Marika v Gordon [2011] NTSC 13

PARTIES:	MARIKA, James
	v
	GORDON, Robert Karena
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 54 of 2010 (21013729)
DELIVERED:	23 FEBRUARY 2011
HEARING DATES:	23 FEBRUARY 2011
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	Ms Hannam CM

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE

Whether matter should be sent back before learned Magistrate as original sentence imposed was not in accordance with agreed facts.

Sentencing Act, s 40 and s 78BA.

REPRESENTATION:

Counsel:

Appellant:	G Lewer
Respondent:	P Usher

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	Ril 1104
Number of pages:	4

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Marika v Gordon [2011] NTSC 13
No. JA 54 of 2010 (21013729)

BETWEEN:

JAMES MARIKA
Appellant

AND:

ROBERT KARENA GORDON
Respondent

CORAM: RILEY CJ

Ex Tempore
REASONS FOR JUDGMENT

(Delivered 23 February 2011)

[1] This is an appeal against sentence. The sole ground of appeal is that the sentence imposed by the learned Magistrate was not in accordance with the agreed facts.

[2] The appellant was sentenced on 5 October 2010 in relation to an assault which occurred on 1 April 2010. He was sentenced to imprisonment for a period of 16 months with the sentence wholly suspended pursuant to s 40 of the *Sentencing Act*.

[3] The circumstances of the offending were the subject of agreement and included that, early on the morning of 1 April 2010, the appellant left the

Walkabout Tavern and approached his victim who was sitting by himself at a nearby taxi rank. The appellant asked the victim for a cigarette and when the victim said that he did not have one the appellant struck him with a closed fist to the left eye causing him to fall backwards off his seat. The appellant then got into a taxi and left the area. The victim made his way to the local hospital and, on the next day, was flown to Royal Darwin Hospital. As a result of the assault he sustained three fractures to his left eye socket, swelling and internal bleeding in the left eye. He spent six days in the hospital and a further nine days in a self care unit.

[4] When the matter came before the learned sentencing Magistrate, her Honour took the agreed facts from a précis which included additional information not the subject of agreement. It is not clear how the précis came to be before her Honour. The additional information included in the précis was that, at the relevant time, the appellant was in the company of others and the assault occurred in the presence of those others. In the course of the sentencing remarks her Honour recounted the facts and observed:

> And if he chooses not to give you a cigarette, it is completely and utterly unacceptable that you and a mob of young other fellows surround him and you punch him so hard that he is knocked to the ground, that breaks bones in his face, that he has to go to Darwin for treatment and he has got damage to his nerves that is going to be there for the rest of his life. This is a man minding his own business.

[5] It is apparent from the sentencing remarks that her Honour regarded the presence of others as being part of the context in which the offending occurred. There was no suggestion in the remarks that the other "young

fellows" were involved in the assault or that they took part in intimidating the victim. They were simply present. Events unfolded quickly and the appellant left the scene in a taxi. What happened to his companions is not known.

[6] Whilst, in my opinion the differences in the factual scenarios raised on appeal may not have made any difference to the sentence imposed by her Honour, it is possible they did so. There has been an unfairness which may have impacted upon the sentence imposed. Had the correct facts been placed before her Honour, it may have made a difference to the sentence. In those circumstances the matter should be sent back to her Honour for re-sentence in light of the facts that should have been placed before her Honour.

[7] In allowing the appeal and sending the matter back to the learned sentencing Magistrate for re-sentence, I should not be understood to be suggesting that the sentence should be different from that imposed. It will be a matter for the learned sentencing Magistrate to determine for herself the correct sentence to be imposed in light of the circumstances that should have been placed before her and, of course, in light of other material that may be placed before her Honour in the re-sentencing exercise.

[8] I point out in passing that there is another error in the sentence. It is apparent that s 78BA of the *Sentencing Act* applies to the sentence to be imposed. That section requires that the Court must record a conviction and

must order that the offender serve a term of actual imprisonment or a term of imprisonment that is partly but not wholly suspended. In the present case the learned sentencing Magistrate imposed a sentence which is wholly suspended in apparent contravention of s 78BA of the *Sentencing Act*.

[9] In all the circumstances I allow the appeal. The sentence imposed by the learned sentencing Magistrate will be set aside. I remit the matter to the same Magistrate for re-sentencing in accordance with the correct facts and in accordance with the provisions of the *Sentencing Act*.
