

Martin v The Queen [2012] NTCCA 2

PARTIES: **MARTIN, Stavros**

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: CA 13 of 2011 (21001822)

DELIVERED: 1 February 2012

HEARING DATES: 1 February 2012

JUDGMENT OF: RILEY CJ, KELLY & BARR JJ

APPEALED FROM: REEVES J

REPRESENTATION:

Counsel:

Appellant: J Dickinson SC
Respondent: Dr N Rogers SC

Solicitors:

Appellant: Central Australian Aboriginal Legal Aid
Service Inc
Respondent: Office of the Director of Public
Prosecutions

Judgment category classification: C

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Martin v The Queen [2012] NTCCA 2
No. CA 13 of 2001 (21001822)

BETWEEN:

STAVROS MARTIN
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY AND BARR JJ

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 1 February 2012)

The Court:

- [1] On 2 September 2011, following a trial before a judge and jury, the appellant was convicted of the offences of (a) attempted robbery with the aggravating circumstances that he was in company and that harm was caused to the victim and (b) of having unlawfully caused harm.
- [2] At the trial there was no dispute that there had been an attempt to rob the victim and that he was harmed in the process. The issue left for the jury to determine was whether or not the Crown had established beyond reasonable doubt that the appellant was one of the assailants.

- [3] The relevant circumstances can be briefly stated. On the night of 16 January 2010 the victim was riding his bicycle towards his home. He broke the journey at a convenience store on Gap Road in Alice Springs. When he left the store he was approached by a man who asked for money. He refused the request. A short time later he was confronted by a group of people, one of whom he identified as the appellant. He said he was punched "really hard in the side of the head" by the person he had identified as the appellant. He was then attacked by numerous people and was knocked to the ground. He managed to escape but was pursued. There followed another attack upon him at a different location. On the second occasion an attempt was made to take his wallet. After a time another group of people intervened allowing him to ride away. He reported the matter to police.
- [4] The following day the victim attended the Alice Springs Hospital for treatment in relation to the injuries he had suffered. Whilst awaiting medical attention he saw the appellant enter the waiting room and he identified him as being the person who had attacked him the night before. Police were called and the appellant was arrested.

The directions

- [5] The principal issue for the jury to resolve was whether or not the Crown had established beyond reasonable doubt that the appellant was the man who had attacked the victim on the previous night. The learned trial Judge gave

general directions to the jury and, when it came to the issue of identification, said:

I now come to the third and final part of my summing up and it is perhaps the most important part. It involves the central issue of identification that Mr Geary and Ms Collins have addressed you on. As I have said a number of times, the facts of this case are entirely a matter for you. But you may find that with one very important exception you have little difficulty concluding that the Crown has proved beyond reasonable doubt each of the elements of the two crimes I have just taken you to. But I emphasise, that is a matter for you.

The critical issue in this case relates to that very important exception and that is whether the accused was actually involved in the events of this night. Now this boils down to the question of whether the Crown has proved beyond reasonable doubt that the accused was one of the members of the group of Aboriginal men who accosted and assaulted (the victim) on the night or early morning of 16 January 2010. And in turn, that really boils down to whether you are satisfied beyond reasonable doubt that (the victim) is correct in his evidence that the accused was a person who came across Stott Terrace from the KFC in an angry manner and assaulted him and then pursued him.

At the outset, I also emphasise that this is a question of fact and it is a matter for you and you alone to assess. So taking into account that, but with one exception that I will be mentioning a little later, what I am about to say to you are not directions on matters of law that are binding on you. These are just matters that I hope will assist you in your task of deciding the facts going to identification. So I repeat that identification is a question of fact on which you are the sole judges.

So to begin with the process of giving you some assistance about this question of fact you have to resolve, I must tell you that there are dangers in convicting a person on identification evidence where the reliability of that evidence is open to genuine dispute. Of course, the critical issue is whether there is a genuine or real dispute about the evidence and that is something you will have to decide. I will come back to that a little later.

That danger is particularly present if the only evidence of identity comes from one source. So in this case, if the critical evidence only comes from (the victim). That of course may or may not be the case depending upon what you make of the evidence about the events at the hospital on the next morning or afternoon. That is, whether, for example, you conclude that the accused's conduct at the hospital in the next morning confirms or supports (the victim's) identification evidence so that it is just not one source; it is independently supported by the accused's conduct or whether, on the other hand you think his conduct is explicable by other possible reasonable explanations or inferences of the kind that Ms Collins put to you. And I will come back to those matters in a moment.

- [6] His Honour then went on to summarise the submissions of counsel regarding the issue of identification.

Submissions of the appellant

- [7] The appellant submitted that the directions provided to the jury in relation to the issue of identification were inadequate. Reference was made to *Domican v The Queen*¹ where it was said:

Nevertheless, the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.

Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of (the identification) evidence in the circumstances of the particular case". A warning in general terms is insufficient. The attention of the

¹ [1991-1992] 173 CLR 555 at 561 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

jury "should be drawn to any weaknesses in the identification evidence". Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.

- [8] It was submitted that, although a warning was provided in the present case "to the effect that there are dangers in convicting a person on identification evidence where the reliability of that evidence is open to genuine dispute", the warning was not sufficient for the purpose and was expressed to be not binding upon the jury. The trial Judge failed to identify the dangers in the particular case and did not explain to the jury that it was the experience of the criminal courts that mistakes are frequently made in the area of identification. Further, his Honour advised the jury that the dangers would only exist where the reliability of the evidence was open to "genuine dispute". His Honour queried whether a genuine dispute existed in this case. There was a genuine dispute, it being the defence case that the victim wrongly identified the appellant as being one of his attackers.

The respondent concedes the appeal

- [9] There was no issue regarding most of the grounds of appeal. Counsel for the respondent conceded that the learned trial Judge erred in the manner identified in the following grounds which are the only grounds now pressed:
- (a) failing to adequately direct the jury on the issue of identification;

- (b) suggesting that there may not be a genuine or real dispute as to the reliability of the identification evidence;
- (c) failing to direct the jury that all members need to be unanimous as to which event gave rise to the criminal liability where both counts contained a latent duplicity as to when and where the offences alleged may have been committed; and
- (d) in failing to adequately relate the law to the evidence in the case.

[10] There is a foundation for each of the complaints made by the appellant and error on the part of his Honour was correctly conceded by the respondent. In the circumstances the appeal must be allowed. The verdict is set aside, the conviction quashed and the matter remitted for retrial.
