*Bamblett v Andreou* [2014] NTSC 2

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| PARTIES: | BAMBLETT, John Edmond<br><br>v<br><br>ANDREOU, Andreas |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 2 of 2013 (21229935) |
| DELIVERED: | 10 January 2014 |
| HEARING DATES: | 12 August, 18 October & 4 November 2013 |
| JUDGMENT OF: | HILEY J |
| APPEALED FROM: | Carey SM |

**CATCHWORDS:**

CRIMINAL LAW - Justices appeal – Appeal against conviction – Appellant pleaded guilty to aggravated assault – Appellant's understanding of the facts to which he agreed when he pleaded guilty – No error or mistake – No miscarriage of justice - *Justices Act* s 163

*Dube v Rigby* [2012] NTCA 7; *Gower v Ross* [1959] SASR 278; *Liberti v The Queen* (1991) 55 A Crim R 120; *Lo Castro v The Queen [No 2]* [2013] NTCCA 15; *R v Forde* [1923] 2 KB 400; *R v Murphy* [1965] VR 187; *Salmon v Chute & Anor* (1994) 4 NTLR 149, applied.

*JK v Waldron* (1988) 93 FLR 451; *McCarthy v Kennedy* [2007] NTSC 8; *Meissner v The Queen* (1994) 184 CLR 132; *Shah v Trennery* [1998] NTSC 11, referred to.

*Justices Act 1928* (NT) s 163

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M Hubber |
| Respondent: | D Dalrymple |

*Solicitors:*

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| Appellant: | Maley & Burrows Barristers & Solicitors |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Bamblett v Andreou* [2014] NTSC 2
No. JA 2 of 2013

BETWEEN:

**JOHN EDMOND BAMBLETT**
Appellant

AND:

**ANDREAS ANDREOU**
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 10 January 2014)

[1] This is an appeal against a conviction imposed by the Court of Summary Jurisdiction in Darwin on 13 February 2013.

[2] The conviction followed the appellant's guilty plea to a charge of aggravated assault on a taxi driver Kashif Rasheed on 12 August 2012. The charge was that the appellant unlawfully assaulted Kashif Rasheed contrary to s 188(1) of the *Criminal Code*, and that the assault was accompanied by two circumstances of aggravation, namely, that Kashif Rasheed suffered harm, and that he was

working as a driver of a commercial vehicle defined in the *Commercial Passengers (Road) Transport Act* at the time of the assault. (He also pleaded guilty and was convicted of another offence, regarding the unlawful possession of ammunition.)

[3] The appellant was sentenced to five months imprisonment suspended after serving one month with an operational period of 12 months.

**History of this appeal**

[4] On 14 February 2013 the appellant filed a notice of appeal. On 15 February he was granted bail pending the outcome of the appeal pursuant to s 168(1) of the *Justices Act*.

[5] The appeal was originally set down to be heard on 12 April 2013, but was adjourned on a number of occasions, initially because the parties required more time to assemble their evidence, and later because the appellant would be out of Darwin and would not be able to attend the hearing.

[6] On 9 August 2013 the respondent raised for preliminary consideration a question as to the competency of the appeal. That issue was set down to be heard on 12 August 2013. The respondent filed a written outline of submissions in relation to the preliminary

issue. The respondent contended that the grounds of appeal relied upon by the appellant did not fall within the scope of s 163(1) of the *Justices Act* because the grounds did not assert an error or mistake of the kind set out in s 163(1)(b). Following submissions during the hearing of the preliminary issue, the appellant sought and was granted leave to amend the grounds of appeal, and the respondent withdrew its contentions concerning the preliminary issue.

[7] The appeal was then set down for hearing on 18 October and 4 November, those dates selected partly to accommodate the appellant's work commitments away from Darwin. Counsel for the appellant informed the Court that the appellant may wish to tender expert evidence concerning the appellant's literacy and numeracy skills, and was given leave to file and serve any such expert evidence by close of business 30 September 2013.

[8] The following materials were filed on behalf of the appellant:

(a) affidavit of John Edmond Bamblett sworn 17 April 2013;

(b) affidavit of Ashleigh Jade Church sworn 17 April 2013;

(c) written outline of submissions filed 7 June 2013.

[9] The following materials were filed on behalf of the respondent:

(a) affidavit of Anna Cherie Swindley sworn 2 May 2013 (filed 7 May 2013);

(b) written outline of submissions filed 18 June 2013;

(c) affidavit of Will Collins-Putland sworn 7 May 2013 (filed 10 September 2013);

(d) supplementary affidavit of Anna Cherie Swindley sworn and filed 10 October 2013.

[10] The Amended Notice of Appeal, filed 18 September 2013, identifies the following ground of appeal:

> "The magistrate was mistaken in that he misconceived the true position of the appellant in relation to the appellant's instructions to his counsel and his understanding of the true nature of the charge to which he pleaded guilty and as a result of that a miscarriage of Justice has occurred."

[11] At the hearing on 18 October 2013 counsel for the appellant confirmed that the appellant would not be pursing allegations of incompetent conduct on the part of his counsel. Accordingly, counsel for the appellant did not read or otherwise rely on the affidavit of Ashleigh Jade Church.

[12] The appellant relied on the mistake asserted in the Amended Notice of Appeal, namely the magistrate's alleged misconception

concerning the appellant's true position and understanding. Counsel also agreed that even if the magistrate had been mistaken, the appeal would not succeed unless the appellant could establish that a miscarriage of justice had occurred as a result of the mistake.

[13] Counsel for the appellant tendered a "Reading Comprehension Report" dated 27 September 2013 based on an assessment of the appellant's literacy skills by Teresa Pianta of Charles Darwin University's Language and Literacy Division.

[14] Counsel for the respondent tendered a transcript of proceedings on 15 February 2013 when the appellant applied for bail (Ex P1), handwritten notes made by Ms Swindley as to what was said when the charges were read to the appellant at the hearing on 13 February 2013 (Ex P2) and a handwritten victim impact statement completed by the victim Kashif Rasheed (Ex P3).

[15] The Court indicated that it had access to the transcript of the proceedings before the Court of Summary Jurisdiction on 13 February 2013 and to the exhibits tendered during those proceedings, namely, the information sheet, typewritten victim impact statement, and a reference by Mr Mathew Black provided on behalf of the appellant.

**Relevant law**

[16] Section 163 of the *Justices Act* includes the following provision in relation to the right of appeal from the Court of Summary Jurisdiction:

> "(1) A party to proceedings before the Court may appeal to the Supreme Court from a conviction, order or adjudication of the Court … on a ground which involves:
>
> (a) sentence; or
> (b) an error or mistake, on the part of the Justices whose decision is appealed against, on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law,
>
> as hereinafter provided, in every case, unless some Special Act expressly declares [otherwise]."

[17] Section 164 provides that "[n]o appeal shall be allowed from any conviction, order, determination, or adjudication of the kind mentioned in section 163(1) … except as provided by this Act."

[18] Accordingly an appeal against conviction in the present matter can only be brought if there has been an error or mistake on the part of the magistrate "on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law".

[19] Since s 163(1) was amended in 1983 appeals against a conviction following a plea of guilty are not appeals by way of rehearing but

must be based on an error or mistake of the kind set out in s 163(1)(b).[1]

[20] This is so notwithstanding the Court's power to receive fresh evidence under s 176A. Per Kearney J in *Salmon v Chute & Anor*[2], at p 157:

> "In my opinion this Court sitting on an appeal under s 163(1) is exercising only appellate jurisdiction, and not original jurisdiction. Where it receives fresh evidence on appeal under s 176A of the Justices Act, its approach to the exercise of that appellate jurisdiction is necessarily different to that where the evidence is the same as that before the Court below, because it must determine the appeal on the (now different) evidence. However, whether or not fresh evidence is received, for an appeal to succeed the appellant must establish an 'error or mistake' by the Court below (s 163(1)(b))."

[21] The scope of an appeal under s 163(1) was summarised by Kearney J in *Salmon* at p 156:

> "This appeal against conviction follows a plea of guilty. The law in those circumstances is as stated in *R v Murphy* [1965] VR 187: the appeal will only be entertained if it appears that there has been a miscarriage of justice below in that, for example, the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty, or, on the admitted facts he could not in law be convicted of the offence charged. If any of these matters are shown, there has been a miscarriage of justice because a plea of guilty must flow from a genuine consciousness of guilt; and the conviction must be quashed."

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1 *J K v Waldron* (1988) 93 FLR 451 at 455-456; *Salmon v Chute & Anor* (1994) 4 NTLR 149 at 156-157.

2 *Salmon v Chute & Anor* (1994) 4 NTLR 149 (*Salmon*).

[22] The limitations expressed in *R v Murphy* and summarised in *Salmon* have also been applied in other Northern Territory matters concerning appeals against conviction following a guilty plea. See for example *Shah v Trenerry* [1998] NTSC 11; *McCarthy v Kennedy* [2007] NTSC 8 at [10]; and *Dube v Rigby* (unreported, Supreme Court of the Northern Territory, Mildren J, 13 July 2012) upheld by the Court of Appeal in *Dube v Rigby* [2012] NTCA 7. At [5] of *Dube v Rigby* the Court of Appeal referred to *R v Murphy*:

> "where it was held that, save in exceptional circumstances, an appellate court will only entertain an appeal against conviction based on a plea of guilty if it appears '(1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that on the admitted facts he could not in law be convicted of the offence charged.'"

[23] In *Lo Castro v The Queen [No 2]*[3] the Court of Criminal Appeal summarised the principles regarding appeals to that court against a conviction following a plea of guilty. At [89]:

> "A court of appeal will only grant an appeal against conviction, where a plea of guilty has been recorded, if it appears that: (1) the plea of guilty was not unequivocal and was made in circumstances suggesting that it is not a true admission of guilt[4]; (2) the appellant did not appreciate the nature of the charge[5]; (3) upon the admitted facts the appellant could not in law have been convicted of the

3 *Lo Castro v The Queen [No 2]* [2013] NTCCA 15.
4 *Maxwell* (1996) 184 CLR 501 at 501-11.
5 *R v Forde* [1923] 2 KB 400 at 403.

> offence charged[6]; or (4) there has otherwise been a miscarriage of justice[7]."

[24] The Court of Criminal Appeal also referred to what Kirby P said in *Liberti v The Queen*[8]:

> "For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests upon high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary ingredients of the offence."

[25] The first test - that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it – was expressed in *R v Forde* [1923] 2 KB 400 at 403.

[26] That test was applied in *Gower v Ross* [1959] SASR 278 at 282:

> "Where to all appearances, a person possessed of normal faculties has heard a charge read and then admits the truth of it by pleading guilty, there must at least be a strong presumption that he has heard and understood the charge, knows what he has been charged with, and intends to admit it."

[27] *Forde* and *Gower* were referred to by Martin CJ in *Shah v Trenerry* [1998] NTSC 11. His Honour added:

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6 *R v Forde* [1923] 2 KB 400 at 403.
7 *DPP (Cth) v Hussein* (2003) 8 VR 92 at 95.
8 *Liberti v The Queen* (1991) 55 A Crim R 120 at 122.

> "The tests formulated in *R v Forde* were adopted in the Full Court of the Supreme Court of Victoria in *R v Stewart* [1960] VR 106, where reference is also made to *R v Rhodes* (1914) 11 C.A.R 33 which, it was said, made it clear that the court must be satisfied that there really has been a mistake, one that led the accused to plead guilty. The mistake, in the words of Hudson J at p 111, must be 'real and genuine' and led the appellant 'into taking the course that he did'."

[28] In *Meissner v The Queen*[9] Dawson J made some general observations about the reasons why a person might plead guilty and about the circumstances in which a conviction entered on the basis of such a plea can be set aside on appeal:

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud."

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9 *Meissner v The Queen* (1994) 184 CLR 132 at 157.

**Facts**

[29] At the hearing of the appeal the appellant gave evidence and the respondent called evidence from Mr Collins-Putland. Both were cross-examined.

[30] Mr Rasheed had picked up the appellant, his father Dennis Bamblett, Ashleigh Church and another female at the Darwin City Casino in the taxi that he was driving, and took them to Annear Court, Tipperary Waters, Stuart Park. The passengers alighted. An argument started between Dennis Bamblett, the appellant and Mr Rasheed when he was still in the driver's seat. Mr Rasheed got out of his taxi and the argument continued outside. The altercation resulted in Mr Rasheed sustaining a number of injuries including a broken nose, a laceration and swelling to his face, sore ribs and bruises. He was taken to hospital.

[31] It appears that some of Mr Rasheed's injuries were suffered after he got out of the taxi, and that some of them were caused by the appellant's father, Dennis Bamblett. The prosecution alleged that Mr Rasheed was initially assaulted by the appellant before he, Rasheed, got out of the taxi. In respect of the assaults outside the taxi, it seems that the appellant was proposing to raise defences of

self-defence. The agreed facts upon which he was convicted only related to what happened inside the taxi.

[32] The appellant was originally charged with unlawfully assaulting Mr Rasheed contrary to s 188(1) of the *Criminal Code* with aggravating circumstances, and the more serious offence of unlawfully causing serious harm to Mr Rasheed, contrary to s 181 of the *Criminal Code*. The unlawfully causing serious harm charge was withdrawn in October 2012, as a result of which the aggravated assault charge was able to be dealt with by the Court of Summary Jurisdiction.

Evidence of Mr Collins-Putland

[33] The appellant obtained legal assistance from the North Australian Aboriginal Justice Agency Ltd (NAAJA) and was advised and represented by Will Collins-Putland, a solicitor employed by NAAJA. Mr Collins-Putland had numerous communications with the appellant, including on 3 & 19 September 2012, 30 October 2012, 31 October 2012 (at the NAAJA offices), 20 November 2012 (at the NAAJA offices), 17 December 2012 (at the NAAJA offices), 10 February 2013, 11 February 2013 (at the NAAJA offices), 12 February 2013 and 13 February 2013.

[34] At the meeting on 17 December 2012, which was also attended by the appellant's father Dennis Bamblett, CCTV footage from the taxi was viewed and Mr Collins-Putland provided advice concerning the advantages and risks associated with proceeding with a contested hearing on the one hand and pleading guilty on the other. He pointed out that if the appellant pleaded guilty, he would receive a discount on his sentence, but that s 78BA of the *Sentencing Act* would require that he be sentenced to some period of actual imprisonment. He told the appellant that the best he could receive was a sentence to the rising of the court, with the remaining portion of his sentence suspended, but that such an outcome was unlikely. The appellant instructed Mr Collins-Putland that he wished to proceed with a contested hearing.

[35] The matter was set down for a contested hearing to be heard by the Court of Summary Jurisdiction on 13 February 2013.

[36] On 10 February 2013 Mr Collins-Putland reviewed the brief of evidence and formed the opinion that in light of the CCTV evidence there was no viable defence to the allegation of assault involving the appellant striking Mr Rasheed through the window of the taxi while Mr Rasheed was still sitting in the driver’s seat.

[37] When the appellant attended at the NAAJA offices at approximately 6 pm on the 11 February 2013 with his father and Kylie Church, Mr Collins-Putland advised the appellant that he should plead guilty to the charge on the basis of the "first strike" to Mr Rasheed through the window of the taxi, but that the matter could still proceed by way of a disputed facts hearing if the prosecution was not prepared to agree to certain changes to the facts to be agreed. Mr Collins-Putland also advised the appellant that he did not have a viable defence in relation to that conduct. Mr Collins-Putland also took further detailed instructions regarding the appellant's recollection of events, and also proofed the appellant's father, Dennis Bamblett in the expectation that he would also be giving evidence at the hearing.

[38] The next day, Ms Swindley told Mr Collins-Putland that the prosecution would be prepared to amend the proposed agreed facts so that they would only refer to the events inside the taxi (referred to in their conversations as the "first strike"), amend the victim impact statement, not tender the photographic and medical evidence and not press for a term of imprisonment extending beyond the rising of the court, if the matter was to proceed by way of guilty plea. (The previous version of the agreed facts included allegations

regarding further assaults by the appellant after the victim had alighted from the taxi. It also included some allegations regarding the victim's injuries that were removed from later versions.)

[39] Mr Collins-Putland telephoned the appellant and told him of the prosecutor's proposal and advised him that he should plead guilty on the basis that he had discussed with Ms Swindley. The appellant instructed Mr Collins-Putland that he wished to pursue a resolution without a contested hearing.

[40] Mr Collins-Putland received an email from Ms Swindley with a proposed précis of facts attached and he telephoned the appellant again. During that second conversation he read to the appellant the proposed amended précis which Ms Swindley had emailed to him, and the appellant expressed concern regarding the inclusion of the word 'enraged' which appeared in the paragraph that read:

> "The defendant then became enraged at this and leant through the open passenger-side window and punched the victim a number of times with clenched fists to the face and body."

[41] Mr Collins-Putland spoke to Ms Swindley again about this but she advised that she was not prepared to remove that word.

[42] Mr Collins-Putland telephoned the appellant a third time and advised him that the prosecution was not willing to remove the word ‘enraged’. He said that he read the proposed précis to the appellant again and advised him that by pleading guilty and agreeing to those facts there would be less risk of a substantial period of actual imprisonment than would be the case if he proceeded with a contested hearing. He told him that it was his decision to make, but that the decision should be made that evening in order to enable the prosecutor to cancel witnesses and increase the utilitarian value of the plea. Mr Collins-Putland testified that the appellant instructed him that he would plead guilty to the charge “with the facts agreed as read to him”.

[43] Mr Collins-Putland then informed Ms Swindley that the matter would proceed the following day by way of guilty plea.

[44] On the morning of the 13 February 2013, the appellant attended at the NAAJA offices with his father, who expressed anger that the appellant had agreed to plead guilty. He also raised concerns about any possible civil liability that might flow following a conviction. The appellant indicated that he was no longer certain that he wanted to plead guilty.

[45] Mr Collins-Putland then sought advice from the Principal Legal Officer of NAAJA, Johnson Hunyor, following which Mr Collins-Putland advised the appellant that if he pleaded guilty he may incur civil liability, and that if he wished to plead not guilty the matter would have to be adjourned for a contested hearing to take place and NAAJA would seek leave to withdraw. The appellant instructed Mr Collins-Putland that he wanted to proceed to a contested hearing.

[46] Mr Collins-Putland then advised Ms Swindley of this change in his instructions and that he would be seeking an adjournment of the matter in order that the appellant could seek alternative legal representation. At the call-over of the matter at 9.30 am the Chief Magistrate Hannam indicated that leave to withdraw would be granted but that an adjournment may not be granted. She suggested that if the matter was adjourned the appellant may lose the benefit of a discount on his sentence were he later to plead guilty.

[47] Further discussions between Mr Collins-Putland and the appellant ensued in an interview room, during which time the appellant appeared highly stressed and uncertain as to which course he should adopt. The appellant left the interview room for about two minutes, and then returned and instructed Mr Collins-Putland that he wanted

to plead guilty on the basis of the resolution reached the previous day.

[48] Because of the appellant's indecision that morning, Mr Collins-Putland wrote out the appellant's instructions to plead guilty, and a summary of his final advice to the appellant. Mr Collins-Putland testified that he provided the document to the appellant to read, and that the appellant appeared to read it. He then read it aloud to the appellant "to ensure that he fully understood its contents" and asked him if he understood the summary of his advice. The appellant told Mr Collins-Putland that he did understand and he agreed that Mr Collins-Putland had provided him with that advice. He said that the appellant appeared to understand the contents of the document.

[49] The document, which is Annexure "A" to the appellant's affidavit, includes the following:

> "I, John Bamblett, instruct my solicitor, that I wish to P.G. (sic) to Aggravated Assault where the victim suffered harm and was a driver of a commercial vehicle …
> My solicitor has advised me:
> - that I face mandatory imprisonment for the charge of aggravated assault;
> - that the best possible outcome of sentencing is a rising of the court disposition with a suspended sentence, but that I face actual jail;
> - that I have the right to not enter a plea of guilty and progress to a contested hearing.
>
> My solicitor has:

- explained the plea process;
- read me the negotiated facts to be tendered to court, which I have agreed to accept as true in court;
- advised me that I face civil liability in relation to the victim."

[50] Mr Collins-Putland went back to court and the matter was listed for hearing of the plea at 11 am.

[51] At the hearing, before Carey SM, the charges were read out and the appellant entered pleas of guilty. Ms Swindley then read the précis of agreed facts, and tendered the appellant's prior criminal history. Submissions were made by Mr Collins-Putland on behalf of the appellant, followed by submissions by Ms Swindley. Carey SM proceeded to sentence the appellant, sentencing him to five months imprisonment, suspended after serving one month imprisonment, with an operational period of 12 months.

[52] The facts read out at the hearing included the following:

> "… on the evening of Saturday 11 August 2012, the defendant, John Bamblett, was drinking with family and friends at Sky City Casino in Darwin.
>
> At approximately 3:45 am on Sunday 12 August 2012, the defendant and his father and his girlfriend and another female got into Darwin taxi 165 at the main entrance to the casino. Taxi 165 was being driven by Kashif Rasheed, the victim in this matter. The group told the victim to take them to Annear Court in Stuart Park.

The defendant was seated in the middle of the rear seat between both females and his father occupied the front passenger seat. When the taxi arrived at the front of the unit complex situated at 3 Annear Court, all of the passengers exited the vehicle. The fare had come to $12.90.

The defendant's girlfriend attempted to pay by EFTPOS, but her card was declined. The defendant then handed the victim at $20 Note and told him to keep the change. Dennis Bamblett, the father of the defendant, however, wanted to keep the change and told the victim in an abrupt manner to give the change to him.

The victim then handed the $7.10 to the defendant's father who then asked to be driven to Alawa. The victim declined because he was concerned about the defendant's aggressive demeanour. The defendant's father then exited the taxi and walked around to the driver's side of the vehicle.

The dispute between the defendant's father and the victim regarding the further fare to Alawa has continued through the open window of the driver's side door. The defendant has then become enraged and has leant through the open passenger's side window and punched the victim a number of times with clenched fists to the face and body.

The defendant was pulled away from the vehicle by his father. The defendant walked to a nearby unit. After a short period of the time the victim was located by nearby residents who heard the commotion. At approximately 9:25 am on Monday 13 August 2012, the defendant was arrested and conveyed to the watch house where he was held pursuant to s 137 of the Police Administration Act.

At approximately 3 pm on the same day, a search warrant was issued under s 117 of the Police Administration Act and was executed at the defendant's home residence being 22 Mullen Gardens in Alawa. During the search warrant 39 300 calibre magnum bullets were located in the bedside drawer of the defendant's bedroom.

> The defendant participated in a formal record of interview where he made some admissions. He was later charged and bailed. As a result of the assault, the victim suffered a broken nose, a laceration and swelling to his face and bruising and soreness to his chest. He was conveyed to hospital by ambulance where he was treated and found to have impaired cognition with reduced information processing and reduced attention and impaired reasoning skills."

[53] The facts describing the events after the taxi stopped in Annear Court were identical to those set out in the "Amended Précis" documents at Annexures ACS 4 and ACS 6 to Ms Swindley's affidavit, and which Mr Collins-Putland says he read out to the appellant the night before the hearing during the second and third telephone conversations.

Evidence of Ms Swindley

[54] Ms Swindley swore two affidavits. She was not required for cross-examination. Her first affidavit set out in some detail the various dealings that she had - with Mr Collins-Putland particularly on the 12th and 13th of February. In essence that evidence was consistent with that of Mr Collins-Putland.

[55] Her second affidavit, affirmed 10 October 2013, was filed in response to part of the appellant's outline of submissions filed 11 June 2013 and set out in some detail the evidence that was available

to the prosecution to use in the event that the matter had proceeded to a fully contested hearing. That evidence included the CCTV footage, evidence from Mr Rasheed including 3 or 4 blows delivered by the appellant inside the taxi and more punches and kicks after he got out of the taxi, an electronic record of interview conducted with the appellant and other statements.

Evidence of the Appellant

[56] In his affidavit the appellant said that prior to the day of the hearing his instructions to Mr Collins-Putland never changed. It was his intention to fight the allegation of unlawful assault and plead guilty to the offence regarding the ammunition. He said that at the meeting on 11 February he confirmed his instructions that "I wanted to contest the allegation of assault and that I became involved in a consensual fight with the taxi driver outside the taxi after he had exited the vehicle and pursued me."

[57] He only referred to one discussion with Mr Collins-Putland on 12 February. He said that he could not recall the exact details but that Mr Collins-Putland said something about pleading guilty, to which the appellant said "no" and that he wanted to contest the charges as previously instructed.

[58] He said that when he attended court the following morning everything had changed. Mr Collins-Putland told him that a plea deal had been arranged with the prosecutor and that the matter was not going to be a hearing. He said he was extremely confused and shaking his head because he did not know what was happening.

[59] The appellant did not say anything about having attended at the NAAJA offices before going to court that morning. However he did say that Mr Collins-Putland told him that he had already made a deal, that NAAJA would not represent him unless he pleaded guilty and that he would need to find another lawyer or do it himself. The appellant said that this conversation occurred after the matter had been stood down by Hannam CSM, in an interview room where Mr Collins-Putland wrote out Annexure A to his affidavit. He acknowledged his signature at the bottom of the page and said that he does not recall any of the contents of that document being read out to him by Mr Collins-Putland at the time he signed it.

[60] He then went on to say that he had very low literacy skills. He said that he only completed schooling to year 9, had only attended about 3 days per week when he was at school and spent most of his schooling in classes for students with mild intellectual disabilities or learning disabilities. He said he can read but only very slowly

and that it takes him a long time to understand the things that he reads. During his evidence he said that he cannot read running writing.

[61] The appellant said that he thought he was pleading guilty to sticking his arm in through the window of the taxi, and that he was advised that would still constitute an assault even if he did not actually hit the taxi driver. He said he felt intimidated by the court process and by being told that his lawyer could no longer represent him unless he pleaded guilty. He said that he did not intend to plead guilty to the charge of aggravated assault causing harm. He said that he did not agree to the facts that were put before the court and admitted by Mr Collins-Putland.

Further evidence at the hearing of the appeal

[62] At the hearing of the appeal counsel for the appellant tendered a letter from Teresa Pianta, a "VET Lecturer / Workplace Assessor, Adult Language and Literacy Top End, Office of VET Business Improvement, Charles Darwin University", entitled "Reading comprehension report". The report refers to a nationally recognised assessment tool used to facilitate identification and development of the core skills of reading, writing, learning, oral communication and

numeracy on a scale of 1-5. Under the heading "Assessment outcome" the report states that:

> "John displayed reading comprehension competency at level 1 and some ability at level 2 on the ACSF scale.
>
> John, in a highly supported environment, was able to read a range of familiar texts, however he struggled with some words, and was unable to predict meaning from context clues.
>
> His comprehension was limited. Although John was able to locate and select specific information from written texts, for example, a newspaper article, his responses to comprehension questions were inconsistent demonstrating a lack of depth of understanding of the given texts.
>
> Based on this assessment, John would struggle with texts containing unpredictable, unfamiliar language."

[63] At the hearing of the appeal the appellant was cross-examined by counsel for the respondent. He conceded that he had previously had the experience of pleading guilty in a court which included the procedure of the prosecutor reading out the facts and his lawyer addressing the magistrate. He also agreed that he understood what the magistrate was saying when he sought and obtained bail on 15 February and that he understood the terms of his bail undertakings.

[64] The appellant disputed many contentions put to him during cross-examination that had been based upon the affidavit evidence of Mr

Collins-Putland. On many occasions his answers were not responsive to the questions and he kept repeating that he did not intend to plead guilty to actually striking the taxi driver, but that his lawyer had advised him that even what he did admit to, did amount to an assault. He disputed some of the evidence contained in Mr Collins-Putland's affidavit particularly the evidence that when they had the discussions following the hearing before Hannam CSM he left the interview room and returned a few minutes later saying that he wanted to plead guilty on the basis of the resolution reached the previous day.

[65] He did appear to have some difficulty understanding some of the questions put to him by counsel for the respondent but many of those questions were multipronged and couched in legalese.

[66] Whilst I accept that his reading and comprehension skills are limited I do not accept that he had any intellectual or other disability such as prevented him from understanding what was going on. During cross-examination he agreed that he is quite capable of having conversations with anyone he meets and "doing what you need to do in your life through talking." In answer to my proposition that his problems relate to reading and understanding some of the things that he reads he said: "Yes, I can't - I don't

understand - I can't read running writing. … all through high school I was in the IM class and I don't know what that means but – yeah special classes". He went on to say that he "can read writing but it takes a long time to [understand] what it's saying to me" and that as far as talking to people: "Yeah, I can have a chat yeah."

[67] The appellant did concede that he was prepared to plead guilty to unlawful assault, and also that he did agree that he would plead guilty, but that was on the basis that he would concede having raised his hand in the direction of the victim and that this constituted an assault. What he was disputing was that part of the agreed facts which was to the effect that he struck the driver several times.

[68] Mr Collins-Putland was also cross-examined on his affidavit. He agreed that during his dealings with the appellant the appellant had denied punching the taxi driver multiple times. But he said that after he had reviewed the CCTV footage and told the appellant that he considered that it shows that he did hit the taxi driver, the appellant "stopped disputing that fact". (He thinks that this was at the meeting which the appellant's father also attended on 17 December 2012.)

[69] Mr Collins-Putland also agreed that following the mention before Hannam CSM the appellant did appear concerned about the prospect of having to proceed without a lawyer, and that he seemed bothered and stressed. He agreed that the appellant was not a sophisticated man. However he had no concerns about the appellant's ability to comprehend what was being said, and he confirmed that he asked the appellant whether he understood what he was signing when he signed Annexure A and that the appellant said he did. Mr Collins-Putland said he had gone to some lengths to explain to the appellant what it was that he was pleading guilty to.

[70] I accept and prefer the evidence of Mr Collins-Putland and conclude that the appellant's recollection was confused and inaccurate. I consider it likely that he may no longer recollect some of the things that Mr Collins-Putland had said to him, particularly during the various conversations the day before the hearing.

**Submissions**

[71] Counsel for the appellant acknowledged that the appellant bears the onus of proof, including in relation to the threshold issue regarding the appellant's knowledge of what it was that he was pleading guilty to.

[72] Counsel submitted that the appellant has shown that he did not appreciate the true nature of the charge to which he was pleading guilty, and that he proceeded with a plea of guilty based upon a different factual matrix than what was read onto the record and agreed to by his lawyer on his behalf. He contended that the agreed facts were very much intertwined with the charge itself and therefore any misunderstanding on the appellant's part regarding the facts would also constitute a misunderstanding of the charge.

[73] No authority was advanced to suggest that a conviction should be set aside in circumstances where it is not the plea of guilty as such that is challenged, but the facts which are said to be agreed. Counsel for the appellant argued by analogy with the cases where appeals have been successful due to an appellant not understanding the charge. He said that the facts are intrinsic to the offence charged, so that pleading with an inadequate understanding of the facts is equivalent to pleading with an inadequate understanding of the charge.

[74] However, where the facts support all of the elements of the offence charged, it would seem that the only purpose and function of the agreed facts is to enable the court to decide on the appropriate sentence. In my opinion, it would be more appropriate for a

challenge of this kind to be brought by way of appeal against sentence, rather than an appeal against conviction.

[75] Counsel also referred to the CCTV footage and submitted that the footage does not show the appellant making contact with the taxi driver any more than once, if at all. Unfortunately a critical part of the CCTV footage was missing and so it is difficult to discern from the CCTV footage available whether and how many times the appellant made contact with the victim.

[76] Counsel also referred to the events on the morning of the hearing, including the pressure on the appellant, the possibility of him being mistaken regarding what he was being asked to agree to and the fact that he had only ever agreed to plead guilty to a single contact with the taxi driver.

[77] Counsel for the appellant also argued that Mr Collins-Putland should have taken the appellant through the agreed facts again on the morning of the hearing.

[78] Counsel for the respondent submitted that the appellant had adequately understood his decision to plead guilty. He pointed to the fact that the appellant effectively had two options. One was to proceed to a fully contested hearing where the prosecution would

call evidence extending beyond the events inside the taxi which could result in a conviction and a heavier penalty. The other option was to plead guilty, on the basis discussed the day before the hearing.

[79] In this regard counsel referred to the evidence of Mr Collins-Putland that during the first telephone conversation on 12 February the appellant instructed Mr Collins-Putland that "he wished to pursue a resolution without a contested hearing."

[80] Counsel also referred to the evidence of Mr Collins-Putland concerning the meeting at the NAAJA offices on the morning of the hearing when the appellant's father expressed anger that the appellant had agreed to plead guilty. The father must have been told that by the appellant, following his discussions with Mr Collins-Putland the night before.

[81] Regarding the appellant's reluctance to plead guilty on the basis of the multiple punches alleged by the prosecution, the respondent submitted that that was the price that he had chosen to pay in order to avoid a contested hearing and the risks associated with pursuing that option.

[82] Counsel also referred to the transcript of the appellant's application for bail pending this appeal on 15 February 2013, which was heard by the same magistrate, Carey SM. His Honour made the following observations about the appellant's guilty plea two days earlier:

> "On the face of it, this matter was a plea that was validly entered by counsel, representing the accused at the time. Agreed facts were read, and agreed to, and the plea entered. It didn't appear to me that the defendant accidentally said guilty, when he meant to say not guilty.
>
> … There is no claim … that counsel was, either acting contrary to instructions, or alternatively, was incompetent, in the matter in which he conducted the matter."

**Consideration**

[83] Mr Collins-Putland had extensive involvement with the appellant's matter since 3 September 2012. In addition to assisting him with bail applications and arranging court sittings to meet the appellant's convenience due to his work commitments in Queensland, Mr Collins-Putland engaged in discussions with the prosecution regarding the matter, viewed the CCTV footage and discussed it with the appellant and his father, explored possible defences, particularly in relation to assaults upon Mr Rasheed outside the taxi, and generally acted in the appellant's best interests in achieving a good result for him. Had the matter proceeded to a trial the

evidence of Mr Rasheed coupled with the CCTV footage could well have resulted in more adverse findings being made against Mr Bamblett and a stronger penalty.

[84] I accept the evidence of Mr Collins-Putland and in particular his evidence that:

(a) he had at least 3 telephone discussions with the appellant on 12 February;

(b) during the first telephone discussion he passed on the gist of his conversation earlier that day with Ms Swindley including that the plea would be on the basis of the strike inside the taxi and that the prosecution would not argue against the rising of the court disposition, and that the appellant instructed him that he wished to pursue a resolution without a contested hearing;

(c) during the second conversation he read to the appellant the proposed amended précis which Ms Swindley had emailed to him at about 5.02 pm, and the appellant expressed concern regarding the inclusion of the word ‘enraged’ which appeared in the paragraph which read:

> “The defendant then became enraged at this and leant through the open passenger-side window and punched the

victim a number of times with clenched fists to the face and body."

(d) during the third conversation he advised the appellant that the prosecution was unwilling to remove the word 'enraged' and he read the proposed précis to the appellant again;

(e) during that same conversation he advised the appellant that by pleading guilty and agreeing to those facts there would be less risk of a substantial period of actual imprisonment than would be the case if he proceeded with a contested hearing, but that it was his decision to make, and also that the decision should be made that evening in order to enable the prosecutor to cancel witnesses and increase the utilitarian value of the plea;

(f) the appellant then instructed him that he would plead guilty to the charge "with the facts agreed as read to him". (That the appellant had then agreed to plead guilty is also supported by his father's conduct early the next morning at the NAAJA offices when he expressed anger about the appellant's agreement to plead guilty and concern about liability to pay compensation to the victim if he were to plead guilty.)

[85] I find that during the adjournment following the mention before Hannam CSM on 13 February the appellant:

(a) initially instructed Mr Collins-Putland that he did not want to plead guilty on the basis of the proposed agreed facts and wished to apply for an adjournment;

(b) requested time to think things over and left the interview room for about 2 minutes;

(c) returned and instructed Mr Collins-Putland that he wanted to plead guilty on the basis of the resolution reached the previous day, namely on the basis of the facts previously agreed and on the assumption that the prosecutor would not oppose a rising of the court disposition.

[86] The facts that were read out to the Court on 13 February which the appellant now challenges, namely those referred to in paragraph [84](c) above and those concerning the injuries sustained by Mr Rasheed as a result of the assault, were identical to those which Mr Collins-Putland said he had read out to the appellant during the second and third conversations the previous day. I find that those facts were read out to the appellant by Mr Collins-Putland the day before the hearing, and that the appellant knew and understood that they included the fact that he punched the taxi driver a number of times and that the taxi driver suffered injuries as a result of that.

[87] I accept that the appellant would have felt some pressure, some of it resulting from his father and possible concerns about civil liability, and some resulting from his uncertainty as to his best way forward. However I do not consider that such pressure is particularly unusual. I also accept that because of his reading disability he may not have read the handwritten statement confirming his instructions to Mr Collins-Putland. However I accept Mr Collins-Putland's evidence that he read the document aloud to the appellant to ensure that he fully understood its contents, and that the appellant said that he did understand them. Although the agreed facts document was not attached to the handwritten statement, it included an acknowledgement that Mr Collins-Putland had explained the plea process and read him the "negotiated facts to be tendered to court, which I have agreed to accept as true in court."

[88] I do not consider that the pressure on the appellant at the time or his limited literary skills were such that he did not appreciate the nature of the charge, the facts admitted on his behalf or that his guilty plea was not a true admission of guilt. Nor am I satisfied that there has otherwise been a miscarriage of justice.

[89] Accordingly I do not consider that there has been an error or mistake of the kind contemplated by s 163(1)(b) of the *Justices Act* or a miscarriage of justice.

[90] The appeal is dismissed.

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