CITATION:	*Darcy v Chambers* [2019] NTSC 18
PARTIES:	DARCY, Angus v CHAMBERS, Kim Trevenan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from YOUTH JUSTICE COURT exercising Territory jurisdiction
FILE NO:	LCA 66 of 2018 (21837575)
DELIVERED ON:	22 March 2019
HEARING DATE:	20 March 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Whether Youth Justice Court erred in recording convictions – principles which govern the sentencing of youths discussed – reasons detailed essential thrust of reasoning process applied by sentencing judge – reasons show why the step of recording the convictions was taken – no error of law arising by reason of failure to provide reasons – whether sentencing judge failed to take into account a relevant factor or took an irrelevant factor into consideration – whether the approach demonstrated error in disregarding an applicable principle or acting on a wrong principle – no process error established – whether recording convictions manifestly excessive – recording of convictions not so "egregiously erroneous" as to constitute sentencing error – appeal dismissed.

Abbott v Wilson [2017] NTSC 50, *CI v Heath* [2017] NTSC 38, *Cook v Nash* [2017] NTSC 14, *DD v Cahill* [2009] NTSC 62, *Denham v Hales* (2003)

NTSC 87, *Emitja v The Queen* [2016] NTCCA 4, *Gibson v Heath* [2017] NTSC 72, *Hanks v The Queen* [2011] VSCA 7, *Johnson v The Queen* [2012] NTCCA 14, *LA v Kennedy* [2009] NTSC 56, *M v Hill* (1993) 114 FLR 59, *M v Waldron* (1988) 90 FLR 355, *Millar v Brown* [2012] NTSC 23, *Noakes v The Queen* [2015] NTCCA 7, *P (a minor) v Hill* (1992) 110 FLR 42, *Peach v Bird* (2006) 17 NTLR 230, *Pullman v Murphy* [1999] NTSC 109, *R v Horstmann* [2010] SASC 103, *R v Zamagias* [2002] NSWCCA 17, *Sanderson v Rabuntja* (2014) 33 NTLR 205, *Simmonds v Hill* (1986) 38 NTR 31, *TM v The Queen* [2017] NTCCA 3, *Truong v The Queen* (2016) 35 NTLR 186, *Verity v SB* [2011] NTSC 26, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Emery
Respondent:	R Everitt

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Darcy v Chambers [2019] NTSC 18
LCA 66 of 2018 (21837575)

BETWEEN:

ANGUS DARCY
Appellant

AND:

KIM TRAVENAN CHAMBERS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 22 March 2019)

[1] This is an appeal against sentence imposed by the Youth Justice Court on 30 October 2018. The appellant contends that the sentencing judge erred in recording convictions for the offences of unlawful entry and stealing which were committed on 4 August 2018, and erred in failing to provide sufficient reasons for those dispositions.

The circumstances of the offending and offender

[2] On 30 October 2018 the appellant pleaded guilty to offences committed on 25 March, 30 April, 2 May and 4 August 2018 respectively. The offences all took place in Maningrida. The appellant was 16 years of age at the time of this offending. All of the offences, with the

exception of a breach of the conditions of bail, were committed in the company of other youths. At the time of sentence the appellant had no prior criminal history.

[3] The offence committed on 25 March 2018 was trespass. The agreed facts were that at 5 a.m. on the day in question the appellant and five co-offenders entered a construction yard and took a few small items including two old mobile phones. The appellant was granted bail after his arrest for this offending. The appellant was sentenced to a nine-month good behaviour order without proceeding to conviction.

[4] The offences committed on 30 April 2018 were unlawful entry and stealing. The agreed facts were that at about 3 a.m. on the day in question the appellant and two co-offenders entered a dwelling house. The appellant was carrying a home-made slingshot at the time. The appellant and his co-offenders took food from a partially enclosed veranda area of the residence. These offences were committed while the appellant was on bail in respect of the first episode of offending. The appellant was sentenced to a nine-month good behaviour order without proceeding to conviction.

[5] The offence committed on 2 May 2018 was a breach of the conditions of bail which had been granted on 1 May 2018. The appellant was arrested on the evening of 30 April 2018 in relation to the offences committed earlier on that day. He was remanded in custody to the

following day. On 1 May 2018 the appellant was granted bail by the same judge who came to consider sentence on 30 October 2018. That grant of bail was subject to the conditions that the appellant reside at a family outstation, not return to Maningrida except for medical emergency or to attend court, and must leave Maningrida by 3 p.m. on that day. The appellant did not comply with the last of those conditions and was arrested in Maningrida at 3.45 p.m. on 2 May 2018. He was subsequently granted fresh bail on 3 May 2018. For that offence the appellant was discharged without conviction.

[6] Following the first two episodes of offending the appellant was referred to diversion. He completed some community work under the diversionary program but then disengaged from that process. The further offending was committed in August 2018, and the attempted diversion had been abandoned by September 2018.

[7] The offences committed on 4 August 2018 were also unlawful entry and stealing. The agreed facts were that late on the evening in question the defendant and 11 co-offenders attended at the Maningrida School with the intention of stealing bikes from the maintenance workshop. The bikes were unassembled in flat packs. The defendant and the co-offenders entered the workshop. The defendant took one of the flat packs and assembled the bike before leaving. The bike was left behind. These offences were committed while the appellant was on bail for both episodes of earlier offending. For those offences the

appellant was convicted and sentenced to a nine-month good behaviour order. It is from those convictions that the appeal is brought.

The grounds of appeal

[8] It is necessary to say something at the outset about the grounds of appeal. Although the Notice of Appeal does not particularise the error asserted in recording the convictions, in submissions that error was said to have arisen from a failure on the part of the sentencing judge to give adequate consideration to and apply the sentencing principles applicable to young offenders, particularly as they relate to the exercise of the discretion whether or not to record a conviction. The other ground of appeal is that the sentencing judge failed to provide sufficient reasons for recording convictions.

[9] As the Northern Territory Court of Criminal Appeal has previously observed, any contention that the sentencing court has accorded inadequate or excessive weight to a factor or principle is properly viewed as a particular of manifest excess.[1] Those factors may include matters such as an appellant's youth, deprived upbringing and the sentencing purpose of rehabilitation. When considering a ground of appeal expressed in those terms, "an appellate court must be especially

1 *Noakes v The Queen* [2015] NTCCA 7 at [15] citing *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220; 24 VR 457 at 459-460.

cautious not to substitute its own opinion for that of the sentencing judge in the absence of identifiable or manifest sentencing error".[2]

[10] Beyond any inferences that might be drawn from the ultimate determination of whether the sentence was either within or without the available range, it is neither possible nor necessary for an appeal court to reach any particular conclusion concerning the allocation of weight to a factor. For these reasons, the contention that the sentencing judge failed to give adequate weight to the sentencing principles applicable to young offenders necessarily resolves to a contention that the recording of a conviction was manifestly excessive in the circumstances.

[11] Different considerations may apply to the contention that the sentencing judge has altogether failed to consider a relevant factor or principle. Where the contention is not that the sentencing court accorded inadequate or excessive weight to a factor or principle, but that the court failed to take into account a relevant factor or took an irrelevant factor into consideration, the appeal court may substitute its own sentence. If the sentencing judge's approach demonstrated error in disregarding an applicable principle or acting on a wrong principle, it may also be incumbent on the appeal court to impose its own determination or assessment in that respect, and to resentence

2 *Johnson v The Queen* [2012] NTCCA 14 at [25].

accordingly.[3] Again, however, that enquiry ordinarily takes place in the context of an assertion of manifest excess.

[12] As to the third ground of appeal, insufficiency of reasons does not, of itself, provide a ground for review of the sentence. At most, an insufficiency of reasons in relation to a matter which properly weighed in the sentencing exercise may support a conclusion that the matter was not taken into account. That determination will ordinarily depend on whether it can be said that a markedly different sentence should have followed if the matter was in fact taken into account.

The sentencing judge's determination

[13] The principles which govern the sentencing of youths have been often stated and are well-known to the courts in this jurisdiction. The purpose of rehabilitation will usually be more important than general deterrence, particularly in relation to first offenders.[4] Detention or imprisonment should only be used as a last resort.[5] The recording of a conviction is not a condition precedent to the imposition of punishment, and the exercise of the discretion may give rise to considerations separate to and distinct from those which inform the assessment of the objective seriousness of the offending.[6] It will often

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3 *Emitja v The Queen* [2016] NTCCA 4 at [39], citing *Liddy v R* [2005] NTCCA 4 at [12].

4 *TM v The Queen* [2017] NTCCA 3 at [25]; *M v Hill* (1993) 114 FLR 59 at 67; *Pullman v Murphy* [1999] NTSC 109 at [31].

5 *P (a minor) v Hill* (1992) 110 FLR 42 at 47-48; *Gibson v Heath* [2017] NTSC 72 at [11], [19].

6 *M v Waldron* (1988) 90 FLR 355 at 360; *P (a minor) v Hill* (1992) 110 FLR 42 at 47-48; *Verity v SB* [2011] NTSC 26 at [34]-[36]; *Cook v Nash* [2017] NTSC 14 at [26].

be the case that the recording of a conviction will not serve the purpose of specific deterrence given that the consequences of that disposition may not be readily apparent or ascertainable by the youth.[7]

[14] When sentencing juvenile offenders, a finding that an offence has been proved without proceeding to conviction should not be reserved for special or unusual cases.[8] Before imposing a conviction a court must ask itself whether it is necessary to go beyond the lesser options. In making that determination it is necessary to bear in mind that the recording of a conviction may be detrimental to a youth's future prospects of securing employment, occupational and other licences, insurance cover and travel documentation, and as a result counter-productive to the purpose of rehabilitation.[9] Finally, particular care must also be taken in determining whether or not to record a conviction in circumstances where to do so might lead to some significant additional penalty (such as under a mandatory sentencing regime).[10]

[15] Counsel for the appellant submitted that in order to satisfy the test of adequacy, the reasons given by the sentencing judge were required to "state generally and briefly the grounds which have led [the trial judge] to the conclusions reached concerning disputed factual questions and to

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7 *CI v Heath* [2017] NTSC 38 at [29]; *DD v Cahill* [2009] NTSC 62 at [15].

8 *Simmonds v Hill* (1986) 38 NTR 31 at 33.

9 *LA v Kennedy* [2009] NTSC 56 at [20]; *DD v Cahill* [2009] NTSC 62 at [16].

10 *Abbott v Wilson* [2017] NTSC 50 at [49].

list the findings on the principal contested issues".[11] That formulation is obviously directed to the determination of contested issues in a trial, rather than to sentencing proceedings on agreed facts in a guilty plea. However, in sentencing proceedings in the Youth Justice Court reasons ought to be given where a decision is made to impose a conviction to show why that step has been taken.[12] It is necessary in those circumstances to take a broad view of *ex tempore* reasons delivered in the course of a busy circuit court listing in order "to ascertain the essential thrust of the reasoning process applied". In undertaking the task it is "inappropriate to attempt to dismember *ex tempore* reasons and subject them to a vigorous analysis".[13]

[16] Turning then to the sentencing proceedings in this matter, after the charges had been read and defence counsel had made brief submissions concerning the circumstances of the offending and the appellant's personal circumstances, the sentencing judge indicated an intention to impose a good behaviour bond and proceeded to deal with the charges in chronological order. The sentencing judge prefaced his determination with the formulation, "[h]aving regard to all the principles of the sentencing of youths". That statement was characterised by counsel for the appellant as "perfunctory". The alternative characterisation is that it was an acknowledgement by the

11 *Sanderson v Rabuntja* (2014) 33 NTLR 205 at [10].

12 See, in relation to an order for cumulation, *Denham v Hales* (2003) NTSC 87 at [15].

13 See, for example, *Peach v Bird* (2006) 17 NTLR 230 at [13].

sentencing judge at the outset of the well-known principles which govern the sentencing of youths, some of which I have described above. The court was thereby reminding itself of those principles and making it express that they were being taken into account in the disposition. That is the characterisation which I prefer in the circumstances.

[17] For the offences committed in March and April 2018, the sentencing judge imposed good behaviour bonds without proceeding to conviction. On coming to the last charges in time, the sentencing judge observed:

> Time to get to August. His continued criminality is such that I'm going to place him on the same bond but he is convicted of charges 1 and 2 and ordered to enter the same bond as the previous bond.[14]

[18] The sentencing judge was there drawing a distinction between the circumstances of the offending in March and April 2018, and the circumstances of the subsequent offending in August 2018 after the appellant had taken the benefit of the conditional release on bail and the referral to diversion.

[19] Defence counsel then sought to be heard in relation to whether convictions should be recorded. The submission put was that conviction should not be recorded given the appellant's age and that he was, in effect, a first offender. The sentencing judge drew attention to

14 Transcript of Proceedings on 30 October 2018 (**Transcript**), page 7.

the prevalence of this particular type of offending in the community and the fact that the appellant had committed a third offence of that type by breaking into a community facility while on bail.[15] Those observations must be considered in the context in which the sentencing judge was aware of the train of events, and had granted the appellant bail on the two previous occasions.

[20] Defence counsel then drew attention in general terms to the decisions of this Court in relation to first-time offenders. The sentencing judge correctly identified that the decision whether to record a conviction or not was one which fell to the exercise of the judicial discretion, and then made the following observations:

> You don't normally record a conviction for first offenders given their age and the principles of sentencing youths.
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> …
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> But by the time in August he wasn't a first offender anymore.[16]

[21] While the appellant was technically and obviously a first offender by reason of the fact that he had not previously been the subject of any finding of guilt in the courts, the clear purpose of the sentencing judge's comments in that respect was to draw attention to the course of offending involving separate episodes in March, April and August 2018.

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15 Transcript, page 7.

16 Transcript, page 7.

[22] Defence counsel then drew attention to the purpose of rehabilitation and the effect that a conviction might have on that purpose in terms of the difficulty in obtaining certain employment, licences and travel documentation.[17] These were all matters of which the sentencing judge was no doubt aware, forming as they do part of the well-known principles which operate in relation to sentencing dispositions of this nature. At the conclusion of those submissions the sentencing judge stated:

> Thank you. I have had regard to all those matters and I note that he spent two or three days in jail for breaching his bail and still managed to, in August, to do that break and enter again. And in my view he needs to be encouraged by way of some denouncement by way of convictions being recorded in the convictions are – will be recorded in the way I've just said.[18]

[23] In the application of the relevant standard, those reasons detailed the essential thrust of the reasoning process applied by the sentencing judge and show why the step of recording the convictions was taken. There is no error of law arising by reason of any failure to provide, or insufficiency in, reasons.

[24] I turn then to the question whether the sentencing judge failed to take into account a relevant factor or took an irrelevant factor into consideration, or whether the approach demonstrated error in disregarding an applicable principle or acting on a wrong principle. In

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17 Transcript, page 8.

18 Transcript, page 8.

the context of appeals of this type, this is sometimes referred to as "process error".[19] It is to be distinguished from "outcome error", which describes the situation in which the sentence is plainly and obviously excessive or inadequate on its face. The appellant puts a number of submissions in this respect.

[25] First, it is said that the sentencing judge "did not fully take into account the youth of the appellant, his limited education, his lack of criminal history, prospects of rehabilitation and the circumstances surrounding the offending". This resolves to a contention that the sentencing judge should have placed more weight on those matters in his determination, or that those matters should have led to a non-conviction disposition. It is suggested in that respect that the sentencing judge should have ordered a report in relation to the youth's circumstances before proceeding to impose a conviction. There was no obligation on the sentencing judge to order a report in the circumstances and, as already observed, the attribution of weight by a sentencing court to relevant factors does not in itself give rise to appellable error.

[26] Secondly, it is said that when sentencing youthful offenders there is a strong imperative to consider the implications a conviction will have for the future. The import of that submission is that the sentencing

19 *R v Horstmann* [2010] SASC 103 at [36]-[38]; subsequently endorsed in *R v Meschede* [2016] SASCFC 49 at [3]. See also *R v Lutze* [2014] SASCFC 134; 121 SASR 144 at [47].

judge did not give that matter adequate consideration in the present case. As already observed above, during the course of the sentencing proceedings defence counsel made submissions concerning the effect that a conviction might have on the rehabilitative purpose, and these were all matters of which the sentencing judge was no doubt aware. Again, the submission resolves to a contention that the sentencing judge should have placed more weight on that consideration.

[27] Thirdly, it is suggested that the sentencing judge "did not turn his mind sufficiently to the fact that the appellant … had never [previously] been before the court for sentence". This was clearly a matter canvassed during the course of the sentencing proceedings. The point was made on a number of occasions by defence counsel. The sentencing judge acknowledged the significance of that fact, but considered it was outweighed by the repetitive nature of the appellant's course of offending since the first episode in March 2018. There was no failure to have regard to the appellant's lack of criminal history as a consideration, and it cannot be said that the exercise of the sentencing discretion to record a conviction for a first offender necessarily constitutes an error of principle.

[28] Fourthly, it is suggested that the sentencing judge failed to give consideration, or at least any express consideration, to the alternatives to imposing convictions. The most obvious alternative was to proceed without imposing convictions, as the sentencing judge did in relation to

the offences committed in March and April 2018. The sentencing judge clearly had a non-conviction disposition in mind as a possible alternative. The other alternatives suggested during the hearing of this appeal were the imposition of a good behaviour order of longer duration, or perhaps a suspended period of detention without conviction. It was not incumbent on the sentencing judge to state explicitly that he had given consideration to the alternative dispositions, and to describe in detail why he chose not to adopt another course.[20] In the absence of any suggestion that the sentencing judge refused or otherwise failed to consider alternative dispositions, it may and should be assumed that the sentencing judge was aware other options were open and that consideration was given to them.[21]

[29] No process error is disclosed. I turn then to the question of manifest excess. As the parties acknowledge, and as the authorities make plain, the decision whether or not to record a conviction is a discretionary determination and the ordinary principles which govern appeals from determinations of that nature have application. In *Truong v The Queen*[22], the Court of Criminal Appeal referred with approval to the following statement in relation to manifest excess made by Bongiorno JA in *Hanks v The Queen*:

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20 See, in relation to the decision whether or not to make an order suspending sentence, *R v Zamagias* [2002] NSWCCA 17 at [29]-[30].

21 *Millar v Brown* [2012] NTSC 23 at [19].

22 *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [37].

> The term "manifest excess" is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.[23]

[30] That approach recognises the breadth of the legitimate sentencing discretion. There is no rule or presumption that youthful first offenders will not have a conviction recorded. The fact that the sentencing judge imposed convictions does not suggest that the court ignored the principle that a rehabilitative approach will operate in the community interest by reducing the prospect of re-offending. In some cases, a sentencing court may conclude that a youth's profile and history will be such that a sentence involving conviction – or selective conviction – will best encourage the youth's development as a law-abiding citizen. In other cases, the sentencing court may determine that objective is best achieved by not recording a conviction.

[31] The question whether recording a conviction will have any specific deterrent effect will depend on the sentencing court's assessment of the youth's comprehension and circumstances. It may be noted in this respect that the appellant was 17 at the time of the sentencing proceedings. While the objective seriousness of the offending may not be a significant consideration in making that determination, the

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23 *Hanks v The Queen* [2011] VSCA 7 per Bongiorno JA at [22], Redlich JA agreeing. Also cited in *Namala v Whittington* [2016] NTSC 71 at [25].

offences in this case were serious in that they involved the unlawful entry to a community building at night while in company with the intention of stealing from it. Offending of that general kind is prevalent in Aboriginal communities. In those circumstances, it is legitimate to consider whether recording a conviction will have some general deterrent effect as an act of social censure. The sentencing judge was familiar with the circumstances prevailing in the Maningrida community and well-placed to make those sorts of assessments.

[32] The weighing of these matters has rightly been described as a balancing exercise. The competing considerations will often be finely balanced. It cannot be said that the recording of the convictions in this case was so "egregiously erroneous" that the sentencing judge must have made a sentencing error.

Disposition

[33] For those reasons, the appeal is dismissed.
