, in April 2011 confirmed the original Assessor's decision that Mr Doherty was not eligible to apply for assistance. The Team Leader also gave Mr Doherty a Statement of Reasons which, again, relied upon s 80 and, also, two matters that occurred in the course of the sentencing of Schackow and his co-accused, Donald Edwards.
- [6] The first was that during the course of submissions on penalty the Crown Prosecutor informed Judge O'Brien that:

"...it is not controversial to say that all parties, the prisoners and the complainants were effectively involved in a criminal culture that involved the use and distribution of methyl amphetamine or ice."
- [7] The second was that during the sentencing hearing Judge O'Brien said:

¹ *Victims of Crime Assistance Act 2009*, s 124.

“...neither complainant (victims) in this matter can be said to have been blameless. Both were clearly involved in the drug trade and both had made threats. It was that involvement in the drug trade and those threats which led directly to the events on this night.”

- [8] Mr Doherty then sought external review of the Team Leader’s decision in QCAT.² The Tribunal directed an exchange of material, including Mr Doherty’s criminal history and any statements of evidence upon which Victim Assist Queensland might rely, and listed the matter for hearing before a QCAT Member on 26 September 2011.
- [9] The transcript of that hearing shows that both Mr Doherty and a Victim Assist Team Leader, Mr James, made lengthy submissions and produced documents, after which the Member gave oral Reasons for her decision.
- [10] Mr Doherty has now filed an appeal against the Member’s decision to the QCAT Appeal Tribunal. He represents himself, as he has throughout. Neither his appeal application nor written submissions exchanged by the parties pursuant to an earlier direction of the Appeal Tribunal address the question whether his appeal is on a question of law, or on a question of fact or mixed law and fact, in which event he would require leave to appeal.³
- [11] In his submissions he says that all three previous decision makers have been wrong when they concluded, on the balance of probabilities, that the only reason or the main reason the act of violence was committed against him by Schackow was because he was, or had previously been, involved in criminal activity.
- [12] He contends that he was not involved in the drug trade and was not trading drugs and although he has a previous drug conviction, that was a long time ago, in 1998, and that a threat he had made by telephone to Schackow earlier on the day he was shot was not a criminal activity.
- [13] Each of the previous decision-makers was required to consider certain evidence about the historical relationship between Mr Doherty and Mr Schackow, and Mr Doherty’s own conduct in order to decide whether the only or main reason for the act of violence against Mr Doherty was because of his involvement in criminal activity under s 80 of the Act.
- [14] The question whether facts fall within the provision of a statute will in some cases be categorised as a question of law.⁴ We think this is a case of that kind and that Mr Doherty does not, therefore, need leave to appeal.
- [15] The internal review decision of the Team Leader relied upon the statements of the Crown Prosecutor and the Judge at Schackow’s sentencing, and the transcript of the sentencing proceedings as “findings of Court”. These were held to be relevant to the assessment of Mr Doherty’s application and were said to be sufficient, on the balance of probabilities, to establish that the only or main reason he was shot was because of his involvement in criminal activity.

² Section 125 of the *Victims of Crime Assistance Act 2009* provides for external review of a reviewed decision.

³ *Queensland Civil and Administrative Tribunal Act 2009*, s 142(3)(b).

⁴ *Hope v Bathurst City Council* (1980) 144 CLR 1, at 7 per Mason J.

[16] The learned QCAT Member also relied upon those statements from the sentencing transcript and, in her Reasons, weighed that evidence against Mr Doherty's submissions that he had taken drugs in the past but his drug taking had ended 2-3 months before he was shot; that he had a longstanding relationship with Schackow and had previously lent him money and was his landlord; that Schackow had moved out of his home and owed him backrent and for gold that he had given to him on his (Doherty's) behalf; and, that he had made a threat to Schackow earlier in the day about the repayment of those monies but, because of their longstanding relationship, did not believe that Schackow would have taken the threat seriously.

[17] The learned member observed:

"Mr Doherty paints the picture today or attempts to paint the picture today that he was effectively a minor drug user who was an innocent bystander to the events of the night. There is no evidence before me to support that version of what happened on that night particularly as has been said by the Judge, the criminal activity here is the drug trade and the threats which led to the events on that night."

[18] In his submissions to this Appeal Tribunal, Mr Doherty contends that some hours before Schackow shot him, he telephoned Schackow and asked him to repay almost \$800.00 owed in unpaid rent. Mr Doherty says that he was under the influence of alcohol at the time and said words to Schackow like: "well, the next time I see you I will kick your f'n head in".

[19] He also reiterates his earlier statements and submissions to Victim Assist and the QCAT Member that he was not involved in the drug trade and was not taking drugs. He says that he had not used drugs for a period of three months prior to the incident. He admits that Schackow had previously provided him with drugs but they were "...in my view, recreational only". He had used drugs that were provided by Schackow but submits that he does not know and can not say why Schackow gave him those drugs; but, says he believes that were a "gratuity for lending him money".

[20] He says that he had previously loaned Schackow \$2,000.00, but Schackow did not say what the money was for. He submits that money was repaid two weeks later, long before he was shot and there was,

"...no temporal or commercial connection between me lending the offending money, my personal drug use, and the act of violence committed against me."

[21] Amongst the material considered by both decision makers within Victim Assist Queensland, and provided to the QCAT Member, were statements of witnesses given to Queensland Police, including Mr Doherty's statement.

[22] That material can legitimately be obtained by an Assessor, and used for the purposes of any application for assistance: *Victims of Crime Assistance Act 2009*, s 66.

[23] In his statement to police Mr Doherty said:

- He had known Schackow for eight years.
- Schackow rented a room in his home after October 2007.

- He loaned Schackow \$2,000.00 and,

“Jade wanted the money so that he could buy drugs to re sell (sic) to various people. I knew the drug to be crystal meth or smokable speed...”
- Over the course of the ensuing seven weeks, Schackow began to pay some of the money back but left his tenancy in the room in Mr Doherty’s room owing him \$400.00 of the original \$2,000.00, and \$350.00 in rent.
- *“Over the course of the 7 weeks that Jade lived downstairs I believed he was selling drugs. I know that he uses drugs as I have watched him smoke 2 points of ‘crack’ and then inject 3 points of ‘crack’ all within about a minute period...”*
- *“I smoked ‘crack’ with Jade pretty much every weekend. It was sort of like part of the deal with lending him the money, that he would shout me a couple of pipes each weekend.”*
- *“I don’t want to say who I saw come to the house, but people would come over and I saw Jade sell them drugs. I tried to stay upstairs most of the time and I saw about five transactions a week. I saw a lot more people turn up, but I stayed upstairs.”*
- *“I remember Friday 22 February 2008. I remember that I had three phone call conversations with Jade that day. I am a bit fuzzy at (sic) to what times, but they started at about 2pm, then about 6pm and then the last one was at about 9:30pm.”*
- *“The first two phone calls I made to Jade. It was about the money he owed me. I said to him words to the effect of: ‘where is my money? I need it ‘cause I have bills due.’”*
- *“The third phone call I also made to Jade ...I was saying the same thing that I needed the money to pay bills and I ended the phone call saying: ‘if you don’t bring the money around, the next time I see you I am going to kick your head in you gutless little prick.’”*

[24] Later that evening, Schackow shot Mr Doherty.

[25] The learned QCAT Tribunal Member correctly directed herself about the task that confronted her. She was obliged, under s 19 of the QCAT Act, to decide the matter in accordance with that Act and the provisions of the *Victims of Crime Assistance Act 2009* with the purpose of producing the correct and preferable decision after a fresh hearing on the merits.

[26] In her Reasons she concluded that there was no evidence other than his own assertions to support Mr Doherty’s contention that he was, effectively, an innocent bystander, and she concluded that the remarks of the Crown Prosecutor and the sentencing judge were sufficient for the purposes of s 80 of the Act to establish on the balance of probabilities that the main reason for the shooting of Mr Doherty was his own involvement in criminal activity at the time, or previously.

[27] The exercise of weighing the evidence about these matters that lay upon the QCAT Member involved the lighter civil, and not the heavier criminal, standard of proof: the balance of probabilities. The exercise of that discretion does not, moreover, require satisfaction that the connection was

the *only* reason for the act of violence; it need be no more than the *main* reason.

- [28] Mr Doherty relied (as he was entitled to do) upon his own evidence and, also, the absence of any criminal convictions involving drug offences for at least nine years before he was shot. Against that, the learned Member was persuaded that evidence tendered and statements made in the course of the sentencing of Schackow and the co-offender were themselves sufficient to establish a connection that warranted a refusal under s 80 of the Act.
- [29] Submissions made in the course of the sentencing process may rely upon or be the product of evidence which is proven to an acceptable standard but, it must be acknowledged, from time to time represent no more than a summary of a set of background or surrounding circumstances. This may happen, in particular, when they include comments about the activities of persons who were not on trial, as Mr Doherty was not.
- [30] Mr Doherty was not represented at the sentencing proceeding, and had no opportunity to correct any perceived or actual misstatement made about him or his relations with the accused during the submissions. Reliance upon things said in the course of those submissions, or things said by the sentencing Judge with reference to submissions, may not always be appropriate unless they are supported by evidence that provides them with sufficient justification and underpinning.
- [31] The sentencing Judge's comments are supported here, however, by Mr Doherty's own statement to the police. As the passages set out show, while he now protests that he did not know Schackow's intended purpose with the loan funds, he had earlier made an unequivocal statement to the police that Schackow "...wanted the money to that he could buy drugs to re sell (sic) to various people". He also says that he was still owed some of the original loan of \$2,000.00 when Schackow ceased to reside in his home, and that was part of the money he was pursuing when he telephoned Schackow on the day of the shooting.
- [32] The phrase "criminal activity" in s 80 is defined in Schedule 3 of the Act to mean "...an activity of a criminal nature". That phrase is not defined but it would be surprising if it did not encompass the events Mr Doherty related in his police statement: lending money to Schackow; knowing he would use it to buy drugs; permitting his home to be used for the sale of drugs; and, using drugs provided to him by Schackow. Even if it could be said that Mr Doherty was not involved in criminal activity at the actual time of the act of violence, it is inescapable that his shooting by Schackow was causally connected with the earlier loan, which, itself, involved support for or condoning of the trading of drugs, and their use.
- [33] As a result, whilst the apparent reliance of the learned Member on submissions made to the sentencing Judge and the Judge's sentencing remarks may have left it open to Mr Doherty to argue that too much weight was given to unproven evidence, it is clear from the material that was before the learned Member that those remarks were, in fact, based upon

satisfactory evidence including, in particular, Mr Doherty's own earlier statement to Police.

[34] While the learned Member did not advert to that fact, it means that allowing an Appeal would be a futility, because there was sufficient evidence to support the statements made by the prosecutor and his Honour.

[35] Mr Doherty also alleges that Schackow did not mean to shoot him, but intended to shoot another tenant in his home, and that there was no connection between the threats he had made on the telephone to Schackow earlier that evening, and that event.

[36] Several of the witness statements to police, however, record Schackow as saying that he had deliberately shot Mr Doherty, and giving two reasons for doing so, one of which was because he owed Mr Doherty money. Again, on any view, there was evidence that establishes on the balance of probabilities that the act of violence was causally connected with a relationship, involving money and drugs, between Schackow and Mr Doherty.

[37] In summary, there was sufficient evidence to justify a conclusion adverse to him under s 80 of the Act that, on the balance of probabilities, the main reason he was shot was because he was or has been involved in criminal activity.

[38] While the learned Member may have spoken during her oral reasons in terms that suggested she might have placed excessive weight upon the remarks of the Crown prosecutor and the sentencing Judge at the sentencing hearing, there was, in any event, evidence sufficient to support the conclusions she reached, and, therefore, no error warranting an order upholding Mr Doherty's appeal.

[39] We observe in passing that we have used, for the Respondent, the name *Victim Assist Queensland* although that is not, so far as we can see, a name or term created under or defined in the Act. Submissions in the Appeal use the term *Department of Justice & Attorney-General (Victim Assist Queensland)*. It seems to us in light of Chapter 3 Part 19 of the Act that the correct Respondent would be the Scheme Manager. Nothing turns on this and in light of the fact the Respondent itself uses the term we are satisfied that it refers, sufficiently, to the correct Respondent.

MICHELLE HOWARD

[40] I have read the Reasons of the President and concur with them, and the order he proposes.