CITATION:	*Court v Magtibay* [2019] NTSC 12
PARTIES:	COURT, Michael
	v
	MAGTIBAY, Lavina
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 17 of 2018 (21828282)
DELIVERED ON:	25 February 2019
HEARING DATE:	22 February 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – JUDGMENT AND PUNISHMENT

Whether sentence manifestly inadequate – sentence imposed must reflect the objective seriousness of offence – there must be reasonable proportionality between the sentence passed and circumstances of the crime – mitigating subjective factors cannot operate to lead to sentence disproportionate to the crime – sentence manifestly inadequate – appeal allowed – respondent resentenced.

Criminal Code 1983 (NT) s 43AL, s 174E, s 174F
Local Court (Criminal Procedure) Act 1928 (NT) s 163
Sentencing Act 1995 (NT) s 8

Carnese v The Queen [2009] NTCCA 8, *Demur v The Queen* [2014] NTCCA 15, *Director of Public Prosecutions v Janson* [2011] VSCA 19, *Director of Public Prosecution v Neethling* (2009) 22 VR 466, *Director of Public Prosecution v Oates* (2007) 47 MVR 483, *Edmond & Moreen v The Queen* [2017] NTCCA 9, *Hales v Adams* [2005] NTSC 86, *Muldrock v The Queen*

(2011) 244 CLR 120, *R v Dodd* (1991) 57 A Crim R 349, *R v Jurisic* (1998) 45 NSWLR 209, *R v McNaughton* (2006) 66 NSWLR 566, *R v Scott* [2005] NSWCCA 152, *R v Whyte* (2002) 55 NSWLR 252, *The Queen v McInerney* (1986) 42 SASR 111, *The Queen v Mossman* [2017] NTCCA 6, *Toohey v Peach* (2003) 141 A Crim R 437, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Lapinski
Respondent:	G Betts

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Greg Betts, Barrister and Solicitor

Judgment category classification:	B
Judgment ID Number:	GRA1903
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Court v Magtibay [2019] NTSC 12
LCA 17 of 2018 (21828282)

BETWEEN:

MICHAEL COURT
Appellant

AND:

LAVINA MAGTIBAY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 25 February 2019)

[1] This is an appeal brought by the informant pursuant to s 163(1) of the *Local Court (Criminal Procedure) Act 1928* (NT) from an order or adjudication of the Local Court involving sentence.

[2] The issue for consideration is whether the imposition of a two-year good behaviour bond without conviction in respect of the offence of negligently causing serious harm contrary to s 174E of the *Criminal Code 1983* (NT) was manifestly inadequate having regard to the circumstances of the offending and the offender.

[3] The Court of Criminal Appeal has recently described the considerations governing Crown appeals against sentence in *The Queen v Mossman*.[1] They should be a rarity brought only to establish some matter of principle. Sentences which are so inadequate as to indicate error or departure from principle will constitute error in point of principle which the Crown is entitled to have corrected on appeal. The same considerations apply to appeals of this nature from the Local Court to the Supreme Court.

The facts and circumstances

[4] The plea proceeded on the following agreed facts.

[5] On the morning of 2 March 2018 the respondent left her home address to drive her daughter to school. The vehicle in which she was driving was a Toyota Prado with a gross vehicle mass in excess of two tonnes. The respondent turned onto Larapinta Drive and accelerated to a speed near the 60 km/h limit. At the same time, a seven-year-old boy and his school-age sister were walking to school. They stopped at a pedestrian crossing on Larapinta Drive which was controlled by traffic lights. They pressed the button to activate the green walk signal.

[6] The red light stopping traffic activated at 8:06:18 hours. At that point the respondent was 50 metres from the traffic lights still driving at about 60 km/h. The weather was clear and dry. She continued driving

1 [2017] NTCCA 6 at [8]-[14].

the vehicle without making any proper observation of the road and traffic lights while knowing it was a time at which children might be using the crossing to go to school. At that point, a grey sedan was already stationary at the red light. The respondent failed to observe the sedan or the red light. The green walk signal activated at 8:06:21 hours, three seconds after the traffic lights turned red. The children commenced walking across the crossing.

[7] Two seconds after that, at 8:06:23 hours, the respondent ran the red light, saw the victims crossing the road, and swerved the vehicle in an attempt to avoid the collision. At the same time the female child stopped, screamed, and attempted to drag her brother out of the path of the oncoming vehicle. If not for her actions her brother would have received the full force of the vehicle. As it was, the side of the vehicle struck the boy's right leg resulting in a closed fracture of his right tibia and fibula. The female child was also struck to the hand, but escaped any significant physical injury. The boy was hospitalised as a result of the impact and the fracture was realigned and a cast applied. If the injuries had been left untreated they would have resulted in significant disability. As might be expected, both children suffered emotional trauma as a result of the incident.

[8] Police arrived at the scene soon afterwards and spoke with the respondent. She returned a negative breath test to alcohol. Almost four months later the respondent participated in an interview with

police. She made admissions to running the red light and striking the boy. When asked why she drove through the red light she stated, "I thought the light was green". When asked about the other vehicle which was stationary at the lights she stated, "I didn't see the other car".

[9] The respondent had no prior criminal record. At the time of the offending she was 28 years of age. She is married with one daughter aged seven. She is originally from the Philippines and migrated to Australia with her husband in 2013. Once in Australia she completed a bridging program which enabled her to work in Australia as a nurse. At the time of the incident she was working at a dialysis unit in Alice Springs and had been for the previous two years. Her husband is also employed on a full-time basis at the Alice Springs hospital.

[10] During the course of the plea in the Local Court, in response to a query from the sentencing judge the respondent's counsel advised that the respondent explained the incident by reference to the fact that she was driving into the sun in a manner which obscured her vision. I pause there to note that this explanation does not operate to reduce the respondent's moral culpability. It suggests that the respondent drove for a distance and time during which her vision of the roadway was fundamentally obscured. That is something more than momentary inattention. The respondent's counsel also drew attention to the fact

that the incident did not involve excessive speed, overtly dangerous driving or intoxication.

[11] The sentencing judge heard that following the impact the respondent stopped the vehicle immediately, got out and tried to render assistance to the child. She personally apologised to the child and his parents. She demonstrated remorse to that family for the injury she had caused. It was accepted during the course of the sentencing proceedings that the respondent was extremely remorseful for her conduct. It was also accepted that the respondent was a person of general good character who was held in high professional and personal regard. She indicated her intention to plead guilty at the earliest opportunity.

The nature of the offence

[12] The offence for which the respondent was sentenced was that of engaging in negligent conduct which caused serious harm to another person contrary to s 174E of the *Criminal Code*. The maximum penalty for that offence is imprisonment for 10 years. It may be noted in this respect that s 174F(2) of the *Criminal Code* creates the offence of driving a motor vehicle dangerously so as to cause serious harm to another person. That offence provision, although directed specifically to serious harm as the result of the use of a motor vehicle, attracts a maximum penalty of imprisonment for seven years. The legislature clearly considers the former offence to be the more serious of the two, at least in potentiality.

[13] The physical element of the offence the subject of this appeal was the respondent's conduct in driving through the red light and striking the victim, which has already been described. The fault element of this offence was negligence. Section 43AL of the *Criminal Code* provides that a person is negligent in relation to the physical element of an offence if the person's conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence. That is the gravamen of the offence for which the respondent stood to be sentenced.

The failure to record a conviction

[14] The determination whether or not to record a conviction is governed by s 8(1) of the *Sentencing Act 1995* (NT), which provides:

> **Conviction or non-conviction**
>
> (1) In deciding whether or not to record a conviction, a court must have regard to the circumstances of the case including:
>
> (a) the character, antecedents, age, health or mental condition of the offender; and
>
> (b) the extent, if any, to which the offence is of a trivial nature; and
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.

[15] There can be no doubt that the difference between recording a conviction or not is significant. A conviction operates as a significant act of legal and social censure.[2]

[16] Two observations may be made concerning the operation of s 8(1) of the *Sentencing Act*. First, the considerations referred to in that provision are not exhaustive of the matters which might properly be taken into account by the sentencing judge in determining whether or not to record a conviction. Secondly, in making that determination the sentencing judge is required to have regard to all three limbs of the provision.

[17] While a sentencing judge might make the determination concerning conviction on the basis of the offender's character and antecedents without necessarily having to be satisfied that the offence was trivial or committed under extenuating circumstances, the sentencing judge may not proceed solely on the basis of an offender's character and antecedents without giving any consideration to the second and third limbs, and any other relevant circumstances.[3]

[18] Even where an offender's character, antecedents and age might militate in favour of a "non-conviction" disposition, it will still be necessary for the sentencing court to weigh those matters against the seriousness

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2 *Carnese v The Queen* [2009] NTCCA 8 at [16], citing *The Queen v McInerney* (1986) 42 SASR 111 at 124.

3 *Toohey v Peach* (2003) 141 A Crim R 437 at 440-441; *Carnese v The Queen* [2009] NTCCA 8 at [16].

of the offending and its context. There will obviously be circumstances in which the seriousness of the offending will require a conviction notwithstanding that the offender might be of otherwise unblemished character. So much is apparent from the fact that a determination not to record a conviction is relatively rare rather than a disposition made in the ordinary course, leaving aside the special considerations which apply to juvenile offenders.

[19] That determination will also be influenced by the nature of the offending and the principal sentencing purposes for that particular type of offending. As Southwood J observed in *Hales v Adams*:

> [Whether a conviction is recorded] is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction. Mature age offenders who have led previously blameless lives may benefit from an exercise of the discretion not to record a conviction. The discretion may also be exercised in an offender's favour where the offender has no previous convictions, or where the offending related to ill health or where it would, in itself, be a significant additional penalty for a first offender. On the other hand, the recording of a conviction may be necessary where the offender is of mature age and deterrence is being given weight, especially in relation to breaches of regulatory or social legislation.[4]

[20] During the course of the sentencing proceedings the respondent's counsel submitted that the recording of a conviction could have adverse impact on her circumstances in the future. It was said that she had been traumatised by the events and the family was considering a

4 *Hales v Adams* [2005] NTSC 86 at [17].

move interstate. In that event, she would be required to apply for new employment and the recording of a conviction might have a detrimental effect on her prospects of securing employment. That potential detriment notwithstanding, the present matter involved a serious offence and serious offending. Offending of this nature calls for some public demonstration of the court's disapproval of the conduct and, as is discussed further below, it was the type of offending for which the purpose of general deterrence was a significant consideration in the sentencing calculus.

The sentence imposed

[21] I turn then to consider the imposition of the two-year good behaviour bond in relation to this offending.

[22] The principle of proportionality requires the fixing of sentences which are proportionate to the gravity and totality of the offending. Matters personal to an offender are irrelevant to the assessment of the objective gravity, which is to be determined by reference to the nature of the offending.[5] The objective circumstances will include such matters as the maximum statutory penalties, the degree of harm caused, the method by which the offence was committed and the offender's

5 See *Muldrock v The Queen* (2011) 244 CLR 120 at [27].

culpability.[6] Those matters define the upper limit of a proportionate sentence.

[23] Mitigating subjective factors cannot operate to lead to a sentence which is disproportionate to the crime. The sentence imposed must ultimately reflect both subjective factors and the objective seriousness of the offence committed, and in striking the balance there must still be a reasonable proportionality between the sentence passed and the circumstances of the crime.[7] The sentence cannot be less than the objective gravity of the offence requires.[8] Otherwise, the sentencing purposes of just punishment and denunciation will not be satisfied.[9] There will be circumstances in which a disproportionate emphasis on subjective considerations will cause inadequate weight to be given to objective circumstances and the achievement of reasonable proportionality between the sentence imposed and the circumstances of the crime.[10]

[24] There is a wide range of sentencing outcomes for this offence. It comprehends many different types of offending behaviours. As the Crown has submitted, where the offence involves the negligent infliction of serious harm by use of a motor vehicle general deterrence

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6 See *Edmond & Moreen v The Queen* [2017] NTCCA 9 at [6].

7 See *R v Scott* [2005] NSWCCA 152 at [15].

8 See *R v McNaughton* (2006) 66 NSWLR 566 at [15].

9 See *Sentencing Act*, s 5(1)(a) and (b).

10 See *R v Dodd* (1991) 57 A Crim R 349 at 354.

must be given significant weight in the sentencing calculus.[11] As the Victorian Court of Appeal observed in *Director of Public Prosecutions v Janson*,[12] it is not open to treat general deterrence as less important simply because the offences were the consequence of unthinking negligence.

[25] Offending of this nature will almost invariably attract a term of imprisonment, the length of which will be informed by the offender's moral culpability. The relevant considerations will include the extent and nature of the injuries inflicted, the number of people put at risk, and the character of the negligence involved. I have already dealt with those matters as they presented in this offending. The nature and gravity of the respondent's conduct in this case must be assessed having regard to the fact that, as I have already observed, she drove for a distance of approximately 50 metres over a period of approximately five seconds during which her vision of the roadway was fundamentally obscured.

[26] A review of the sentences imposed by this Court for the offence of negligently causing serious harm discloses that they rarely involve the use of a motor vehicle. The sentencing database records only one such case, for which an aggregate penalty of imprisonment for four years

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11 *Demur v The Queen* [2014] NTCCA 15 at [6]; *Director of Public Prosecution v Neethling* (2009) 22 VR 466 at [27]-[28]; *R v Whyte* (2002) 55 NSWLR 252; *R v Jurisic* (1998) 45 NSWLR 209; *Director of Public Prosecution v Oates* (2007) 47 MVR 483 at 487.

12 [2011] VSCA 19.

was imposed for this offence and a hit and run charge arising out of the same incident. The charges arising under this offence provision usually involve interpersonal violence in which serious harm is negligently inflicted. Allowing for that distinction, the head sentences imposed by this Court for offences against this provision after reduction to take into account a plea of guilty range from eight months up to six years. They are most commonly around the two-year mark. In only one recorded case was a conviction not recorded and a good behaviour bond imposed.[13] The circumstances of that offence involved a consensual fight which the 18-year-old offender had attempted to avoid after being subjected to an extended course of provocation by the victim.

[27] A review of the sentences imposed by this Court for the lesser offence of driving a motor vehicle dangerously so as to cause serious harm under s 174F(2) of the *Criminal Code* discloses the following matters. The head sentences imposed by this Court for offences against this provision after reduction to take account of a plea of guilty range from nine months up to three years and six months. In only one recorded case was a conviction not recorded and a good behaviour bond imposed.[14] The circumstances of that offence involved a 14-year-old offender with no criminal record who had been directed by his mother

13 *The Queen v Nunes* (Northern Territory Supreme Court, 16 April 2013, SCC 21212402).

14 *The Queen v Butler* (Northern Territory Supreme Court, 28 February 2013, SCC 21141510).

to drive the vehicle, and the accident arose through misjudgment rather than selfish disregard. In only one recorded case was a conviction recorded and a good behaviour bond rather than a sentence to imprisonment imposed.[15] The circumstances of that offence involved a 19-year-old breastfeeding mother from a remote community who was attempting to transport a mattress on top of a motor vehicle with the assistance and complicity of the victim.

[28] That review of the sentencing outcomes in these categories of cases confirms that for this type of offence, a sentence to imprisonment will almost always be required to reflect the objective seriousness of the offence committed and to achieve a reasonable proportionality between the sentence passed and the circumstances of the crime. During the hearing of the appeal, counsel for the respondent reiterated that the respondent was driving at or below the speed limit, there was no intoxication or substance abuse involved, there was no allegation of erratic or aggressive driving, and the respondent stopped immediately following the collision. The absence of those aggravating factors does not operate in mitigation, but it does assist in the assessment of moral culpability.

[29] That assessment must also take into account the fact that the manner in which the respondent drove the vehicle involved a serious breach of its

15 *The Queen v Smiler* (Northern Territory Supreme Court, 15 August 2017, SCC 21638167).

proper management and control, was potentially dangerous to people in the vicinity of the roadway, and created a considerable risk of serious injury or death. Even where the conduct giving rise to the harm is caused by a serious lapse of attention or misjudgement, rather than a selfish disregard for the safety of other road users, a sentence to imprisonment will almost invariably be imposed. Conduct falling within the first category might be expected to result in a sentence at the lower end of the range, while conduct falling within the second category might be expected to result in a sentence towards the upper end of the range.

Disposition and re-sentence

[30] The wide range of sentencing outcomes evident from the foregoing discussion notwithstanding, those outcomes do comprise a general sentencing standard for the type of offence for which the respondent was sentenced. It may be accepted that a sentencing standard is not a fixed range departure from which will necessarily found demonstrable error. Even allowing for that, the imposition of a two year good behaviour bond without conviction was plainly and obviously inadequate. There is no countervailing factor which would warrant the exercise of the residual discretion in this matter. The respondent's good character and subjective considerations obviously inform the length of the head sentence, whether an order suspending sentence is

imposed, and, if so, whether the sentence should be suspended in whole or in part.

[31] Having regard to those considerations, I make the following orders:

1. The appeal is allowed and the sentence imposed by the Local Court on 12 October 2018 for the offence of negligently causing serious harm contrary to s 174E of the *Criminal Code* is quashed.

2. For that offence, the respondent is convicted and sentenced to imprisonment for nine months to take effect from 12 October 2018 and suspended from that date.

3. An operational period of nine months is fixed to run from 12 October 2018 for the purposes of ss 40(6) and 43 of the *Sentencing Act 1995* (NT).
