Qadir v Rigby [2012] NTSC 90

PARTIES:	QADIR, Nasar v RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 3 of 2012 (21042598)
DELIVERED:	15 November 2012
HEARING DATES:	27 June 2012
JUDGMENT OF:	BARR J
APPEAL FROM:	TRIGG SM

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST RECORDING OF CONVICTION AND SENTENCE – *Criminal Code* (NT) s 294(2) – appellant pleaded guilty to single count of assisting his brother to enable him to escape prosecution for the crime of hit and run – magistrate concluded appellant made no attempt to alert police or ambulance to treat accident victim – conclusion not relevant to the charge – sentencing discretion affected by extraneous or irrelevant matter – appeal allowed in part – re-sentencing – having regard to appellant's youth, lack of prior offending and rehabilitation, sentence of imprisonment inappropriate – sentence of imprisonment quashed and conviction bond substituted

CRIMINAL LAW – APPEAL AGAINST RECORDING OF CONVICTION AND SENTENCE – 19 year old offender with no prior criminal history – whether insufficient weight placed on youth and prospects of rehabilitation

– whether insufficient weight placed on co-operation with police and guilty plea – youth, lack of prior convictions, co-operation and guilty plea acknowledged by magistrate – general deterrence an important factor – error not identified on grounds based on *R v Mills* (1998) 4 VR 235

CRIMINAL LAW – APPEAL AGAINST CONVICTION AND SENTENCE – Whether magistrate erred in characterising seriousness of the offence charged –whether appellant wrongly sentenced for conspiracy to pervert the course of justice – principle in *R v De Simoni* (1981) 147 CLR – magistrate did not take into account matters which would have warranted conviction for more serious offence – no mischaracterisation – no sentencing error established on this ground

Criminal Code (NT) s 13(1), s 174FA, s 286, s 294(2)
Justices Act (NT) s 177
Sentencing Act (NT) s 5, s 7(a), s 8, s 11(a), s 13, s 40
Criminal Records (Spent Convictions) Act (NT) s 11

Cranssen v R (1936) CLR 55 CLR 509; *Dinsdale v R* (2000) 202 CLR 321; *House v R* (1936) 55 CLR 499; *Liddy v R* [2005] NTCCA 8; *Lo Castro v R* [2011] NTCCA 1; *Midjumbani v Moore* [2009] NTSC 27, followed.

R v Bernath [1997] 1 VR 271, applied.

Carnese v The Queen [2009] NTCCA 8; *DD v Cahill* [2009] NTSC 62; *Hales v Adams* [2005] NTSC 86; *Kelly v The Queen* (2000) 10 NTLR 39; *Nona v The Queen* [2012] NTCCA 3; *R v De Simoni* (1981) 147 CLR 383; *R v McInerney* (1986) 42 SASR 125; *R v Mills* (1998) 4 VR 235; *R v Rogerson* (1992) 174 CLR 268; *Yeomans v The Queen* [2011] VSCA 277, considered.

REPRESENTATION:

Counsel:

Appellant:	K Roussos
Respondent:	D Jones

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Qadir v Rigby [2012] NTSC 90
No. JA 3 of 2012 (21042598)

BETWEEN:

NASAR QADIR
Appellant:

AND:

KERRY LEANNE RIGBY
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 15 November 2012)

[1] On 15 December 2010, a vehicle driven by the appellant's brother, Mohammed Qadir, struck and caused serious injury to a pedestrian.

[2] Because of his failure to stop at the scene of the accident, Mohammed Qadir committed the crime of "hit and run" contrary to s 174FA Criminal Code; more precisely, that, being the driver of a vehicle which was involved in an incident which involved serious harm to a person, he, as the driver, failed to stop the vehicle at the scene of the incident and give any assistance to the person that was reasonable in the circumstances.[1]

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[1] Mohammed Qadir pleaded guilty to that crime before the Court of Summary Jurisdiction on 12 December 2011.

[3] The crime committed by Mohammed Qadir carried a maximum penalty of imprisonment for 7 years.[2]

[4] On 11 January 2012, the appellant pleaded guilty in the Court of Summary Jurisdiction to a charge on information that, on 16 December 2010, he assisted Mohammed Qadir, who to his knowledge had committed a crime, namely, hit and run, in order to enable him to escape prosecution.

[5] The Criminal Code provides that a person "who receives or assists another who, to his knowledge, has committed an offence in order to enable him to escape prosecution becomes an accessory after the fact to the offence."[3] The Criminal Code then provides a maximum penalty of imprisonment for two years for a person who becomes an accessory after the fact to a crime (other than murder or terrorism) where the principal offender may be sentenced to imprisonment for a term greater than three years.[4]

[6] Given that Mohammed Qadir was liable to a maximum penalty of imprisonment for seven years, the maximum penalty to which the appellant was liable on being found guilty of being an accessory after the fact was imprisonment for two years.

[7] On the admitted facts relating to the appellant's offending, at about 7.30 pm on 15 December 2010, the appellant's elder brother Mohammed was driving a Tarago taxi van along Manunda Terrace when the left hand side of the

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2 s 174FA *Criminal Code* provides a maximum penalty of imprisonment for 10 years if the incident results in the death of a person, and imprisonment for 7 years if the incident results in serious harm of a person.

3 *Criminal Code* s 13(1).

4 *Criminal Code* s 294(2).

vehicle collided with a pedestrian. The impact caused the pedestrian to hit the windscreen and travel over the roof of the vehicle, landing on the road surface. Mohammed continued driving, but stopped a short distance away and made a u-turn. Mohammed then drove back past where the pedestrian lay and continued on without stopping until he arrived at his family home.

[8] On arriving home, Mohammed told the appellant what had happened. The appellant and Mohammed then moved another vehicle out of the driveway and drove the damaged Tarago van into the premises, closing the gate behind them. The appellant and Mohammed made alterations to the damaged Tarago, removing the rear numberplate, Taxi 800, and replacing it with an ordinary vehicle number plate. The brothers removed the taxi dome light from the roof, and replaced the damaged bonnet with a spare bonnet from another vehicle.

[9] The following morning, Mohammed instructed the appellant to remove the smashed windscreen from the damaged Tarago. Mohammed then left to purchase a new windscreen. Using a reciprocated saw, the appellant cut out a piece of windscreen from the front left passenger side and placed it underneath another vehicle parked in the front yard. The cut-out part of the windscreen had human hair penetrated through the shattered glass.

[10] The appellant continued working on the windscreen until police arrived at the family home at about 11.20am on 16 December. On inspection of the damaged Tarago van, police obtained a search warrant and seized various

items. Later that day, the appellant accompanied police to the police station and voluntarily participated in a formal interview, in which he made full admissions to making alterations to the vehicle in order to hide its involvement in his brother's hit and run accident.

[11] Submissions were put to the sentencing magistrate in mitigation of penalty, including the appellant's youth, absence of prior offending, and his explanation for participating in the offending conduct. At the time the offence occurred, Mohammed, aged 20, and the appellant, aged 19, were looking after their parents' house and their father's taxis. Their parents were in Pakistan. The appellant did not give evidence. However his counsel informed the magistrate the appellant did as he did out of fear of what might happen to his brother, fear of his brother getting in trouble with police, and fear of his father's reaction when he returned home.[5]

[12] For his part in the offending, the appellant was convicted and sentenced on 17 January 2012 to a term of imprisonment of two months, suspended immediately, with an operational period of two years.

[13] The learned magistrate delivered a lengthy and comprehensive ex tempore sentencing decision, most of which I extract below:-

> … the defendant was charged with a number of charges which have been withdrawn over time and, the end result, the defendant has pleaded guilty to the one remaining charge, being charge 4, being on 16 December 2010 at Darwin, he did assist Mohammad Qadir, who is his older brother, who, to his knowledge, had committed a crime;

[5] Transcript of 11 January 2012, p 4.

namely, hit and run, in order to enable him to escape prosecution. That is a charge under s 294(2) of the *Criminal Code* which carries a maximum penalty of two years' imprisonment.

In relation to the matter, as I say, the defendant is not charged with being involved in the actual hit and run himself; that was his brother. There was no suggestion that the defendant was in the vehicle that his brother was driving. What has occurred is apparently that when the defendant's parents were overseas, he and his older brother, who appears to have been a couple of years older – the defendant was 18 at the time – were at home.

It appears that the father operated some form of taxi business and there was a Tarago taxi, presumably the father's vehicle. The older brother, Mohammad, chose to drive that vehicle on this particular evening and, in the course of his driving, he hit a pedestrian, causing the pedestrian to crash into his bonnet, onto his bonnet, smash into the windshield and go over the car and onto the roadway. It clearly was an impact of considerable force and it would have been obvious to anybody that the person hit was likely to have received possibly very serious injuries if not possibly fatal. The brother apparently went up the road for a short distance, then stopped, turned around and then drove off, back home. The brother did not seek to render any assistance to the person he had hit, did not ring 000, did not call for any ambulance, did not alert police; he simply drove home.

Thereafter, the brother's concern appears to have been for his own self rather than for the person he struck and he told the defendant about what had happened. The defendant then has joined in the brother's concern and has then agreed to assist the brother to effectively alter the vehicle to try and hide the crime. There is no suggestion that the defendant took any steps to ring police or an ambulance or took any steps to ascertain whether the person hit was being attended to or treated by anybody else. The defendant's concerns, as I say, were for his brother and to help his brother in the circumstances.

It is to be borne in mind the defendant was an 18-year old. He was an adult but he clearly was a young adult. The brother was a little bit older, only a couple of years. There was no family or serious, more mature adult in the premises who might be able to render some guidance. One would have hoped that if the defendant's parents were home, they would have stopped the events that occurred and immediately instructed them to return to the scene to render

assistance. One would hope that. Whether that's what would have occurred or not is only speculation. I don't know the family at all.

The defendant is a young person, as I say, 18. He has no priors alleged against him. He therefore comes before the court as a youthful first offender and that is important. A number of cases have been provided to me by Ms Blundell. I'm not quite sure why a number of them have been provided to me, particularly the ones that relate to sentencing for hit and run, because the defendant is not to be sentenced for hit and run. Perhaps it has been put to me on the basis of some form of parity between the defendant and his brother, but the offending which the brother is facing carries a far more serious term of imprisonment than this. I think that for causing an accident, not stopping and causing serious harm, I think the penalty is somewhere near about seven years. So in terms of parity, I don't see how that quite fits. Perhaps I would have been more assisted by some cases relating to sentencing concerning attempts to pervert the course of justice or similar type offending which this really is.

…

In that case, the general principles that were stated in relation to youthful offenders, one of them was that in the case of a youthful offender, rehabilitation is usually – and I emphasis 'usually' – far more important than general deterrence. Clearly it is not the case that general deterrence is not relevant and never relevant in relation to youthful offenders.

It has been suggested to me that the defendant has some intention of perhaps undertaking a law degree at some stage in the future and also might have some aspirations to joining the police force, and that appears to be apparently after having done or partly completed or whatever a law degree. Whether that is that the defendant does in fact choose to do is a matter of speculation; I don't know. He may follow that path or he may not. If he does, then that will be a matter for those various bodies to deal with at the time, based on his character at the time, but this offending, in my view, does provide a window towards the defendant's character and something which those bodies would need to cause some pause in relation to whether the defendant was a suitable person to be a police officer in the future or, if he should do law and if he should ever apply to be admitted to practice, whether he was a fit and proper person to be a legal practitioner.

In terms of being a police officer, it's a heavy onus in relation to serving and protecting the community and part of that onus is clearly the maintenance of honesty and integrity and the maintenance of exhibits and evidence. A person who, as this defendant has, has shown a willingness to deliberately alter evidence and potential exhibits in the case of a serious crime would, on present indications, be contraindicated to a person being a police officer. If the defendant were a police cadet and did this, I would expect his immediate dismissal. If the defendant were in a process of applying to be admitted to be a legal practitioner, I would expect his application to be immediately dismissed. Clearly he is not a person who is fit and proper at this stage of his life to either be a police officer or a legal practitioner.

The offending is serious offending because, in my view, it does smack at the very integrity of the justice system. What the defendant did on this occasion appears to have been spread over several hours. Firstly, the defendant, with his brother, began to make alterations to the vehicle. The rear numberplate for taxi 800 was removed and replaced with a non-taxi numberplate. The taxi dome light was removed from the roof; clearly trying to remove indications of this vehicle being a taxi. Further, the front bonnet was removed and replaced with a spare bonnet from another vehicle, obviously intending to remove the damage by it which was damage as a result of the collision and not an action which would take a matter of a couple of minutes.

The next morning, the defendant was instructed by his brother to remove the smashed windscreen so that the brother could go and purchase a new one. The defendant was in the process of working on the windscreen by cutting a piece of the windscreen out, being a 30 centimetre by 30 centimetre section on the front passenger side, using a reciprocated saw. This piece of glass was observed subsequently by police to have an amount of hair penetrated within the shattered glass, so clearly it had real forensic value, hence why the defendant was trying to cut it out. He was in the process of doing that when police arrived at 11.20 am. They saw what he was doing and they obtained a search warrant. They seized the vehicle, they seized the removed items and, hence, fortunately, the forensic value of the items was not lost. But the defendant was clearly in the process of attempting to do that.

By deliberately altering the vehicle as he was doing and removing items which had forensic value, it was clearly, in my view, a serious

attempt to pervert the course of justice. Clearly, the items were of great forensic value in the event that the police had to prove who had been driving or which vehicle had hit this unfortunate person, and the defendant was actively involved in seeking to alter and potentially destroy evidence. The defendant in his action clearly on this occasion disclosed a clear personality trait whereby he would put his family or familial interests above any moral or legal interest or obligation. Whether this was a one-off mistake due to his youth or an underlying fault, only time will tell. As I say, it should cause pause to anybody looking at the defendant in the future in terms of any position of trust involving this sort of matter.

The offending is, in my view, serious. It carries a maximum penalty of two years' imprisonment. Ultimately, due to the quick police work – and I don't know how they obtained the information, it may well have been that a person passing saw the taxi take off or it may have been that a neighbour or person in the vicinity came out and saw and disclosed information to the police which eventually led them to this premises and the vehicle. But one apprehended, the defendant then did the right thing. He then went to the police station, he made full admissions in relation to his involvement, so he did not attempt to lie, which is good. It would have been a bit hard to lie because he was caught red-handed in relation to the windscreen, but in relation to the earlier activities with the numberplate, taxi light and bonnet, he hadn't been caught in relation to that, so his subsequent honesty to police in relation to that is a good sign that maybe this is a one-off, but as I say, only time will tell.

Clearly, in offending of this type, the court must impose a sentence which, in my view, has some general deterrence aspect, notwithstanding the defendant's age and lack of priors, as clearly people cannot be seen to be encouraged to attempt to destroy or hide evidence or alter evidence in order to deflect or avoid people being successfully prosecuted for serious criminal offending. This is not a case where someone's brother has come home with a stolen $50 pushbike and you've stuck it in the back shed, trying to think of what to do with it. This is a serious matter where somebody could have been serious injured or killed, and attempting to destroy and hide the evidence in relation to it.

The question is what is a suitable disposition? In that regard, a sentence of imprisonment in all cases must be a sentence of last resort and the court, in deciding what sentence to impose, should

almost start from the very lowest of sentences and work their way up. It's only if a court decides that a particular sentence is too low or not sufficient in the circumstances that a court should then move onto the next. It may well be at times the court is in a situation where the sentence falls squarely either in one or other category and both have arguments for or against it; in which case, the court should generally then move to the most lenient disposition unless the person's prior poor character or offending is such that they lose discounts and something more stern needs to be sent home to a defendant.

The defendant is not in that category so I bear I mind that in relation to sentencing this defendant, I start from the lowest disposition, which includes a no conviction, and work my way through and only move on if I'm satisfied that for reasons of the seriousness of the offending, personal deterrence, general deterrence and general sentencing principles, including taking into account all the personal circumstances of the defendant, that a more serious sentencing disposition is required.

The defendant has written to the court and that is exhibit D4. In addition, there are three letters that have been put forward to the court on behalf of the defendant, exhibits D1, D2, and D3. It is clear from those various letters that the defendant has proved himself to those people that he is generally a person of good character and reliable. I note that one of those comes from his family but the other two do not.

Taking all matters into account, including particularly the defendant's age and lack of priors, on charge 4 the defendant will be found guilty, convicted and sentenced to be imprisoned for a period of two months from today. I also take into account the defendant's plea of guilty and allow some discount in relation to that. That sentence will be suspended forthwith and I set an operational period of two years from today during which he is not to commit another offence punishable by imprisonment if he is to avoid going to gaol for some or all of that time. I decided to fully suspend the sentence given the defendant's age and lack of priors in the hope that that could be an aid in his rehabilitation. I don't think that sending him to actual gaol today, given that the administration of justice was not in fact adversely affected, would serve his or society's interest. Hopefully this is a one-off but, as I say, only time will tell.

[14] Relevant to the appellant's arguments on appeal, I note that the magistrate expressly referred to the following matters in his sentencing decision, although not in the same order in which I now set them out:

- the appellant was 18 years old at the time of offending;
- the appellant was an adult, but clearly a young adult;
- the appellant had no prior convictions and was before the court as a youthful first offender;
- the appellant's brother was two years older than the appellant;
- the appellant's parents were overseas at the time of the offence;
- there was no family member or mature adult in the premises who might have been able to render some guidance to the appellant and Mohammed;
- after Mohammed told the appellant what had happened, the appellant "joined in the brother's concern" and agreed to assist the brother to "effectively alter the vehicle to try and hide the crime";
- the appellant's concerns were for his brother and to help his brother in the circumstances;
- the offending was serious because it smacks at the integrity of the justice system (a reference to the alteration and/or destruction of evidence of a crime);
- the offending was carried out over several hours in the evening of 15 December 2010, and involved replacement of the taxi numberplate with a non-taxi numberplate, removal of the taxi dome light from the roof of the vehicle, and removal and replacement of the damaged bonnet;
- the offending the following day included removal of a smashed windscreen and in particular removal of a section of the windscreen which had hair penetrated within the shattered glass and hence had "real forensic value";
- the appellant was in the process of attempting to get rid of forensically valuable items when apprehended by police;
- the appellant's was a serious attempt to pervert the course of justice;

- the appellant put his family or familial interests above any moral or legal interest or obligation;

- once apprehended, the defendant went to the police station and made full admissions in relation to his involvement, and did not attempt to lie;

- even with the appellant's youth and lack of prior convictions, the sentence imposed must have general deterrent effect (on those who might attempt to destroy, alter or hide evidence in order to protect people from being successfully prosecuted for serious criminal offending);

- the appellant proved to referees that he is generally reliable and a person of good character;

- noted (but questioned on grounds of character) that defendant might at some future stage undertake a law degree or join the police force; and

- with discount for the plea of guilty, found guilty, convicted and sentenced to two months' imprisonment, fully suspended.

[15] The appellant appeals against the recording of the conviction and sentence on seven grounds. Before I deal with those grounds in detail, I make the general point that this Court will only interfere with the exercise of a sentencing discretion on the basis explained by the High Court in the well-known authority of *House v R*:-

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the

> appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[6]

[16] Where the ground of appeal is that a sentencing Judge failed to give sufficient weight to particular factors (as the appellant asserts in a number of grounds), in contrast 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 substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[7]

Grounds of appeal

(a) Ground 1: the learned Magistrate erred in failing to give adequate weight to the appellant's youth.

(b) Ground 2: the learned sentencing Magistrate erred in that he failed to give adequate weight to the appellant's prospects of rehabilitation.

[17] Grounds 1 and 2 may conveniently be dealt with together.

[18] At the time of his offending on 15 and 16 December 2010, the appellant was 19 years old; he was 20 at the time of sentence.[8] The appellant had never previously been sentenced for a criminal offence, and no allegations of

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6 *House v R* (1936) 55 CLR 499 at 504-505; see also *Cranssen v R* (1936) 55 CLR 509 at 519-520.

7 *R v Bernath* [1997] 1 VR 271 at 277 per Calloway J, approved by the Court of Appeal of the Supreme Court of Victoria in *DPP v Castro* [2006] VSCA 197 at [17]; cited with approval in *Johnson v The Queen* [2012] NTCCA 14 at [25].

8 The magistrate was told that the appellant was aged 18 years and five months at the time of the offending. However, on the hearing of the appeal the appellant's counsel informed the Court that the appellant's date of birth was 07/07/1991, indicating he was 19 years and five months at the time of the offending.

offending post-December 2010 were made against him at the time of sentencing.

[19] During submissions, counsel for the appellant referred the magistrate to the case of *R v Mills*,[9] in which the Victorian Court of Appeal held that the following general propositions were established by the authorities in relation to the sentencing of youthful offenders:

> i) Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
>
> ii) In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)
>
> iii) A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified.[10]

[20] Counsel for the appellant submitted on appeal that the magistrate erred in his consideration of the appellant's youth and prior good character in his approach to sentence, citing the following passage in his Honour's reasons:

> The defendant is a young person, as I say, 18. He has no priors alleged against him. He therefore comes before the court as a

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[9] (1998) 4 VR 235 at 241.

[10] *R v Mills* (1998) 4 VR 235 at 241.30 per Batt J.A. with Phillips C.J. and Charles J.A. agreeing.

> youthful first offender and that is important. ... The general principles as stated by the Court of Appeal in Victoria in the matter of *R v Mills* are of some general application but decisions of other courts, apart from the High Court are not binding on this court and are only instructive. But clearly a decision of the Court of Appeal from Victoria is a matter to be given quite some weight. In that case, the general principles that were stated in relation to youthful offenders, one of them was that in the case of a youthful offender, rehabilitation is usually- and I emphasise "usually"- far more important than general deterrence. Clearly it is not the case that general deterrence is not relevant and never relevant in relation to youthful offenders.[11]

[21] The appellant contends that the learned magistrate took the view that the appellant's youth was not a relevant consideration in the sentencing exercise. I disagree. I accept the respondent's submission that his Honour was simply pointing out that, although the appellant's youth was an important consideration, it did not cause the principle of general deterrence to become completely irrelevant.[12] The learned magistrate's statement reflects the comments made in relation to *R v Mills* by the Victorian Court of Appeal in *Yeomans v The Queen* [2011] VSCA 277 at [46]:

> The applicant's youth is clearly relevant, but as has often been pointed out, *R v Mills* is not authority for the proposition that in the case of youthful offenders, rehabilitation is invariably the overriding factor in sentencing. As Maxwell P said in *R v Wyley* [2009] VSCA 17, [19] – [20]:
>
> > "[w]hat *Mills* did, in my respectful opinion, was to draw attention to the great significance for sentencing of looking to the offender's future, as well as to the past conduct for which the offender is being sentenced.

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[11] Transcript of 17 January 2012, p 10.

[12] Respondent's Outline of Submissions, p 2 at [4].

> *Mills* constantly reminds sentencing courts, and this court on appeal, that there is great public benefit in the rehabilitation of an offender and in maximising the prospect that the offender will carry on a law-abiding life in the future. But that consideration is not unique to young offenders. Nor is there any one correct answer as to how the balance is to be struck between that consideration and others which may point towards a period, or a longer period, of imprisonment, rather than a non-custodial sentence."

[22] The magistrate clearly viewed the offence committed by the appellant as serious, and considered that general deterrence was an important factor in the appellant's sentence.[13]

[23] The appellant's youth and lack of prior offences were specifically acknowledged by the learned magistrate – see the first six dot-pointed matters summarized in par [14] above. His Honour clearly took youth into account both as a matter relevant to the offence itself and as a matter in its own right relevant to the offender. His Honour also remarked on the number of character references tendered on behalf of the appellant: "It is clear from those various letters that the defendant has proved himself to those people that he is generally a person of good character and reliable".[14] These matters in particular were the basis of his Honour suspending the appellant's sentence in its entirety and forthwith.[15]

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[13] T 17/01/2012 p 12: "Clearly, in offending of this type, the court must impose a sentence which, in my view, has some general deterrence aspect, notwithstanding the defendant's age and lack of priors, as clearly people cannot be seen to be encouraged to attempt to destroy or hide evidence or alter evidence in order to deflect or avoid people being successfully prosecuted for serious criminal offending."

[14] Transcript of 17 January 2012, p 13.

[15] Transcript of 17 January 2012, p 13: "I decided to fully suspend the sentence given the defendant's age and lack of priors in the hope that that could be an aid to his rehabilitation."

[24] I reject the appellant's argument that the magistrate did not give adequate weight to the appellant's youth and prospects of rehabilitation. Further, I refer to and repeat my comment in par [16] above as to the need for caution where it is argued on appeal that a sentencing Judge failed to give sufficient weight to particular factors.

[25] Since there is no identified sentencing error in relation to the weight afforded by the magistrate to the appellant's youth and/or prospects of rehabilitation, grounds 1 and 2 of the appeal must fail.

(c) Ground 3: the learned magistrate erred in that he accorded insufficient weight to both the appellant's cooperation with police and his guilty plea.

[26] The appellant does not complain that the magistrate failed to take into account the appellant's guilty plea and co-operation with police, but contends that he placed insufficient weight on both. In support of this ground of appeal, the appellant relies on the following passage in the learned magistrate's reasons:

> But once apprehended, the defendant did the right thing. He then went to the police station, he made full admissions in relation to his involvement, so he did not attempt to lie, which is good. It would have been a bit hard to lie because he was caught red-handed in relation to the windscreen, but in relation to the earlier activities with the numberplate, taxi light and bonnet, he hadn't been caught in relation to that, so his subsequent honesty to police in relation to that is a good sign that maybe this is a one-off, but as I say, only time will tell."[16]

[16] Transcript of 17 January 2012, p 12.

[27] It can be seen that the magistrate was giving the appellant credit for his co-operation with police, particularly for having made full admissions in relation to his involvement in matters for which police did not have direct evidence ("the earlier activities").

[28] On the hearing of the appeal, counsel for the appellant argued that the learned magistrate erred in treating the case against the defendant as strong; Ms Roussos argued that the appellant's admissions to police, both at his home and in his formal interview, were significant and that he was not 'caught red-handed' in relation to *any* of the offending.

[29] I accept that the appellant's admissions were helpful insofar as the police did not have to embark on DNA testing or fingerprinting to prove who had made alterations to the Tarago taxi van. The magistrate acknowledged that much. However, I do not accept that the police did not already know that the appellant had cut out part of the damaged windscreen. It was open to the magistrate to infer from the wording of the agreed facts that when police arrived, the appellant was still in the process of cutting out the windscreen,[17] and was observed by Police in that process. His Honour's reference to the appellant being 'caught red handed' would therefore seem to be an accurate conclusion on the agreed facts.

[30] The appellant submits that the magistrate sentenced the appellant on the basis that his admissions to police and his guilty plea were of little value,

[17] The agreed facts state: "The offender continued to cut the windscreen from the vehicle until police arrived around 11.20am."

given that he was apprehended at the scene.[18] However, it is not apparent that the learned magistrate regarded the appellant's admissions as being of little value. Moreover, this was not a situation where the appellant was entitled to additional leniency in sentence, as might be expected in the case of an offender who incriminates himself (or others) by disclosing information to police about a crime of which the police are unaware, or where police do not have sufficient evidence to press charges in respect of a crime of which they are aware.[19]

[31] As to the timing of the guilty plea, the magistrate noted the reasonably lengthy history of the matter but acknowledged that the delays were not all of the appellant's making. The magistrate was aware that the appellant was originally charged on information with more serious charges, including one count of failing to stop at an accident (s 174FA *Criminal Code*) and one count of conspiring with another to pervert the course of justice (s 286 *Criminal Code*). Those charges were withdrawn on 24 October 2011 and a new charge of being an accessory after the fact was filed on the same day. In arriving at his sentence, the learned magistrate specifically allowed some (unspecified) discount for the appellant's guilty plea. True his Honour did not state by how much the head sentence was discounted, or whether the plea of guilty was reflected in some other way, such as by fully suspending the appellant's sentence of imprisonment. Such an alternative was

[18] Appellant's Outline of Submissions, p 6.
[19] See the discussion of the *Ellis* principle in *Nona v The Queen* [2012] NTCCA 03 at pars [26] – [37].

permissible, as the Court of Criminal Appeal explained in *Kelly v The Queen*:

> In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances. ... In addition, it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples."[20]

[32] Further, when considering ex tempore reasons for sentence delivered by an experienced magistrate in a busy summary court, this Court is usually entitled to assume that the magistrate has considered all matters which are necessarily implicit in the conclusion reached. The presumption is that there is no error: *Midjumbani v Moore*.[21]

[33] I refer once more to my comment in par [16] above as to the need for caution where it is argued on appeal that a sentencing Judge failed to give sufficient weight to particular factors. The appellant has not established error in the weight afforded by the magistrate to the appellant's guilty plea or co-operation with police. This ground of appeal must therefore fail.

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[20] (2000) 10 NTLR 39 at [27] and [29], per Martin CJ, Angel and Mildren JJ.
[21] [2009] NTSC 27.

(d) Ground 4: the learned magistrate erred in making findings which were unsupported by the evidence in sentencing the appellant in accordance with those findings.

[34] The appellant argues that the magistrate fell into error by relying on the following findings, which it says were unsupported by the evidence:

1. That the appellant was aware that the victim of his brother's hit and run accident could have been seriously injured or killed; and

2. The appellant made no attempt to alert police or ambulance to the accident or otherwise ensure that the victim was being treated.

[35] It is correct that the magistrate attributed to the appellant awareness of the potentially serious injuries suffered by the victim of his brother Mohammed's hit and run accident. In my view, his Honour was justified in so doing. The appellant was aware of the damage to Mohammed's vehicle, which included damage to the bonnet and a smashed windscreen. Moreover, as mentioned in par [8] above, Mohammed told the appellant what had happened when he returned home after the accident. This was an agreed fact. The magistrate was entitled to assume that the appellant thus became aware of the significant possibility of serious injury to the victim. Relevant to this ground, the magistrate's sentencing remarks were as follows:

> It clearly was an impact of considerable force and it would have been obvious to anybody that the person hit was likely to have received possibly very serious injuries if not possibly fatal. The brother apparently went up the road for a short distance, then stopped, turned around and then drove off, back home. The brother did not seek to render any assistance to the person he had hit, did not ring 000, did not call for any ambulance, did not alert police; he simply drove home.

> Thereafter, the brother's concern appears to have been for his own self rather than for the person he struck and he told the defendant about what had happened. The defendant then has joined in the brother's concern and has then agreed to assist the brother to effectively alter the vehicle to try and hide the crime. There is no suggestion that the defendant took any steps to ring police or an ambulance or took any steps to ascertain whether the person hit was being attended to or treated by anybody else. The defendant's concerns, as I say, were for his brother and to help his brother in the circumstances.

[36] Contrary to the appellant's submissions, I find it was open to the learned magistrate to make finding 1 in par [34]. Moreover, the finding was relevant to the appellant's sentencing. The appellant by his plea of guilty admitted that he knew at all relevant times that his brother Mohammed had committed the crime of hit and run. The known circumstances of the principal offence determine or are relevant to determining the seriousness of the offence constituted by the attempted cover-up. Knowledge of the seriousness of the principal offence is therefore relevant to the sentencing of the accessory after the fact.

[37] As to finding 2 in par [34], the magistrate did not make a finding that the appellant had not attempted to alert police or ambulance to the accident or otherwise ensure that the victim was being treated. Rather, his Honour referred to the absence of evidence that the appellant had made any such attempts. No doubt if the appellant had made such attempts, his counsel would have informed the magistrate prior to sentence, in particular given the following exchange between the magistrate and the appellant's counsel on 11 January 2012:

HIS HONOUR: He has known about it straight after the accident. What did he do to ring the ambulance?

MS BLUNDELL: He absolutely made the wrong call, your Honour.[22]

HIS HONOUR: Did nothing. Just left that man to die as well.

MS BLUNDELL: Well your Honour the other – I can take some instructions on this. My client wasn't in the vehicle, didn't see it and I don't know what information he had as to any injuries of the person...

HIS HONOUR: He could have worked it out by looking at the damage to the car with hair and blood on the windshield. You know, blind Freddy would have worked out that this person could be dead or seriously injured.

[38] Whether or not the magistrate made an express finding in terms of finding 2 in par [34], it would appear from a fair reading of the magistrate's comments made during the appellant's counsel's submissions and from his sentencing remarks extracted in par [35] that the magistrate concluded in sentencing the appellant that he had not attempted to alert police or ambulance to the accident or otherwise ensure that the victim was being treated.

[39] It is difficult to understand the relevance of the magistrate's consideration of these matters. They do not relate to the charge that the appellant assisted his brother in an attempt to enable him to escape prosecution for the crime of hit and run. Rather, the magistrate's remarks suggest that he was sentencing the appellant as a principal offender at least in relation to the

[22] I understand this to have been a concession by counsel that the appellant had made the wrong choice in terms of the actions he took, not that he had telephoned the wrong number.

neglect of the victim and the failure to give assistance (which is an element of the offence of "hit and run" contrary to s 174FA Criminal Code), or possibly for the offence of callously failing to render assistance to the injured victim.[23] The appellant was being sentenced for neither of these.

[40] Although the magistrate's sentencing remarks were more moderate than the more robust statements he made in the course of defence counsel's submissions (in that his Honour abandoned his preliminary view that the appellant had left the victim to die), he nonetheless continued to attach relevance to a prejudicial matter which in my judgment was irrelevant.

[41] I find that the learned magistrate allowed extraneous or irrelevant matters to affect him in the exercise of his sentencing discretion. This finding does not accord precisely with Ground 4 as drafted, but is nonetheless made in deciding the appellant's arguments in relation to Ground 4 (both in written submissions and on the hearing of the appeal) that the learned Magistrate erred by taking into account "the appellant's apparent conduct of failing to render assistance to the victim" which, it was argued, "effectively amounts to taking into account a finding unsupported by the evidence and proceeding on the basis of … uncharged acts."[24]

[42] Although the error which I have found on the part of the learned magistrate comes within the principle stated in *House v R* and *Cranssen v R*,[25] it does

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[23] See, for example, s 155 Criminal Code.
[24] Appellant's Outline of Submissions, 19 June 2012, p. 8.9.
[25] See par [15] and footnote 6.

not automatically have the consequence that the appeal must succeed, or that some other sentence is warranted in law. The Supreme Court has a discretion under s 177(2)(f) *Justices Act* to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred, "notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant."[26] With this in mind, I turn to consider the remaining grounds of appeal.

(e) Ground 5: the learned magistrate erred when characterising the degree of seriousness of the offence.

[43] Counsel for the appellant argued that the learned magistrate mischaracterised the seriousness of the offence ultimately charged against the appellant. She relied on the sentencing remarks extracted below:

> By deliberately altering the vehicle as he was doing and removing items which had forensic value, it was clearly, in my view, a serious attempt to pervert the course of justice. Clearly, the items were of great forensic value in the event that the police had to prove who had been driving or which vehicle had hit this unfortunate person, and the defendant was actively involved in seeking to alter and potentially destroy evidence."

[44] Counsel for the appellant submitted that it can be reasonably inferred from the extracted remarks that the learned magistrate was sentencing the appellant as if he had pleaded guilty to an offence under s 286 Criminal Code, conspiracy to pervert the course of justice, which carries a maximum punishment of imprisonment for 15 years, and is an indictable offence which

[26] In relation to a similar provision, s 411(4) Criminal Code, see *Damaso* (2002) 130 A Crim R 206 at 217 [53]; *Gilligan v The Queen* [2007] NTCCA at [11].

does not attract summary jurisdiction. She submitted that the magistrate infringed the principle in *R v De Simoni*.[27]

[45] In *R v De Simoni*, the sentencing judge took into account circumstances of aggravation (wounding and using personal violence to a robbery victim) which had not been charged in the indictment. There was a statutory requirement that if any circumstance of aggravation were intended to be relied upon, it had to be charged in the indictment.[28] Gibbs CJ, with whom Mason and Murphy JJ agreed, decided that the words of the statutory requirement were "general and unrestricted", such that the prohibition applied not only to the prosecutor but was also directed to the judge. As a result, the sentencing judge could not take into account an uncharged circumstance of aggravation and thereby impose a penalty more severe than he would otherwise have imposed. The principle is explained in the judgment of Gibbs CJ:

> ... the general principle that the sentence imposed on an offender should take account of all circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles ... is that a judge cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[29]

[46] Gibbs CJ later clarified what is permissible for the sentencing judge:

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[27] *R v De Simoni* (1981) 147 CLR 383 at 389.5 per Gibbs CJ.
[28] See s 582 *Criminal Code* (WA). An almost identical provision is contained in s 305(4) *Criminal Code* (NT).
[29] (1981) 147 CLR 383 at 389.

> .... whether s 582 be construed according to its own terms, or with the assistance provided by the common law, it has, in my opinion, the effect that a judge, in imposing sentence, may not have regard to a circumstance of aggravation which should have been charged in the indictment if it was intended that reliance should be placed upon it. He may, of course, have regard to facts which might ordinarily be described as circumstances of aggravation, but which do not fall within the definition of that expression in the Code, because they do not render the offender liable to a greater punishment.

[47] I do not consider that it can be reasonably inferred from the learned magistrate's sentencing remarks that he was sentencing the appellant for the offence of conspiracy to pervert the course of justice. At the start of his sentencing remarks, his Honour stated that the appellant had pleaded guilty to the one remaining charge: "being on 16 December 2010 at Darwin, he did assist Mohammed Qadir who, to his knowledge, had committed a crime; namely hit and run, in order to enable him to escape prosecution." His Honour went on to correctly identify the relevant section of the *Criminal Code* and the applicable maximum penalty of two years' imprisonment. At a later stage in his sentencing remarks his Honour repeated the applicable maximum penalty.

[48] The learned magistrate did not refer to any conspiracy, nor did he refer to any more serious offence with which the appellant could have been charged. I interpret the reference to the appellant's "serious attempt to pervert the course of justice" as the magistrate's analysis of the conduct constituting the offence which the appellant had committed, and its level of gravity. There are many ways in which a person may assist an offender to escape prosecution, and it was legitimate for the magistrate to characterise the way

in which the appellant assisted, and to comment on its seriousness. Moreover, his Honour's statement was legally correct. To commit an act which frustrates or deflects a possible criminal prosecution, with intent to achieve that result, may constitute an attempt to pervert the course of justice.[30] I do not agree that, in making the particular remarks he made, the learned magistrate thereby took into account matters or circumstances of aggravation which would have warranted a conviction for a more serious offence or which would have rendered the appellant liable to a more serious penalty. In my judgment his Honour did not infringe the principle in *R v De Simoni*. Nor has the appellant established that the learned magistrate erred when characterising the degree of seriousness of the offence.

[49] It follows that Ground 5 must also fail.

(f) Ground 6: In deciding whether or not to record a conviction, the learned magistrate mischaracterised the objective seriousness of the offending and did not properly take into account the subjective materials in determining the issue of whether or not to impose a conviction.

[50] The decision to impose a conviction or not is governed by section 8(1) of the *Sentencing Act*, which provides as follows:

> 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

[30] *R v Rogerson* (1992) 174 CLR 268 at 278.4, per Mason CJ; see also the joint judgment of Brennan and Toohey JJ. at 284.8 as to "an act which tends to mislead the police in their conduct of an investigation into a possible offence".

(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.

[51] 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*[31] the Court of Criminal Appeal approved the statement of Cox J in *R v McInerney*[32] 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*[33] 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 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."

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31 [2009] NTCCA 8.
32 (1986) 42 SASR 125.
33 [2005] NTSC 86.

[52] 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.[34]

[53] In *DD v Cahill*,[35] a 12 year old male appealed against sentences which were said to be manifestly excessive on account of the fact that the magistrate imposed convictions. In that context, Riley CJ made observations as to the effect of the recording of a conviction, which in my view are equally applicable to a 19 year old offender. His Honour referred 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 (even for the young child in that case), the prospect of adverse consequences was real, and that the recording of a conviction remained "a significant act of legal and social censure".[36]

[54] There is a clear benefit to an offender if a court does not record a conviction. Moreover there is a risk of future injustice or disadvantage if a

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[34] 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.

[35] [2009] NTSC 62.

[36] *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].

court does record a conviction. As the Queensland Court of Appeal said in *Briese*[37]:-

> "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."[38]

[55] Counsel for the appellant in the Court of Summary Jurisdiction told the learned magistrate that the appellant had obtained a private investigator's licence in 2010. She explained that he intended to complete a bridging program at Charles Darwin University and to then study Law with a view to joining the police force. His intended career was as a police officer.[39]

[56] It may be noted that, if (having found the appellant guilty) the magistrate had proceeded under s 7(a) *Sentencing Act*, read with s 11(1) *Sentencing Act*, and ordered the release of the appellant on a good behaviour bond without recording a conviction, the appellant's criminal record for that offending would become a "spent conviction" within the meaning of the *Criminal Records (Spent Convictions) Act* at the expiration of the specified period of good behaviour. Under s 11 *Criminal Records (Spent Convictions) Act*, once a conviction becomes spent, the offender is not required to disclose that "spent record" to another person, and any question concerning

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37 (1997) 92 A Crim R 75 at 79, per Thomas and White JJ.

38 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".

39 Transcript of 11 January 2012, p 6.5.

a person's convictions, criminal history or criminal record etc (for example in an application for employment, or an application for a licence) is taken to refer only to a record which is not a spent record. It therefore does not have to be disclosed. However, there is a statutory exception in relation to an application for appointment or employment as a member of the Police Force.[40] If the appellant wished to apply for entry into the Northern Territory Police Force, he would have to disclose his offending. The Northern Territory Police Force could lawfully consider and take into account[41] the offending, notwithstanding the non-conviction disposition. Therefore, given the foreshadowed career path referred to in submissions, the recording of a conviction would have made no difference. The appellant would have been obliged to disclose the non-conviction disposition.

[57] Counsel for the appellant on appeal argued that the learned magistrate should have declined to record a conviction against the appellant. However, the appellant has not established that the learned magistrate did not consider matters which he was bound to consider, or that he took into account irrelevant matters (with the exception of the matter referred to in par [41] above).

[58] I refer to my observations in par [15] and [16] above. Even taking into account the matter referred to in par [41], I am not satisfied that, in

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[40] s 15 *Criminal Records (Spent Convictions) Act.*
[41] Subject to the provisions of the *Anti-Discrimination Act.*

recording a conviction against the appellant, the magistrate erred in the exercise of his sentencing discretion.

[59] Ground 6 must also fail.

(g) Ground 7: The sentence imposed was manifestly excessive in light of the circumstances of the offender and the offending.

[60] The principles which apply to appeals based on manifest excess are well known. An appellate court will not interfere with the sentence unless it is shown that the sentencing judge or magistrate was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge or magistrate has said, or the sentence itself may be so excessive as to manifest error. The presumption is that there is no error. To succeed on this ground, it is incumbent on the appellant to show that the sentence was obviously and not just arguably excessive.[42]

[61] The method by which the many grounds of appeal have been compartmentalised and argued separately has obscured some essential connections. However, I am satisfied that the magistrate erred in the manner identified in par [41] above. I am not persuaded that the sentence imposed by his Honour was manifestly excessive, but I consider that the identified error was such as to justify the intervention of this Court for the purpose of re-sentencing the appellant.

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[42] *Liddy v R* [2005] NTCCA 8 at [15]; see also *Lo Castro v R* [2011] NTCCA 1.

[62] There is no doubt that the appellant's offending was serious, and in this respect I agree with the observations of the learned magistrate as to the characterisation of the offending. In my view, however, having regard to: the absence of prior offending by the appellant; the appellant's youth (which is relevant in itself, but is also relevant to explaining the appellant's poor judgement in involving himself in the 'cover-up' to protect his brother); and the community interest in facilitating the appellant's rehabilitation to the greatest permissible extent, having regard to the important purposes of sentencing other than rehabilitation,[43] a disposition other than a sentence of imprisonment (albeit fully suspended) should be ordered. Even though the sentence of imprisonment imposed by the learned magistrate was fully suspended, s 40(3) *Sentencing Act* provides that a court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the Act. That subsection reflects two principles of sentencing: (1) that imprisonment is a punishment of last resort and (2) the related consideration that committing a further offence during the period of suspension should not produce an unintended consequence.[44]

[63] I allow the appeal in part. Pursuant to s 177(2)(c) *Justices Act* I affirm the finding of guilty and the conviction imposed by the learned magistrate. I

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[43] s 5(1) *Sentencing Act.*

[44] *Dinsdale v R* (2000) 202 CLR 321 at 328 [14] per Gleeson CJ and Hayne J , referring to Western Australian legislation substantially the same as s 40(3) *Sentencing Act* (NT).

quash the sentence of imprisonment imposed by his Honour and would substitute the following order:

> "Pursuant to s 13 *Sentencing Act*, I order that the appellant be released on his giving security without sureties by his own recognizance in the sum of $2,000 that he will appear before the court if called on to do so during the period of 18 months commencing this day, and that he will be of good behaviour for the said period of 18 months."

[64] I will hear counsel on final orders required to give effect to these Reasons.
