Field v Edwards [2016] NTSC 5

PARTIES:	FIELD, Nicholas Brian
	v
	EDWARDS, Melinda Jane
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 26 of 2015 (21438545)
DELIVERED:	21 JANUARY 2016
HEARING DATES:	20 NOVEMBER 2015
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – Manifest excess – Whether conviction and fine manifestly excessive – Assault by police officer – Abuse of power – Breach of trust – General Deterrence – Prior good character – Sentence imposed within appropriate range – Appeal dismissed

CRIMINAL LAW – Appeal against sentence – Whether error of fact in rejecting appellant's stated mental state – Onus on the appellant to satisfy on the balance of probabilities – independent review on appeal – Ground not made out

CRIMINAL LAW – Appeal against sentence – Whether error in exercise of sentencing discretion – Weight placed on antecedents – Whether to record a conviction – Consideration of *Sentencing Act*, s 8 – No obligation to apportion certain weight to any one factor – competing considerations

appropriately weighed – Mental health of the appellant a matter of weight – Imposition of conviction not plainly unreasonable or unjust.

R v ADJ (2005) 153 A Crim R 324; *Barbaro v The Queen* (2014) 253 CLR 58; *Davis v Haywood* [1997] NTSC 8; *Dinsdale v The Queen* (2000) 202 CLR 321; *DPP v Terrick*; *DPP v Marks*; *DPP v Stuart* (2009) 24 VR 457; *Ford v Nicholas* [2010] NTSC 53; *Fox v Percy* (2003) 214 CLR 118; *Hales v Adams* [2005] NTSC 86; *Hanks v The Queen* [2011] VSCA 7; *Hesseen v Burgoyne* [2003] NTSC 47; *Johnson v The Queen* (2009) [2012] NTCCA 14; *Noakes v The Queen* [2015] NTCCA 7; *The Queen v McInerney* (1986) 42 SASR 111; *The Queen v Olbrich* (1999) 199 CLR 270; *Toohey v Peach* (2003) 143 NTLR 1; *Truong v The Queen* [2015] NTCCA 5; *Whitehurst v The Queen* [2011] NTCCA 11; referred to.

Sentencing Act, s 8, 78C

Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed. 2014)

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	L Michalko

Solicitors:

Appellant:	
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

Field v Edwards [2016] NTSC 5
No.(21438545)

BETWEEN:

NICHOLAS BRIAN FIELD
Appellant

AND:

MELINDA JANE EDWARDS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 21 January 2016)

Introduction

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction sitting at Katherine on 25 May 2015. The appellant pleaded guilty to one charge of aggravated assault. The circumstances of aggravation were that the victim suffered harm and was female and the appellant was a male.

[2] The appellant was convicted and fined the sum of $2,000. The required victim's levy of $150 was imposed.

[3] The grounds of appeal are:

(1) The learned Magistrate imposed a sentence that was manifestly excessive;

(2) The learned Magistrate erred in finding that the circumstances in which he assaulted the victim were not the actions of a person who may well have been wary of others;

(3) The learned Magistrate erred in placing insufficient weight on the appellant's antecedents; and

(4) The learned Magistrate erred in applying the considerations as to whether to record a conviction or non-conviction.[1]

Outline of the proceedings in the Court of Summary Jurisdiction

[4] The date of the commission of the offence was 7 October 2013. The matter had been listed for a contested hearing, however a plea of guilty was entered on the scheduled hearing date of 25 May 2015. The Court was told this was after negotiation with respect to the agreed facts.

[5] An unusual circumstance or feature of the offending was that the appellant committed the assault during the course of his duties as a police officer. At the relevant time he was a sworn probationary constable with the Northern Territory Police Force, stationed in Katherine.

[1] No objection was taken to the amended form of ground (2) reproduced here and the addition of ground (4). The hearing proceeded on the grounds set out in [3] above.

[6] In summary, the agreed facts[2] were that at the time of the offending, the appellant was working a rostered shift from 2:00pm until midnight. Constable Jordan was his senior partner on that occasion. Between 7:40pm and 9:40pm they were conducting a foot patrol behind the BP Service Station in Katherine. The victim was walking past them. The victim was sober and alone.

[7] The appellant called on her to stop, but she kept walking. The appellant challenged the victim, speaking to her in an aggressive manner. She asked if she could leave because she was not doing anything. The appellant then grabbed the victim by the shoulder and she turned to face him. Using both of his hands the appellant pushed the victim to the chest and shoulder area, sending her to the ground. The facts indicate there was no provocation on the part of the victim and no warning the appellant was to take the action he did. The appellant then ground stabilised the victim for a short time. After a brief time he got up from on top of the victim. The victim got up from the ground and was allowed to walk away.

[8] As a result of the assault, the victim sustained pain to her back and bruising to her backside. These injuries constituted the aggravated circumstance of harm.

[9] Portions of the victim impact statement were read to the Court. The victim said she still pictures the appellant's face in her dreams and he is hurting

[2] Exhibit P1 in the Court of Summary Jurisdiction.

her. She does not trust police officers anymore. She feels the law has let her down.

[10] Submissions by counsel for the appellant before the Court of Summary Jurisdiction were directed towards a no conviction disposition.

[11] Counsel for the appellant told the Court below the appellant was 34 years old, grew up in a stable family environment in New South Wales, was educated to year 12 and, given his sound sporting skills, had been awarded a football scholarship. As a result of a later injury he ceased playing football at a high level. He commenced working in the sports and fitness area, studied further, and worked for a pharmaceutical company in order to ensure his Canadian partner could obtain a visa to come to Australia. Fulfilling a long held ambition, he applied and was accepted into the Northern Territory Police Force in 2012. After some disruption in his personal relationship during which he and his partner separated for a period, the Court was told they had reconciled and at the time of the plea hearing had a two month old child.

[12] An incident submitted to be of relevance was that a couple of months before this offending the appellant was assaulted, or "king hit" as it was described, by a person he was taking fingerprints from during the course of his duties. The Court was told the assailant was dealt with through the mental health system rather than the criminal justice system.

[13] It was submitted this incident caused the appellant to be anxious and that in the appellant's view, the previous assault had a considerable role to play with respect to his own offending. Describing the appellant's version of the incident, it was said the reason the victim was stopped was that the police were making inquiries about a missing person. It was acknowledged by the appellant's counsel that the victim did what she was entitled to do and that the appellant spoke to her "gruffly". When she did not stop, he placed his hand on her shoulder. When she turned around the appellant thought of the prior incident in the police station and took her to the ground. It was acknowledged by his counsel that this was done on the basis of his personal history, not on any objective basis.

[14] As a result of an unrelated matter before the courts, the appellant had been referred by his doctor for psychiatric assessment. He was diagnosed with a major depressive episode and attention deficit hyperactivity disorder ('ADHD'). The Court was told that at the time of the plea he was taking mood stabilising medication and anti-depressant medication. He was also taking a long acting stimulant for ADHD. He was diagnosed with these conditions subsequent to the offending. He had been referred for treatment by his doctor prior to the offending but the Court was told he could not find a psychiatrist in the Northern Territory and obtained the services of a psychiatrist in Queensland. He did not tell his employer about his mental health issues.

[15] He was described as "really quite sorry" for his actions, believing he conducted himself in good faith but acknowledging his actions were nevertheless unlawful as objectively they could not be justified. It was said this was not a case of losing his temper but rather he overreacted. Part of a psychiatric report was tendered,[3] as were two character references.[4] It was pointed out that the character references were from Aboriginal persons. As the victim in this case was an Aboriginal woman, the appellant sought to assure the Court there was no racist element to the assault. It was submitted the appellant's actions in touching the victim's shoulder were not far from conduct that may be considered in the common intercourse of life. He was trying to stop the victim so she could be spoken to.

[16] Counsel described the appellant as having excellent antecedents and although it was acknowledged it was difficult to characterise a police officer assaulting a person as a trivial matter, it was submitted that in terms of aggravated assaults, this assault was very low on the scale. The earlier incident was put as a mitigating circumstance.

[17] In the Court below, counsel for the respondent acknowledged the assault was in the "low range", however took issue with any suggestion that there was "no pain" and no injury from the grab and subsequent ground stabilising.

[3] Exhibit P2 in the Court of Summary Jurisdiction.
[4] Exhibit P3 in the Court of Summary Jurisdiction.

[18] Counsel for the respondent acknowledged the respondent had no contrary evidence in relation to the suggestion the appellant, as a result of the prior incident, was "gun shy" when he was a probationary officer. Counsel did however call the appellant's explanation into question. He emphasised the victim was an Indigenous woman, alone, sober, unarmed and going about her lawful business. It was submitted the circumstances were the opposite of the situation that the appellant said made him "gun shy". The Court was reminded the victim ended up ground stabilised, a grown man on top of her for no good reason, wearing a full accoutrements belt including a firearm, at night.

[19] The respondent submitted a non-conviction disposition was not appropriate in the circumstances. It was submitted the psychiatric report was provided in a piecemeal fashion, with only the first and last page being tendered as the bulk of the report related to a question about the appellant's lack memory with respect to an unrelated matter. The medical referral was not made until six months after the offending, although it was acknowledged there was no material to contradict the suggestion it took six months to attempt to find a local practitioner.

[20] In terms of relevant sentencing principles, counsel for the respondent emphasised the significance of the appellant's breach of trust and the relevance of general deterrence. It was submitted the community must have confidence that the police force is acting in the public's best interests, irrespective of the pressure a police officer may operate under. It was said

there are mechanisms available for police to deal with their problems, rather than overreacting in circumstances such as occurred here. Counsel reminded the learned Magistrate of the victim impact statement and submitted "your Honour, there has to be some censure; if it only is a conviction perhaps that is enough. But the Court has to be seen to denounce this sort of attitude, this conduct, even in the momentary way that it was".[5]

[21] It was also pointed out that the character references contained no reference to the offending. It was suggested the appellant's resignation from the police force was the first piece of insight evident that the appellant understood he should not be a police officer. Her Honour was invited to consider the appellant's loss of career as extra-curial punishment that should be taken into account.

[22] In sentencing remarks, her Honour noted the plea of guilty came on the day of the hearing. The Court below had been told there had been negotiation about the facts. At the time of the offence the appellant had been in the police force as a probationary constable for 11 months. Her Honour set out the facts and the impact on the victim, noting there was no physical harm. Her Honour was referring to "physical harm" as defined by s 78C of the *Sentencing Act* to distinguish it from "harm", given the sentencing consequences when "physical harm" is caused.

[5] Court of Summary Jurisdiction, transcript of proceedings (25 May 2015) at 13

[23] Her Honour accepted the appellant had no criminal history, a good employment record and that he had tendered his resignation as a police officer on the day of the hearing, given his mental health issues.

[24] Although this will be dealt with further below, her Honour discussed the effect of the previous assault on the appellant, remarking that since that incident he had been more anxious about being assaulted. Since this offending, he had been diagnosed as having ADHD and a major depressive episode and is now on medication.

[25] Her Honour confirmed that s 8 of the *Sentencing Act* does not require satisfaction of all of the criteria and considered the submissions on good character and antecedents, the prior assault on the appellant, his mental health condition and the extent that those matters were extenuating circumstances. Her Honour accepted the appellant was of good character. On the balance of probabilities her Honour concluded she could not find his mental health condition contributed to his offending, or was present at the time of the offending, noting the medical report provided to the Court did not support that proposition.

[26] Although it was accepted the appellant had been previously assaulted and that may have made him more wary of persons in those circumstances, her Honour found the appellant's actions with respect to the current offending were not those of a person who was wary. This will be discussed further with respect to Ground 2.

[27] Her Honour concluded she could not be satisfied these were extenuating circumstances. Similarly, she was not satisfied the offending was trivial and remarked as follows:

> The defendant has engaged in an abuse of process by first laying a hand on the victim, and then assaulting her by pushing her and then ground stabilising her. At one stage, he was on top of her. He has caused her fear and emotional distress as evidenced in her victim impact statement read to me by the prosecution and further he has caused her not to trust the police anymore.[6]

[28] Her Honour referred to the need for denunciation and that other police officers must be reminded that their position of trust and power cannot be abused. Her Honour said that if the Court did not denounce the behaviour, it would be sending a completely wrong message to other police officers "as to the use of their powers and to the community as to their entitlement not to be treated in such a way as has been in this matter."[7]

[29] In sentencing the appellant her Honour said that given there was no physical harm and given the plea of guilty and previous good character and antecedents the appellant would be convicted and fined $2,000.

Ground 1 – *manifestly excessive*

[30] Submissions made on appeal with respect to this ground covered similar matters that were raised on the appellant's behalf in the Court of Summary

[6] Court of Summary Jurisdiction, Transcript of proceedings (25 May 2015) at 22 .
[7] Ibid

Jurisdiction. It was argued the disposition of a conviction and a $2,000 fine was manifestly excessive.

[31] In this Court, counsel for the appellant described the assault as being of low intensity, short duration, unlikely to cause injury, and not the result of any ongoing animosity. Alcohol was not involved and the assault was not racially motivated.[8] It was submitted the appellant's wariness as a result of the assault committed against him in the course of his duty a couple of months previously also formed part of the objective circumstances of the offending. This was because the appellant subjectively felt there was a reason to protect himself, even though this belief was not defensible on an objective basis.

[32] With regards to the subjective circumstances, it was submitted that even leaving the question of the appellant's mental health aside, in the light of the appellant's positive antecedents and prior good character, the sentence imposed was manifestly excessive.

[33] The issue of a fine was not ventilated in the Court of Summary Jurisdiction and it was submitted that the fine and its quantum came "out of the blue". Further, it was pointed out the learned Magistrate did not enquire as to the appellant's capacity to pay a fine.

[34] Counsel for the appellant referred to the respondent's indication in the Court below that a conviction alone was appropriate, stating "there has to be some

[8] Appellant's Outline of Submissions at 2.

censure; if it is only a conviction perhaps that is enough".[9] The appellant submitted that in circumstances where both parties appear to be moving in a particular direction with which the learned Magistrate does not agree, counsel ought to have been alerted to the Magistrate's intention to proceed down a different route and be given an opportunity to make submissions.[10]

[35] The appellant submitted that no fine should have been imposed. Alternatively, a lesser fine should have been imposed.

[36] The respondent argued the appellant failed to identify any error in the exercise of the learned Magistrate's sentencing discretion sufficient to establish that the sentence imposed was manifestly excessive and neither is it apparent that the sentence is manifestly excessive. It was submitted that the conviction and the fine imposed by the learned Magistrate were well within range for offending of this kind.

[37] As was said in *R v ADJ*, whether a sentence is manifestly excessive is a conclusion which does not admit of much elaboration. For a challenge to a sentence as being manifestly excessive to succeed, "the sentence must be unreasonable or plainly unjust".[11]

[38] The exercise of the sentencing discretion is not to be disturbed on appeal on the ground of manifest excess unless error in that exercise is shown. The presumption is that there is no error. The appellate court does not interfere

[9] Court of Summary Jurisdiction, transcript of proceedings (25 May 2015) at 13.
[10] Appeal transcript (20 November 2015) at 28.
[11] (2005) 153 A Crim R 324 at [51] per Batt J; see also *Dinsdale v The Queen* (2000) 202 CLR 321 at 325 per Gleeson CJ and Hayne J.

with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it is shown that the sentencing judge was in error in acting on a wrong principle, in misunderstanding, or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. It must show that the sentence was clearly and obviously and not just arguably excessive. [12]

[39] Recently the Court of Criminal Appeal endorsed the following statement from *Hanks v The Queen* in relation to manifest excess:

> 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 unmistakeable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.[13]

[40] In my opinion the sentence imposed was well within the range of sentences that may be expected for conduct of this kind. It is not plain that it is excessive.

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[12] *Whitehurst v The Queen* [2011] NTCCA 11 at [12] (Riley CJ) ; *Noakes v The Queen* [2015] NTCCA 7 at [23]
[13] *Truong v The Queen* [2015] NTCCA 5, at [37], quoting, *Hanks v The Queen* [2011] VSCA 7 per Bongiorno JA at [22] (Redlich JA agreeing).

[41] The maximum penalty for aggravated assault is five years imprisonment. The maximum fine available for this offending is $2,880, being comprised of 20 penalty units,[14] at a rate of $144 per unit.

[42] In terms of assessing the objective seriousness of the offending, while it is undoubtedly the case that the physical dimensions of the assault do not bear the attributes of more serious examples of offending of this generic type, this is serious offending for other reasons. The learned Magistrate referred to those matters. It was the abuse of the appellant's position and his powers in the circumstances that mark this particular offending as significant, certainly serious enough in my view to warrant a conviction and a fine. Even if the fine is characterised as being in the higher range, bearing in mind the maximum fine for this offence is $2880,[15] a conviction and a fine is not a disposition that could be said to be unexpected when, on the one hand, a term of actual or suspended imprisonment is clearly not warranted but on the other, a lesser community based order would not properly reflect the gravamen of the offending. It seems to me a conviction and a fine are reasonable orders when imprisonment is not appropriate in circumstances, and where there is a need to denounce the offending.

[43] Counsel for the appellant submitted that the fact the offence constituted an abuse of power was simply one of a number of considerations relevant to the

[14] *Sentencing Act*, s 16(2)(b).
[15] 20 penalty units, at a rate of $144 per unit; *Sentencing Act*, s 16 (2)(b)

sentencing exercise.[16] Although this is clearly the case, in my view it is a circumstance of the offending that contributed in a significant way to the assessment of the gravity of the offending

[44] The victim was in a vulnerable positon. She was female, alone and walking at night. She displayed no aggression. As a police officer, albeit a probationary constable, the appellant held a position of trust. It would have been entirely unexpected from the victim's perspective that a police officer would assault her in this manner. I have referred already to the impact of the assault on the victim and the diminished trust she now has for police. Offending such as this possesses the potential to undermine and erode the community's trust in police officers. Members of the community should feel safe if approached by police, whether or not they are under suspicion for an offence. The victim had not committed any offence, was not suspected of anything and was not behaving in any way that could be of concern to police. I see no error in her Honour's approach to penalise the appellant in such a way as to denounce this offending.

[45] In both the Court below and before this Court, some of the facts were referred to in terms that may give an impression of lessening the seriousness of the offending. For example, the initial physical contact was described at some points by counsel as a "tap" or that the appellant "touched" the victim on the shoulder. The agreed facts clearly state "grabbed". There is a difference. There is no reason to reduce the significance of the initial

[16] Appeal transcript (20 November 2015) at 5.

physical contact. The assault and the incident as a whole would have been very frightening. It commenced with the appellant calling on the victim to stop, then speaking aggressively to her. The victim asked if she could leave as she was not doing anything. She was grabbed by the shoulder, pushed to the chest and shoulder, driven to the ground and ground stabilised. Given this was done without any lawful authority by a police officer, it had the complexion of a significant assault, even though it was of short duration and the harm was not significant.

[46] On behalf of the appellant, it was argued the assault was unlikely to cause injury. The victim is said to have suffered "harm", not injury. I do not agree with this characterisation: pain to her back and bruising to her backside constituted an injury. It was no doubt temporary and not as serious as injuries suffered in many cases of this kind but the semantics should not be used to obscure the fact that harm in the form of low level injuries was in fact caused.

[47] The learned Magistrate was not bound by the submission of the prosecutor that perhaps a conviction without more was sufficient. It was consistent with the underlying principles informing the decision of *Barbaro v The Queen*[17] that the learned Magistrate not to regard herself as bound by an indication from the prosecutor.

[17] (2014) 253 CLR 58

[48] The argument on appeal with respect to the imposition of a fine was couched in terms similar to an argument based on lack of procedural fairness, appreciating it was not put quite as highly as an alleged breach of procedural fairness. It was argued within the broad ambit of the manifestly excessive ground. This was not a situation in which a fact or submission was being rejected without notice. In such a situation, fairness may require the Magistrate to disclose rejection of the asserted fact or submission. In my opinion, in circumstances such as this, when this type of offence is customarily dealt with by way of a conviction coupled with a fine, it was not an error for her Honour not to intervene and tell counsel a fine was being considered. Her Honour made numerous interventions during submissions indicating her concerns about the offending and about the points of mitigation being argued. The appellant's argument based loosely around an alleged breach of procedural fairness would be quite different if, for example, the learned Magistrate had imposed a term of imprisonment. In the circumstances however, where her Honour clearly intended to include a punitive element in the sentence, a fine could not be seen as so unexpected as to have required her Honour to advise counsel of the same.

[49] Although the appellant's capacity to pay a fine was not discussed in the Court of Summary Jurisdiction, no submission was made indicating any financial hardship the appellant may have been under. The appellant was still employed at the time of the plea, save that he resigned on that day. It of course may be inferred that he would need to find paid employment but his

work history indicated this was not a particular difficulty for the appellant. Her Honour was well aware of the extra-curial consequences the appellant suffered.

[50] There was a delay in charging the appellant. This Court was told the charge was laid 14 months after the offending. This was not raised or argued about specifically before the Court below, however, her Honour was told Constable Walker took notes of the incident in his probation book. When it was submitted at the end of the appellant's training, senior members commenced inquiries. The appellant was spoken to on 29 August 2014 by members of the internal investigations section. The Court hearing was some 18 or 19 months after the event. There was no information given to this Court or in the Court below about whether the appellant was aware of Constable Walker's notation. In my view the delay between the offending and the charge in the circumstances was not of the type to require an adjustment of the sentence. While there was further delay between charging and the hearing, the matter was contested until close to the hearing date. In my view the delay was not such to require further modification of the sentence in order to justify the sentence imposed.

[51] The appellant raised absence of any racial motivation. This would have been an aggravating feature if present but does not mitigate the appellant's conduct. Additionally, that her Honour did not specifically refer to the character references is not a significant matter in the circumstances.

[52] I will deal further with issues of the appellant's mental health as relevant to other grounds. The evidence in respect of his condition, in particular its connection with the offending, was not strong. It was relevant in an overall sense to the sentence but was not a strong mitigating factor. The evidence was scant in relation to his condition.

[53] The appellant's response to the incident was not of the type that would permit significant mitigation. There did not appear to be any significant expression of remorse or an apology. Although lack of remorse is not in any way an aggravating feature, neither could the appellant claim mitigation of any significance on that basis.

[54] Criticism is made of the learned Magistrate's reliance on general deterrence in circumstances where assaults by police are not prevalent. Although I agree that fortunately in the Northern Territory assaults by police are rare, nevertheless general deterrence remains relevant to offending of this kind given its potential corrosive effects. There is also the issue of general deterrence in respect of assaults against women in the Northern Territory and consistency more generally with respect to sentencing in such cases. In my view, the fine is a high level fine, however, in all of the circumstances I do not conclude it was so plainly unjust so as to warrant appellate intervention. In the circumstances, an alternative community based disposition would not have achieved the sentencing objectives. I would not allow this ground.

Ground 2 – *Error in finding the appellant's actions were not those of a person who may very well have been wary of others*

[55] When an error of fact has been alleged, an appellate court must conduct a real review of the trial and the trial judge's reasons, weigh conflicting evidence and draw its own inferences and conclusions.[18] Findings of fact are not immune from appellate review. The question of the learned Magistrate enjoying the advantage of seeing or having heard witnesses does not arise here as the matter was solely determined on facts, submissions and exhibits as would be expected in a plea hearing.

[56] The learned Magistrate accepted that in the past the appellant had been assaulted in the course of duty and that this "may very well have made him more wary of people in circumstances in which he had been assaulted."[19] However, the learned Magistrate found that "the circumstances in which he assaulted the victim were not the actions of a person who may very well have been wary of others".[20]

[57] The learned Magistrate relied on the following factors to conclude that the appellant's actions were not those of someone who was wary of placing himself in a situation of confrontation: it was the appellant who approached the victim; she was not aggressive; she asked if she could walk away; the

[18] *Fox v Percy* (2003) 214 CLR 118 at [25]
[19] Court of Summary Jurisdiction, Transcript of proceedings (25 May 2015) at 22.
[20] Court of Summary Jurisdiction, Transcript of proceedings (25 May 2015) at 22.

appellant became aggressive; she turned to walk away a second time and he stopped her by grabbing her shoulder.[21]

[58] The appellant submits that the events occurring before the victim turned around are irrelevant. Rather, the most likely explanation for the appellant's actions was the victim turning around to face him and his recollection at that time of the earlier assault against him. It was submitted the appellant's actions are otherwise completely out of character and inexplicable.

[59] In my opinion, the learned Magistrate's finding that the appellant's actions were not those of a person who may very well have been wary of others were appropriate and consistent with the evidence before the Court below no error is disclosed in those findings.

[60] The prior assault against the appellant took place at least two months before this offending and in an entirely different context. The timing of the prior assault was not given with any greater precision other than being expressed as "a couple of months before". The following features of the prior assault on the appellant distinguish it from the present matter: the perpetrator was a male; the assault occurred in a police station; and the perpetrator was presumably a suspect or accused person (as he was being fingerprinted at the time). The perpetrator "king hit" the appellant. In contrast, as pointed out by counsel for the respondent, in the present matter, the assault was committed against a female, in a public place, at night, whilst the appellant

[21] Court of Summary Jurisdiction, Transcript of proceedings (25 May 2015) at 22.

was accompanied by a partner, in circumstances where the victim was doing nothing to attract the adverse attention of police.[22]

[61] Further, at all times the appellant was the aggressor. As set out in the summary of the facts already, it was the appellant who approached the victim, spoke to her aggressively, grabbed her by the shoulder, shoved her to the chest and shoulder area causing her to fall to the ground and ground stabilised her.

[62] The evidence does not support the contention that the appellant became wary due to the prior assault when the victim turned around after being grabbed by the appellant. The victim turned around because she was grabbed by the appellant. There is no suggestion the victim turned around rapidly or aggressively. Rather, the agreed facts state that upon turning she was shoved to the ground "without provocation and without warning."[23]

[63] The appellant bore the onus to establish that the asserted wariness as a result of the prior assault was a mitigating factor;[24] however, the only details provided of the prior assault were in the form of submissions from the bar table. It is a question of how much weight could be given to such a significant claim to mitigation. No medical or psychiatric material was tendered to establish the ongoing impact of the prior assault on the appellant, nor was any material produced to confirm the factual

[22] Respondent's Outline of Submissions at [25]
[23] Court of Summary Jurisdiction, Transcript of proceedings (25 May 2015) at 3.
[24] *The Queen v Olbrich* (1999) 199 CLR 270 at [25]-[27].

circumstances of the prior assault. The portion of the psychiatric report before the learned Magistrate revealed only those medications prescribed from March 2014 until March 2015. It would have been speculation to infer the wariness from the portion of the psychiatric report tendered coupled with the facts before her Honour.

[64] The learned Magistrate was required to assess whether on the balance of probabilities the appellant was wary in the sense submitted at the time of the offending. Nothing in the agreed statement of facts tended to support the appellant's submission. There was no other evidence about that matter. The appellant's previous good character may have weighed in his favour but clearly was not persuasive.

[65] Having reviewed the facts and the submissions by both counsel, I have come to a similar conclusion to the Court below. The assertion of the appellant's subjective state of wariness with respect to this offending is not persuasive. The details of the previous offending are vague and occurred in a totally different situation. Knowledge of the appellant's good character is of some weight, but not persuasive when weighed against the other material before the Court. The portion of the psychiatric report does not assist. It is flimsy support for the proposition being asserted. I would not be prepared to act on it for the purpose of finding the particular problematic mental state at the time of offending. I would not allow this ground of appeal.

Ground 3 – *insufficient weight placed on the appellant's antecedents*

Ground 4 – *error in applying the considerations as to whether to record a conviction or non-conviction*

[66] These grounds were substantially argued together. In terms of ground three and the argument that the learned Magistrate failed to give sufficient weight to the appellant's subjective circumstances, such questions are more properly viewed as particulars of the ground asserting manifest excess.

[67] *DPP v Terrick*; *DPP v Marks*; *DPP v Stuart*, the Victorian Court of Appeal said:

> The proposition that too much – or too little – weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations. The question to be addressed when the ground of manifest inadequacy – or, in a prisoners appeal, manifest excess – is advanced is whether the sentence arrived at was within the range reasonably open to the sentencing judge in the circumstances, taking proper account of all relevant sentencing considerations (whether aggravating, or mitigating, or both). If the conclusion is that the sentence was outside the available range, then it may be inferred that too much or too little weight was given to one of other consideration. But rarely, if ever, will it be possible – or necessary – for the appeal court to reach a conclusion on that question.[25]

[68] In *Johnson v The Queen* the Court of Criminal Appeal said:

> Where the ground of appeal is that the sentencing judge failed to give sufficient weight to particular factors (as the appellant asserts here), in contract to a ground asserting that the sentencing judge disregarded a factor altogether or took an irrelevant factor into consideration, an appellate court must be especially cautious not to

[25] (2009) 24 VR 457 at 459-460.

substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[26]

[69] The recording of a conviction is a "formal and solemn act marking the court's and society's disapproval of a defendant's wrongdoing".[27] It is not an "everyday occurrence" nor is it "something that should be imposed upon people because they come before a court and plead guilty per se".[28] Professor Freiburg summarises the significance of the recording of a conviction as a "significant act of legal and social censure".[29] It is a judicial act by which a person's legal status is officially and – subject to any provisions relating to expungement – irreversibly altered.[30]

[70] Section 8 of the *Sentencing Act* provides:

> 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.

[26] [2012] NTCCA 14 at [25].
[27] *The Queen v McInerney* (1986) 42 SASR 111 at 124, quoted with approval in *Carnese v The Queen* [2009] NTCCA 8.
[28] Appeal transcript (20 November 2015) at 9.
[29] Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed. 2014) 85.
[30] Ibid

[71] Before the Court of Summary Jurisdiction the appellant submitted s 8 of the *Sentencing Act* was enlivened, the criteria being sufficiently satisfied to justify a no conviction disposition. It was submitted the appellant satisfied two of the three limbs of s 8. The appellant had resigned from the police force on the day of the hearing. The significance of the loss of his career was emphasised, as were his previous positive contributions.

[72] As Martin (BR) CJ explained in *Hesseen v Burgoyne*,[31] judicial minds may differ about the significance to be placed upon any one or more of the factors enumerated in s 8 of the *Sentencing Act*, as well as the other circumstances of the case, in determining whether or not to record a conviction. An appellate court will only interfere if there is some reason for regarding that the discretion conferred was improperly exercised and the Magistrate fell into error. The sentencer bears no obligation to apportion certain weight to any one factor. Each of the factors, and the overall circumstances of the case, need only be given the due consideration when determining whether the discretion should be exercised.[32] A court is not constrained to consider only the matters enumerated in s 8 of the *Sentencing Act* alone.

[73] In *Hales v Adams* Southwood J considered the discretion not to record a conviction noting in the context of proportionality, ruling that the more serious or blatant an offence, the less proportionate it is for a court to

[31] [2003] NTSC 47 at [20]
[32] *Davis v Haywood* [1997] NTSC 8 at 13; *Toohey v Peach* (2003) 143 NTLR 1.

decline to record a conviction. [33] His Honour especially noted the following circumstances may result in a favourable exercise of the discretion: when the court is dealing with a mature age offender who has previously led a blameless life or an offender with no previous convictions; when the offence is related to the offenders ill health; or when a conviction in itself would be a significant additional penalty on a first offender. All of these circumstances are accepted as relevant here, however, all of the circumstances of a particular case must be taken into account. The principles of sentencing, including both punitive and benevolent considerations, are not excluded from the weighing process to determine whether or not a conviction should be imposed.

[74] The learned Magistrate accepted the appellant was of "good character and antecedents in relation to his working history and lack of criminal history"; however, her Honour rejected that the appellant's ADHD and/or depressive episode contributed to, or were present at the time of, the offending.[34] As already discussed, her Honour was entitled to take that view.

[75] Clearly the learned Magistrate accepted that the appellant had satisfied the requirement set out in s 8(1)(a) of the *Sentencing Act*. The discussion of good character and antecedents immediately follows the discussion of the criteria of s 8 of the *Sentencing Act*. Her Honour was, however, entitled and indeed obliged to consider the overall circumstances of the case.

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[33] [2005] NTSC 86 at [17].
[34] Court of Summary Jurisdiction, transcript of proceedings (25 May 2015) at 22.

[76] The appellant submitted however that her Honour gave cursory attention to the appellant's prior good character and antecedents and that the reasons were largely limited to recitations of what was said during the plea without further analysis.[35]

[77] The learned Magistrate's sentencing remarks clearly show that her Honour considered each of the relevant considerations under s 8(1) of the *Sentencing Act* as well as broader considerations. As such, the appellant's submission that her Honour failed to weigh the competing sentencing considerations is unsustainable. Clearly her Honour did embark upon an appropriate weighing process.

[78] When all of the circumstances of this case are considered, in my view, this is not a matter where the imposition of a conviction could be said to be plainly unreasonable or unjust.

[79] In sentencing the appellant, the learned Magistrate stated "if I did not enter a conviction against the defendant's name that would be clearly sending the wrong message".[36] The appellant submits this statement does not identify any balancing of the considerations in s 8 of the *Sentencing Act* against the need to send a message. The appellant submitted that her Honour's remarks regarding denunciation essentially amounted to a decision based on a policy that because the appellant was a police officer he should receive a

[35] Appeal Transcript (20 November 2015) at 12.
[36] Appeal transcript (20 November 2015) at

conviction, irrespective of his lack of prior convictions or positive antecedents.

[80] In my opinion, that is not a fair view of her Honour's reasons when read as a whole. It is accepted here, as argued on behalf of the appellant, that police officers are members of a highly regulated profession, and assaults committed by police officers whilst on duty are uncommon. I have already discussed this matter in the context of the first ground of appeal.

[81] One of the reasons police are highly regulated is because of the position of trust and power they hold in society. This offending was an example of abuse of that trust. It is the case that the *Police Administration Act* deters and imposes consequences for breaches of discipline by police officers. This offending however goes beyond a breach of discipline and is a breach of the criminal law. Here, the deterrent effect of internal discipline did not prevent the offending.

[82] Although assaults by police officers are uncommon, deterrence remains a relevant consideration as assaults committed by police officers have the potential to erode public confidence in the police force. By the very nature of their profession, police are held to a higher standard. Additionally, assaults perpetrated on women in the current environment of the prevalence of such assaults in the Northern Territory, attract the operation of the principle of general deterrence.

[83] The appellant is married to a Canadian woman and it was argued the conviction may impact his ability to travel to Canada. Further, this Court was told he has since obtained employment with a pharmaceutical company and his employer is interested in the outcome of this appeal. While the appellant cannot conclusively state that the conviction will prevent him from travelling to Canada or jeopardise his employment, it was submitted the conviction has the scope to be a significant further penalty on the appellant.

[84] There was no evidence before the Court that the conviction will prevent the appellant from travelling to Canada. The submission was not put with any certainty. This was not such a notorious fact that it could be concluded his travel to Canada would be affected. With regards to the appellant's current employment, as pointed out by counsel for the respondent, the employer hired the appellant after the conviction was imposed, presumably with knowledge of its existence.

[85] As already noted, the appellant pointed out the learned Magistrate did not specifically refer to the references tendered on the appellant's behalf in the sentencing remarks. Her Honour was aware of the references as indicated by her Honour's discussion of the references at the time of their tender.[37] As emphasised by Riley CJ in *Ford v Nicholas*, "it should not be inferred that a Magistrate did not consider all of the relevant material merely because the Magistrate failed to specifically mention a particular matter".[38] In any

[37] Court of Summary Jurisdiction, transcript of proceedings (25 May 2015) at 8.
[38] [2010] NTSC 53 at [18].

event, her Honour found that the appellant was of good character, which is the only sentencing factor that the references are relevant to.

[86] The learned Magistrate was not in error to find there was no nexus between the appellant's ADHD and/or depressive episode and the offending as no evidence was presented to the Court below to establish these mental conditions existed at the time of the offending.[39] As noted by her Honour, the report did not support that proposition. Her Honour was prepared to accept that in circumstances similar to the employment based assault the appellant may be wary. The appellant's position was not rejected outright. His mental health condition evidenced by the medication he was prescribed was a matter of weight to be balanced against all other factors. The report tendered was not particularly informative. It is difficult to envisage that it could have been given much weight.

[87] In my opinion her Honour's reasons were appropriate to the circumstances. The imposition of a conviction was not plainly unjust.

[88] I confirm I allow the amendment of Ground 2 of the appeal and the addition of Ground 4.

[89] The appeal will be dismissed.

[39] Court of Summary Jurisdiction, transcript of proceedings (25 May 2015) at 22.