Petterson v Firth [2017] NTSC 8

PARTIES:	PETTERSON, Matthew v FIRTH, Justin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 2 of 2016
DELIVERED:	3 February 2017
HEARING DATE:	12 October 2016
JUDGMENT OF:	BARR J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – SENTENCING – Appeal against recording of conviction – appeal against severity of sentence – 20 year old first offender – plea of guilty to unlawfully damaging motor vehicle – sentencing discretion miscarried – appeal upheld in part – conviction quashed – manifest excess not otherwise established – community work order affirmed

EVIDENCE – EXPERT EVIDENCE – Psychologist's opinion that appellant's offending "highly likely to have been impacted" by Post-Traumatic Stress Disorder – opinion based on insufficient relevant facts – expert reasoning inadequate and unpersuasive – judge entitled to reject the opinion – no error established

Criminal Code s 241(1)
Sentencing Act s 7(b), s 7(e) and s 7(f), s 8(a), s 34(1)

Evidence (National Uniform Legislation) Act s 4(1)(d), s 4(2)(a)

R v Olbrich [1999] HCA 54; (1999-2000) 199 CLR 27 applied

Briese (1997) A Crim R 75; *Carnese v The Queen* [2009] NTCCA 8; *Dasreef Pty Ltd v Hawchar* (2011) 277 ALR 611; *Hales v Adams* [2005] NTSC 86; *R v Bourchas* (2002) 133 A Crim R 413; *R v McInerney* (1986) 42 SASR 125; *R v Verdins* (2007) 16 VR 269; *Tran v The Queen* (2011-2012) 35 VR 484, referred to

REPRESENTATION:

Counsel:

Appellant:	J Hardy
Respondent:	S Ledek

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

Petterson v Firth [2017] NTSC 8
No. LCA 2 of 2016

BETWEEN:

MATTHEW PETTERSON
Appellant

AND:

JUSTIN FIRTH
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 3 February 2017)

Appeal against severity of sentence

[1] After pleading guilty to unlawfully damaging a motor vehicle, the appellant was convicted and sentenced by a judge of the Local Court to perform 150 hours of community work.[1] The appellant was a 20 year old first offender. He appeals the recoding of a conviction and the severity of his sentence.

[2] The amended grounds of appeal are as follows:

> Ground 1: The learned judge erred in recording a conviction against the appellant.

[1] *Sentencing Act* (NT) s 34.

> Ground 2: The learned judge erred in failing to consider whether a finding could be made in relation to the existence of "exceptional circumstances".[2]
>
> Ground 3: the learned judge imposed a sentence which was manifestly excessive in all the circumstances.

Proceedings in the Local Court

[3] On 29 January 2016, the appellant entered a plea of guilty to a charge that, on 4 December 2015, he had intentionally or recklessly caused damage to a vehicle bonnet, belonging to another, contrary to s 241(1) of the *Criminal Code*. The offence carries a maximum penalty of imprisonment of 14 years. After several adjournments, the matter came back to court on 11 May 2016 for submissions and sentencing.

[4] The admitted facts for sentencing were as follows:[3]

> At 12.32 am on Friday 4 December 2015 [the appellant] was observed on police CCTV leave Monsoons Nightclub via the Nuttall Street exit with another male.
>
> The [appellant] and witness KF met up with two unknown males at the front of a parked black Mazda 3 … belonging to the victim [name omitted] which was parked and secured on Nuttall Place Darwin City.
>
> The [appellant] stepped up onto the bonnet of the vehicle. Whilst standing on the bonnet of the vehicle the [appellant] began to rock up and down on the vehicle concaving the bonnet. The [appellant] jumped off the vehicle back onto the footpath.

[2] As referred to in *Sentencing Act* s 78B(2).
[3] Exhibit P1.

> The [appellant] walked to the front of the vehicle and jumped up and sat on the middle of the bonnet and with both actions caused $800 worth of damage.
>
> After getting off the vehicle the [appellant] and the witness walked back to Mitchell Street and into Monsoons Nightclub.
>
> At 12.40 am Police members [names omitted] were waved down by Monsoons staff members stating that one of their personal vehicles had been damaged.
>
> Monsoons security staff removed the defendant and witness from the establishment and brought them to the Nuttall Street exit where [the appellant] was placed in the rear of a marked police vehicle … and advised that he was under arrest.
>
> The [appellant] declined to participate in a formal recorded interview and was conveyed home and was issued with a Notice to Appear for criminal damage and disorderly behaviour in a public place.
>
> At no time did the [appellant] have permission to cause damage to the vehicle.
>
> At the time of the offence Nuttall Place was a public street open to and in use by the public.

[5] The appellant did not give evidence at the sentencing hearing. Defence counsel below explained the appellant's offending as follows. Very shortly prior to offending, the appellant had been inside Monsoons Nightclub. There he saw a person who had been present at Monsoons some years previously (in 2012) when the appellant had been the victim of a glassing attack. Counsel informed the judge that that person had witnessed the glassing attack and had said, "Good fucking job".[4] After the appellant saw that

[4] Transcript 11 May 2016 p 3.7.

person again at Monsoons on 4 December 2015, he walked outside and committed the offence.

[6] After the judge ascertained that the motor vehicle damaged by the appellant did not belong to the person he had seen inside at Monsoons, his Honour asked why the appellant had chosen to damage an "innocent motor vehicle" which had nothing to do with the person who had offended him.

[7] Defence counsel then referred the judge to a report prepared by forensic psychologist, Kerry Williams, and in particular to a statement by Ms Williams that traumatised individuals "may blow up in response to minor provocations". On the basis of Ms William's report, defence counsel then submitted that the appellant's offending "was highly likely to have been impacted by the appellant's post-traumatic disorder".[5] Defence counsel explained that the appellant behaved irrationally after seeing the person: that he then walked outside, saw the motor vehicle the subject of the charge, and took out his anger on the motor vehicle.

[8] Defence counsel referred the judge to paragraphs 22, 23 and 24 of Ms Williams' report.[6] In brief summary, paragraph 22 of that report contained a statement of opinion that the appellant fulfilled the criteria for Post-Traumatic Stress Disorder (PTSD) in accordance with the DSM-5

[5] Transcript 11 May 2016 p 4.8.
[6] It does not appear that Ms Williams' report was formally tendered and received. However, it was referred to by the judge, and its contents considered as evidence. For the purposes of this appeal, I assume that it was in evidence in the Local Court. I had regard to it on appeal with the consent of both parties.

criteria for assessment.[7] Paragraph 22 also made reference to, inter alia, the following symptoms and behaviours indicative of PTSD: recurrent involuntary and intrusive distressing memories of the traumatic event; persistent avoidance of stimuli associated with the traumatic event, evidenced by avoidance of (or efforts to avoid) external reminders (people, places, activities and situations) that arouse distressing memories, thoughts or feelings about the traumatic event; and marked alteration in arousal and reactivity associated with the traumatic event, evidenced by irritable behaviour and angry outbursts. Paragraph 23 referred to the adverse effects of trauma on an individual's pre-frontal cortex, responsible for reasoning, such that the pre-frontal cortex does not regulate or function properly after trauma. Trauma survivors are vulnerable to react with irrational responses which are irrelevant and sometimes harmful. They may 'blow up' in response to minor provocations. Their emotions often appear to be out of place and their actions inexplicable. Paragraph 24 contained the psychologist's opinion that the appellant's offending behaviour on the night in question was "highly likely to have been impacted by his Post Traumatic Stress Disorder".

[9] A reading of the psychologist's report indicates that the appellant told Ms Williams that he still experienced flashbacks and intrusive thoughts; that he felt uncomfortable in crowded places, and that he continued to suffer headaches and physical pain as a result of the glassing attack several years

[7] Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

previously.[8] He told Ms Williams that, as a result of the attack, he "went off the track", unable to concentrate at the workplace. He did not complete his apprenticeship in carpentry and building, even though he had completed three years and was in the fourth year of his apprenticeship at the time of the glassing attack. His relationship with his girlfriend had broken down. His injuries caused him to have a problem with his speech. Ms Williams observed that the appellant appeared to be "struggling with his obviously scarred face and impediments to his speech following the attack".[9]

[10] Significantly, however, Ms Williams did not obtain a history from the appellant as to what happened on the night of the offending, and as what he was thinking in the moments before, during and after the offending. She did not provide any proper analysis of the appellant's behaviour. She did not refer to research studies or any similar cases in which individuals suffering PTSD had apparently randomly chosen a car or some other valuable object to vandalize, and how they had behaved when doing so.

[11] In his ex tempore sentencing decision, the judge referred to the admitted facts, and then observed as follows:[10]

> Now, this sort of behaviour, without further explanation, appears to be blatant vandalism, no connection between the defendant and the vehicle, no connection between the defendant and the owner of the vehicle, no suggestion that the vehicle was parked in his way, no suggestion that he was getting back at the owner of the vehicle in some way.

[8] Report Ms Williams, par 12.
[9] Report Ms Williams, par 9.
[10] Transcript 11 May 2016, p 18.3 - 20.7.

Instead, what I am told is that the defendant was distressed by an unrelated event which happened shortly before he damaged the vehicle. I am told that the defendant saw somebody going up into Monsoons. That somebody was a person associated with an assault on the defendant three years earlier.

It wasn't the person who perpetrated the assault but somebody who apparently, witnessing the assault or having some such connection, said words to the effect of, "Good job", meaning – indicating approval of the violence being perpetrated on the defendant. This comment I am told had a very significant and very distressing effect on the defendant who, as the victim of a very violent assault, was deeply troubled by it and, upon seeing that person going up into Monsoons, this, I'm told caused the defendant to react in the way I have described.

Now, as a matter of common sense, that is plainly ridiculous. Such an observation has no causative effect which might lead to that behaviour so we have to look for something else. The something else which has been put forward is a medical explanation, and that of course is the obvious possible explanation for what would otherwise be bizarre and unprovoked behaviour, bizarre because of exactly what the defendant did, his exact actions.

He did not hurl himself at this vehicle, smashing wildly with his fists, uttering cries of distress. He did not run furiously at the vehicle and jump on it, risking damage to himself as well as to the vehicle. What the agreed facts [show] is that he walked up and traversed the bonnet and then bounced up and down. He then jumped off, came around to the front and sat himself down in the already concave bonnet, concaving it further.

What has been put forward to establish some explanation, something by way of mitigation for this behaviour, is a report from a psychologist, an undated report, by Ms Kerry Williams, a forensic psychologist, and Ms Williams provides a positive diagnosis in par 22 on page 8 of the report, that:

> Mr Petterson fulfils the criteria for post-traumatic stress disorder as set out in the Diagnostic and Statistical Manual of Mental Disorders, Fifth edition, DSM-V.

I fully accept this. Ms Williams is a psychological expert. Ms Williams is trained and experienced in taking histories, conducting tests and using well recognised criteria such as those set out in DSM-5 to determine whether any particular diagnosis is appropriate, with varying degrees of probability, and Ms Williams was entirely satisfied that Mr Petterson, when she assessed him [on] 21 April 2016, was very probably suffering from post-traumatic stress disorder arising from the assault on him in 2012.

… What I then need is further evidence, with varying degrees of probability, as to how that diagnosis impinges upon Mr Petterson's life, how it might cause him to act or to react in any particular way anticipated, unusual or even bizarre.

I am not satisfied that there is anything in Ms Williams' report that assists me with that process. Ms Williams definitely provides a conclusion. That conclusion, in her opinion, is that Mr Petterson's offending behaviour on the night of 4 December 2015 at Monsoons 'is highly likely to have been impacted by his post-traumatic stress disorder.'

Now, try to turn that into more standard English. She is saying what he did was highly likely to have been 'impacted', [that] his post-traumatic stress disorder played into his behaviour in some way was highly likely. How it played into his behaviour is not spelled out at all.

I look at par 23, which [defence counsel] relied on to a great degree. That tells us the psychological theory, and it's well based in medical science, as I understand it, as to how post-traumatic stress disorder physically impacts upon the human brain, leading to certain behaviours. She says:

> The fact that reminders of the past automatically activate certain neurobiological responses can explain why trauma survivors are vulnerable to react with irrational responses that are irrelevant and sometimes harmful in the present. Traumatised individuals may blow up in response to minor provocations, freeze when frustrated or become helpless in the face of trivial challenges. Their emotions often appear to be out of place and their actions can be described as inexplicable.

In general, again I have absolutely no quarrel with these general observations by Ms Williams which I have read in many other contexts. I am entirely satisfied Ms Williams is well able to offer an opinion that that is, in a very general way, the way that post-traumatic stress disorder can impact upon an individual.

However, when I come to apply those possible types of reactions to the agreed facts in this case I am not satisfied, on the balance of probabilities, that that is what happened. I am not satisfied that a man suffering post-traumatic stress disorder, faced with a reminder of a past highly traumatic event, would react by walking up to a vehicle, walking over the bonnet, bouncing up and down, rocking on it, climbing off, walking around to the front and then seating himself in the dent which he had made.

Those actions lack the distressed extreme sorts of behaviours which in my view would need to be evident. Some sort of blow-up, some sort of loss of control would be expected to fit with the facts of this case, namely that we have a man suffering post-traumatic stress disorder, a man who has been presented with a reminder of the traumatic event and he has lost his cool, lost his control. This is not consistent with the facts in this case.

Rather, we have some sort of public acting out, contemptuous behaviour on the part of Mr Petterson, and I note that this matter was adjourned on a number of occasions following discussions between myself and [defence counsel], so that some evidence could be put before the court which, on the balance of probabilities, might link that very unusual behaviour with that motor vehicle to the stressful link which I was informed of on the first occasion. Once again, what has been provided falls short of that.

Accordingly, I come to deal with it and to sentence in this case unsatisfied by the medical evidence that there's some explanation which would mitigate the severity of the bad behaviour by Matthew Petterson on the night of 4 December 2015.

I must add that even if I were satisfied as to the link, I would not be satisfied in terms of the language used by the author of the report, Ms Williams, simply that the post-traumatic stress disorder impacted on the behaviour. That tells me almost nothing. In what manner did it impact? Was it blatantly causative? Did it act in some way to reduce ordinary governors which people who do not suffer post-traumatic

> stress disorder impose on their behaviour so that far greater levels of impulsiveness were let loose? The report does not tell me anything useful about that.

[12] It can be seen from the judge's sentencing reasons that he accepted the opinion or diagnosis made by Ms Williams that the appellant suffered PTSD, but not that his PTSD had any direct or indirect causative connection with the offending. His Honour referred to the absence of evidence to explain how the PTSD diagnosis impinged upon the appellant's life, and how it might cause *him* to act or react in any particular way.

Consideration of appeal issues

[13] The common law, and not the *Evidence (National Uniform Legislation) Act 2011*, applies in sentencing proceedings in Northern Territory courts.[11]

[14] An important principle to note is that facts in mitigation or matters in favour of the offender must be proved on the balance of probabilities.[12]

[15] Through the report of Ms Williams, the appellant sought to establish that his conduct was caused or contributed to by his PTSD, and that the PTSD thus reduced the moral culpability of his offending. If the appellant's moral culpability were reduced for that reason, the sentencing objectives of

[11] The *Evidence (National Uniform Legislation) Act 2011* applies in sentencing proceedings only if the court directs that the law of evidence applies in the proceeding; otherwise, the common law of evidence applies to the sentencing proceedings. See s 4(1)(d) and s 4(2)(a) of the Act and the discussion in *R v Bourchas* [2002] NSWCCA 373; (2002) 133 A Crim R 413 at [43], [61].
[12] *R v Olbrich* [1999] HCA 54; (1999 - 2000) 199 CLR 270 at [27].

denunciation and general deterrence would become less relevant sentencing objectives,[13] resulting in a lesser punishment.

[16] The opinion of Williams can be simplified in this way:

- The appellant suffers PTSD.
- Persons who suffer PTSD can do aberrant things as a result of their condition, for example, they may have angry outbursts, or react irrationally, or 'blow up' in response to minor provocations.
- The appellant's offending conduct was irrational and irrelevant.
- Therefore, the appellant's PTSD caused him to engage in the offending conduct.

[17] Although the appellant's plea of guilty was such that he either intended to do what he did or was reckless in that respect, the facts of his offending strongly suggest that the appellant intended to cause the damage which he caused. I refer in particular to his conduct in getting down from the bonnet and then getting onto the bonnet again and causing further damage.

[18] Ms Williams' explanation was predicated on the appellant, a traumatised person, being reminded of the traumatising event, and then reacting with an irrational and irrelevant harmful response, "blowing up" disproportionately in response to the reminder of the past. However, her explanation for the appellant's behaviour was in competition with the possibly more obvious

[13] See *R v Verdins* [2007] VSCA 102; 16 VR 269 at [32] sub-paragraph 1, relevantly, a re-statement of the principles in *R v Tsiaras* [1996] 1 VR 398.

explanation mentioned by the magistrate: “blatant vandalism”, or what is often described as malicious damage. It was for the appellant to satisfy the magistrate that Ms Williams’ explanation was correct.

[19] The appellant himself had a lot to explain. He needed to describe the triggering incident (the encounter with the man associated with his glassing three years earlier) and its effect on him. He had to explain, as best he could, his mental processes prior to and at the time of offending, and in particular why he jumped back up on the already damaged bonnet and further damaged it. He also had to explain his state of mind (his thoughts and feelings) after the event, when, on the agreed facts, he returned to the Monsoons Nightclub. This was not only the scene of the earlier glassing incident, but was the location of the person whose presence, it was suggested, had triggered the response which resulted in his offending. Returning to Monsoons Nightclub in those circumstances appears inconsistent with the behavioural indications of PTSD, referred to in [8] above, such as avoidance of stimuli associated with the traumatic event and avoidance of external reminders (people, places etc.) closely associated with the traumatic event.

[20] In my opinion, there were significant evidentiary deficiencies in the report of Ms Williams. As mentioned in [10] above, Ms William did not note or obtain any statement from the appellant as to what he was thinking and feeling at the times relevant to the offending conduct. The logical starting point for any conclusions or inferences in relation to the impact of PTSD on

the appellant would have been the offender's own narrative. Ms Williams did not ask the appellant to provide a narrative or to explain any of the matters which reasonably required explanation, referred to in [19]. In my opinion, Ms Williams did not have a proper basis for her opinion that the appellant's offending behaviour was "highly likely to have been impacted by his Post Traumatic Stress Disorder". If she had some basis for that opinion, such basis was speculative, and her opinion accordingly merited little or no weight. This is not the occasion to pronounce on the issue as to whether the 'basis rule' in relation to expert evidence under the common law rendered the opinion of Ms Williams inadmissible, or simply of little or no weight.[14] The report was admitted into evidence, or at least it should be taken for the purposes of this appeal to have been admitted into evidence.

[21] In my opinion, the opinion of Ms Williams was based on insufficient relevant facts and her reasoning was inadequate and unpersuasive. As a result, the judge was entitled to reject the opinion.

[22] The appellant contends that the judge's reasoning for his rejection of Ms Williams' opinion was "both plainly flawed and wrong at law."[15] The appellant criticises the magistrate for his quest for a causative connection between the offending and the appellant's PTSD. The appellant concedes no more that some "realistic connection" *may* be required.

[14] See *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 277 ALR 611 [89], per Heydon J.
[15] Appellant's Outline of Submissions, par 53.

[23] The appellant contends that the judge's error is evidenced by his use of the words "blatantly causative", as though that was the only test his Honour sought to apply. It was not the only test. It may be noted that the judge also referred to impaired judgment and disinhibition. For example, he asked (by that stage rhetorically): "Did it act in some way to reduce ordinary governors which people who do not suffer post-traumatic stress disorder impose on their behaviour so that far greater levels of impulsiveness were let loose?".

[24] Counsel for the appellant contends that the authorities in relation to the relevance of an offender's mental health problems in sentencing do not require a causal relationship before mental illness may be taken into account to reduce an offender's moral culpability. Counsel referred to the passage from the Victorian Court of Appeal's decision in *Tran v The Queen*,[16] in which reference was made to the Court's earlier decision in *Verdins*:[17]

> 17 The cases in Victoria which have applied proposition 1 of *Verdins* have, on the whole, taken the view that a causal connection needs to be established between the impairment of mental functioning and the offending for which sentence is to be imposed. As Maxwell P said in *Carroll v The Queen*:
>
> > Where reliance is placed on [*Verdins*] proposition 1, concerning moral culpability, the question for the Court is whether the evidence establishes – on the balance of probabilities – that the impairment of mental functioning did contribute to the offending in such a way as to render the offender less blameworthy for the offending than he/she would otherwise have been. Very often, this

[16] *Tran v The Queen* [2012] VSCA 110; (2011-12) 35 VR 484 at [18] et seq.
[17] *R v Verdins* (2007) 16 VR 269.

> question is approached as one of causation. Did the evidence establish a causal connection between the impairment of mental functioning and the offending for which sentence is to be imposed?

18 But nothing in *Verdins* suggested that the only way to establish a basis for a submission about reduced moral culpability was to show a causal connection. The case law shows that – for what, in our view, are quite understandable reasons – sentencing judges look for some kind of causal link in order to reduce the moral responsibility which is otherwise to be properly to be laid at the feet of the offender.

19 The Court in *Verdins* identified a variety of ways in which courts had held that impaired mental functioning might reduce moral culpability, as follows:

> Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of –
>
> (a) impairing the offender's ability to exercise appropriate judgment;
>
> (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
>
> (c) making the offender disinhibited;
>
> (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
>
> (e) obscuring the intent to commit the offence; or
>
> (f) contributing (causally) to the commission of the offence.

20 As the Court there said, this was a descriptive rather than a prescriptive list. It was expressly said not to be exhaustive. Only one of the items in that list – item (f) – referred to causal

> connection. In short, counsel making submissions on the basis of *Verdins* 1 has always been in a position to contend that it is not necessary to establish a causal connection.

[25] I have difficulty with the Court's analysis in that, if an accused were to have impairment of mental functioning at the time of offending which had any of the consequences referred to in sub-paragraphs (a) to (e) of par 19, I would see the impairment as contributing causally (directly or at least indirectly) to the commission of the offence. In short, I see the effects described in sub-paragraphs (a) to (e) as subsidiary to sub-paragraph (f). In the circumstances of the present case, I do not consider that the language used by the judge in his attempt to identify some link between the offending and the appellant's PTSD demonstrated error.

[26] Even if the evidence had been sufficient to establish that PTSD was affecting the appellant at the time of his offending, I would adopt, with respect, the statement from *Verdins* adopted by the Court in *Tran* at par 22 that "… it is of the nature of the sentencing discretion that views will differ as to how, and to what extent, impaired mental functioning may reduce the blameworthiness of the offender's conduct". Much will depend on the nature and severity of the condition, and the nature and seriousness of the offence.

[27] The appellant's arguments in relation to the manifest excess ground were based substantially if not entirely on the asserted error on the part of the judge in rejecting the expert opinion of Ms Williams. Counsel for the appellant argued that the judge should have found that the appellant's moral

culpability was reduced as a result of the impact of his PTSD on his offending. For reasons made clear to this point, I reject that argument.

[28] Having considered all the circumstances of the offence and the offender, including the matters listed in [29] below, I do not consider that the imposition of a sentence requiring the appellant to perform 150 hours of community work was excessive, and certainly not manifestly excessive. The maximum penalty was a term of imprisonment of 14 years. Community work was a very appropriate sentencing disposition in the case of a young first offender. The purpose of making a community work order is to reflect the public interest in ensuring that a person who commits an offence makes amends to the community for the offence by performing work that is of benefit to the community.[18] No error has been established in the judge's exercise of discretion to order the appellant to participate in a community work project, nor as to the number of hours specified. The judge could have ordered the appellant to perform up to 480 hours of community work.[19] The ground asserting manifest excess must fail.

The appeal against the recording of a conviction

[29] I turn to consider the appeal against the recording of a conviction. The outcome of this part of the appeal is not affected by, and has no effect on, my determination of the third ground (manifest excess) in favour of the respondent for the reasons given in [28] above. That is because a community

[18] *Sentencing Act* s 33A.
[19] *Sentencing Act* s 34(1).

work order is an available sentencing option whether or not a court decides to convict an offender. The relevant condition precedent is a finding of guilt.[20]

[30] A conviction is not a mere formality or an additional endorsement on the court file having no significance. The recording of a conviction is to be regarded as a component of the sentence. In *Carnese v The Queen*[21] the Court of Criminal Appeal approved the statement of Cox J in *R v McInerney*[22] that "a conviction is a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing." In *Hales v Adams*[23] Southwood J considered the factors under s 8 of the *Sentencing Act* relevant to the exercise of the judicial discretion as to whether or not to record a conviction against an adult offender. His Honour said**:-**

> It 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. A useful summary of these considerations may be found in RG Fox and A Freiberg, "Sentencing State and Federal Law in Victoria" 2nd Ed, at 190 – 193.

[20] *Sentencing Act* s 7(f), s 34(1).
[21] [2009] NTCCA 8.
[22] (1986) 42 SASR 125.
[23] [2005] NTSC 86.

[31] The appeals which come before this Court concerning the discretion not to record a conviction include both cases where a conviction has been recorded and the appellant argues that the discretion should have been exercised in his or her favour and a conviction not recorded, and cases where a conviction has not been recorded and the Crown appeals against the exercise of the discretion not to convict.[24] Most of those appeals have related to adult offenders dealt with under the provisions of the *Sentencing Act*. However, *DD v Cahill*[25] was a successful appeal by a boy aged 12 against sentences which were said to be manifestly excessive on account of the fact that the magistrate recorded convictions in sentencing under the *Youth Justice Act*. In that case Riley J suggested an approach to the matters to be taken into account in deciding whether to record convictions against young persons, matters not directly relevant to the present case. However, his Honour also made reference to the possible future impact of a conviction on the ability of a person to obtain employment; on the person's dealings with various licensing authorities, government departments and insurers; and on the ability of the person to travel to some countries. He concluded that the prospect of adverse consequences was real, and that the recording of a conviction remained "a significant act of legal and social censure".[26]

[24] See, for example, *Hesseen v Burgoyne* [2003] NTSC 47; *Hales v Adams* [2005] NTSC 86; *Carnese v The Queen* [2009] NTCCA 8; *DD v Cahill* [2009] NTSC 62; *Ford v Nicholas* [2010] NTSC 53.
[25] [2009] NTSC 62.
[26] *DD v Cahill* [2009] NTSC 62 at [15] - [16]; the reference was to Fox and Freiberg, "Sentencing: State and Federal Law in Victoria" (second edition) at par [1.504]

[32] There is a risk of future injustice or disadvantage if a court does record a conviction. As the Queensland Court of Appeal said in *Briese*[27]:-

> It is reasonable to think that this power [*the power not to convict*] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression.[28]

[33] The *Sentencing Act* gives effect to the desirability of avoiding the social prejudice and potential oppression occasioned to offenders by providing a range of sentencing orders which a court has power to make without recording a conviction. For example, the court may order the release of an offender on a good behaviour bond; impose a fine; and make a community work order or a community-based order.[29]

[34] Defence counsel in the court below acknowledged that the offending was serious, but referred to a number of matters which supported her submission that a conviction should not be recorded. They included the following:

- The appellant was a young person, only 20 years of age at the time of offending.[30]

- The appellant entered a plea of guilty at the earliest opportunity.

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[27] (1997) 92 A Crim R 75 at 79, per Thomas and White JJ.
[28] cf *Wild v Balchin* [2009] NTSC 35, where Olsson AJ suggested that suppressing publication of an offender's name directly impacts on the issue of rehabilitation, but that recording convictions "does not necessarily have that effect".
[29] *Sentencing Act* s 7(b), (e) and (f).
[30] Date of birth 2 May 1995.

- The appellant had no prior convictions.

- The appellant was of good character, evidenced by the character references and by his lack of prior criminal history.[31]

- The appellant had not reoffended.

- The appellant was remorseful, as evidenced in the several character references provided.

- The appellant had sought out and engaged in counselling subsequent to the date of offending.[32]

- The appellant was said to have good employment prospects.

- The appellant's rehabilitation prospects were overall very good. He had good family support.

- The appellant was willing to pay restitution and had not done so because the owner of the damaged vehicle had not provided a repair invoice to the prosecutor.

- The appellant had suffered PTSD for some three years (as found by the judge).

[35] The judge's reasons for rejecting the submissions summarised in [34] relied substantially on his rejection of Ms Williams' explanation for the appellant's offending. This appears from his Honour's statement immediately following the remarks extracted in [11] above, as follows:

> I come to sentence Mr Petterson in the absence of that sort of explanation. Absent that explanation, the fact that we have a very early plea entered by a very young person who has no prior criminal

[31] Exhibit D3.
[32] Exhibit D2.

convictions is not sufficient to persuade me that I should not record a conviction. I will record a conviction.

[36] Although this Court must be cautious on appeal in concluding that a matter or matters have not been considered simply because they have not been mentioned, it is apparent in this case that his Honour did not consider or take into account the fact that the applicant had been the victim of a serious assault some three years earlier, which had had a very significant emotional impact on him and had left him with the scarred face and speech impediments commented on by Ms Williams. Although that assault had led to the appellant developing Post-Traumatic Stress Disorder, he had managed for some years to lead a trouble-free life. It is apparent from the transcript of his Honour's reasons that, having rejected Post-Traumatic Stress Disorder as having impacted on the appellant's offending behaviour, he had then not taken that condition into account generally in the sentencing of the appellant. I note that in deciding whether or not to record a conviction, a court must have regard, inter alia, to the character, antecedents, health and mental condition of an offender.[33]

[37] His Honour's specific reference to the appellant's youth, absence of prior convictions and early plea of guilty is an indication that those were the only matters which his Honour took into account. While his Honour probably also took into account the possible effect of a conviction on the appellant's future work prospects, there was at least one other significant matter which

[33] *Sentencing Act* s 8(a).

required careful consideration, being that the appellant had sought out and engaged in counselling.

[38] I have come to the conclusion that the sentencing discretion miscarried. I propose to allow the appeal on the first ground. It is not then necessary for me to decide the second ground, and, for reasons explained in [28], the third ground must be dismissed.

[39] I make an order pursuant to s 177(1)(c) *Local Court (Criminal Procedure) Act* quashing the conviction recorded against the appellant. In all other respects, I affirm the sentence imposed by the learned judge.
