CITATION:	*The Queen v JHW* [2021] NTSCFC 1
PARTIES:	THE QUEEN v JHW
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NO:	21946870
DELIVERED:	8 April 2021
HEARING DATE:	23 April 2020
JUDGMENT OF:	Grant CJ, Southwood and Kelly JJ

CATCHWORDS:

SENTENCING – Juvenile offenders – Evidence or mention of prior offences

Question of law reserved for Full Court – If a court finds a youth under the age of 15 guilty of an offence but does not record a conviction, does s 136 of the *Youth Justice Act* preclude the Supreme Court from taking into account the commission of that offence when sentencing that person at a later date.

Youth Justice Act 2005 (NT) s 5, s 45, s 70, s 81, s 82, s 136, s 147

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27, *Comcare v Martin* (2016) 258 CLR 467, *Coverdale v West Coast Council* (2016) 259 CLR 164, *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431, *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468, *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, *R v Gurruwiwi* (2008) 22 NTLR 68, *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, *Taylor v Owners–Strata Plan 11564* (2014) 253 CLR 531, *Thiess v Collector of Customs* (2014) 250 CLR 664, referred to.

REPRESENTATION:

Counsel:

Crown:	T Moses
Defendant:	M Aust with J Lowrey

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Number of pages:	17

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

The Queen v JHW [2021] NTSCFC 1
No. 21946870

BETWEEN:

THE QUEEN

AND:

JHW

CORAM: GRANT CJ, SOUTHWOOD & KELLY JJ

REASONS FOR JUDGMENT

(Delivered 8 April 2021)

THE COURT:

[1] On 15 April 2020, a Judge of the Supreme Court reserved the following questions of law for the consideration of the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT).

Questions:

If a court finds a youth under the age of 15 guilty of an offence but does not record a conviction, does s 136 of the *Youth Justice Act* preclude the Supreme Court from taking into account the commission of that offence when sentencing that person at a later date:

(a) if the Supreme Court is sentencing the person under the provisions of the *Sentencing Act*;

(b) if the Supreme Court is sentencing the person under the provisions of the *Youth Justice Act*; and

(c) if the Supreme Court is sentencing the person utilising the provisions of both the *Sentencing Act* and the *Youth Justice Act*?

[2] On 23 April 2020, following the hearing of submissions on the reference, the Full Court answered those questions as follows:

> **Answers:**
>
> (a) Yes, if the person was an adult at the time of committing the offence for which he or she is being sentenced.
>
> (b) No.
>
> (c) No.

[3] The Court advised that written reasons for these determinations would be delivered at a later date. These are those reasons.

The circumstances in which the questions arose

[4] On 15 April 2020, the offender pleaded guilty in the Supreme Court to one count of aggravated robbery.

[5] At the time the matter came before the Supreme Court, the offender had just turned 14, and was 13 years and 11 months old when he committed the instant offence on 18 December 2019.

[6] The Crown tendered a copy of an Information for Courts and sought to rely in particular on the fact that the offender was on a Good Behaviour Bond for aggravated robbery when he committed the instant offence.

[7] The offender had been dealt with by the courts three times before the present episode of offending.

(a) On 21 March 2019, he committed a number of offences including property damage, being in possession of stolen property and assault with intent to steal. A week later, on 28 March 2019, he

committed further property damage and trespassed on enclosed premises. He was not dealt with for those offences until 27 November 2019. The offences were found proved, but no conviction was recorded.

(b) On 26 June 2019, he committed two lots of property damage, two lots of trespass, unlawful entry and stealing. He was dealt with for those offences on 6 December 2019. Again, the offences were found proved but no convictions were recorded.

(c) On 22 November 2019, when he was 13 years and 10 months old, he was dealt with by Mildren AJ in the Supreme Court for aggravated robbery committed on 25 July 2019 when he was aged 13 years and 6 months. He was released on a bond to be of good behaviour for 12 months without proceeding to a conviction.

[8] In the course of the sentencing proceedings before the Supreme Court, defence counsel objected to the receipt of the Information for Courts, contending that the Supreme Court was precluded by s 136 of the *Youth Justice Act 2005* (NT) from taking into account any of the offences committed by the offender before he was 15 in respect of which no conviction was recorded.

[9] The Crown contended that s 136 of the *Youth Justice Act* does not have that effect.

[10] Section 136 provides:

136 Certain findings of guilt not to be mentioned

(1) If a court finds a youth guilty of an offence but does not record a conviction, no evidence or mention of the offence may be made to, nor may the offence be taken into account by, a court other than the Youth Justice Court.

(2) Subsection (1):

(a) applies whether the offence was committed, or the finding of guilt made, before or after the commencement of this section; but

(b) does not apply if the offence was committed after the youth had turned 15 years of age.

Defence contentions

[11] In the submissions on the reference, counsel for the defence relied principally on the fact that a distinction is drawn in the *Youth Justice Act* between the terms "Court", "Youth Justice Court" and "Supreme Court". It was said to follow that in the operation of s 136 of the *Youth Justice Act*, "a court other than the Youth Justice Court" must necessarily include the Supreme Court.

[12] Section 5 of the *Youth Justice Act* provides the following definition of "Court":

> ***Court*** means the Youth Justice Court as mentioned in section 45 and, if the context requires, includes the Supreme Court exercising its jurisdiction under this Act.

[13] Section 45 of the *Youth Justice Act* states:

45 Continuation and constitution

(1) The Juvenile Court established under the repealed Act is continued in existence as the Youth Justice Court.[1]

1 The repealed Act is the *Juvenile Justice Act*. It contained an identical definition of "Court" in s 3, and an identical provision in relation to the powers of the Supreme Court in sentencing in s 39.

(2) Each Local Court Judge is a Judge of the Youth Justice Court.

(3) The Youth Justice Court is a court of record and has a seal that must be affixed to all process issued out of the Court.

[14] Section 82 of the *Youth Justice Act* refers to the powers of the Supreme Court in sentencing a youth. It provides:

> **82 Powers of Supreme Court in sentencing**
>
> (1) If a youth is found guilty before the Supreme Court of an offence, the Supreme Court may do any of the following:
>
> (a) exercise, in addition to its powers, the powers of the Youth Justice Court;
>
> (b) order that the youth be detained in a detention centre or imprisoned for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult;
>
> (c) remit the case to the Youth Justice Court.
>
> (2) If the Supreme Court makes an order under subsection (1)(b), it may also make any order in relation to that detention or imprisonment that it could make in relation to a sentence of imprisonment under the *Sentencing Act 1995*.
>
> (3) If the Supreme Court finds a youth guilty of murder, the Supreme Court may, despite s 157(2) of the Criminal Code, sentence the youth to life imprisonment or a shorter period of detention or imprisonment as it considers appropriate.

[15] Counsel for the defence submits that s 136 of the *Youth Justice Act* prohibits offences to which the section applies from being taken into account by any court other that the Youth Justice Court. The prohibition is a blanket one and the only exception is the "Youth Justice Court". The section does not use the word "Court" to create the exception to the prohibition, which would have picked up the definition of that term in s 5 to include the Supreme Court when exercising jurisdiction under the *Youth Justice Act*. Nor does it say, "other than

the Youth Justice Court or the Supreme Court exercising the powers of the Youth Justice Court": it specifies the Youth Justice Court alone.

Crown contentions

[16] Counsel for the Crown contended that s 136 of the *Youth Justice Act* must be construed in the context of the statutory scheme, which creates a distinct regime for dealing with youth offenders. That regime is generally more resource- and time-intensive, reports are mandated in certain circumstances, and the sentencing court needs to be much more aware of the personal circumstances and criminal histories of the youths appearing before it. The availability, receipt and consideration of such information is critical to the effective imposition of rehabilitative sentencing orders responsive to the youth's current circumstances.

[17] To that end, s 81(2)(b) and (e) of the *Youth Justice Act* expressly requires the "Court" (which includes the Supreme Court when sentencing a youth)[2] to consider information about the youth which may assist the Court to decide how to dispose of the matter, including "any history of offences previously committed" and "any previous order in relation to an offence that still applies to the youth". This would not be possible in relation to offences which fall within s 136 if the defendant's construction of that section was accepted.

---

2 See definition of "Court": *Youth Justice Act*, s 5.

[18] Section 69 of the *Youth Justice Act* provides that a Court considering imposing a sentence of detention or imprisonment on a youth must ensure that "it is informed as to the circumstances of the youth", and to that end must require a pre-sentence report to be provided to it unless satisfied that it has the information necessary to determine an appropriate sentence.

[19] Section 70(1) of the *Youth Justice Act* provides that a pre-sentence report may set out all or any of a number of matters relevant to the sentencing of the youth, including:

(a) the social history and background of the youth;[3]

(b) the circumstances of other offences of which the youth has been found guilty;[4]

(c) any relevant diversion history of the youth;[5]

(d) the extent to which the youth is complying with any sentence currently imposed on him or her;[6]

(e) family and community views of the youth's offending behaviour;[7] and

(f) risk issues in relation to the youth and further offending.[8]

---

3 *Youth Justice Act*, s 70(1)(b).

4 *Youth Justice Act*, s 70(1)(g).

5 *Youth Justice Act*, s 70(1)(h).

6 *Youth Justice Act*, s 70(1)(i).

7 *Youth Justice Act*, s 70(1)(m).

8 *Youth Justice Act*, s 70(1)(n).

[20] Each of these matters may require reference to offences to which s 136 applies. If the defence contention in relation to the construction of that section were to be accepted, that would preclude mention of those prior offences in the pre-sentence report, which would in turn render the pre-sentence report less than useful and possibly actively misleading. Because the Supreme Court is required to engage in the same intensive rehabilitation-prioritised procedure as the Youth Justice Court when sentencing a youth offender, in order to ensure the Supreme Court has all of the powers particular to that jurisdiction which are conferred by the *Youth Justice Act* on the Youth Justice Court, s 82(1)(a) confers on the Supreme Court "the powers of the Youth Justice Court".

[21] In that context, the Crown contends that s 82(1)(a) is a facultative provision and should be construed liberally to confer on the Supreme Court all of the powers of the Youth Justice Court, including its power to receive evidence that a youth has been found guilty of an offence committed when the youth was under 15 years of age where no conviction was recorded – unencumbered by the prohibition in s 136 of the *Youth Justice Act* against other courts receiving such evidence. That construction is necessary to reconcile the operation of s 136 with the power of the Supreme Court to order and receive information concerning matters falling within 70(1)(g) to (i) and (n) of the *Youth Justice Act*, and more generally, to receive evidence into account where

relevant under s 81(2)(b) and (e).[9] Both powers are necessarily unencumbered by the limitation found in s 136 of the *Youth Justice Act*.

[22] In further support of that proposition, the Crown points out that the construction of s 136 contended for by the defence would lead to a range of anomalous and absurd outcomes. These include:

(a) The Supreme Court is obliged when sentencing a youth to consider the youth's likelihood of reoffending, and his or her offence history and suitability for any rehabilitative sentencing dispositions. If the defence contention is correct, the Supreme Court could not consider evidence of those matters if caught by the terms of s 136 of the *Youth Justice Act*.

(b) When considering sentencing a youth to a term of imprisonment, the Court must order a pre-sentence report unless satisfied that it already has sufficient information necessary to determine an appropriate sentence. That report would ordinarily deal with a range of matters, including any previous findings of guilt, which, on the defence contention, may be prohibited from being mentioned in the court. Moreover, if the defence contention is correct, the Supreme Court might even be precluded from knowing the matters necessary to decide whether it has sufficient information to determine an appropriate sentence.

---

9 Section 147 of the *Youth Justice Act* operates to confer analogous power on the Supreme Court when it is hearing an appeal. This recognises that in deciding an appeal the Supreme Court may need to exercise the same sentencing jurisdiction as the Youth Justice Court.

(c) Evidence of previous findings of guilt might conceivably, in some circumstances, cause the Youth Justice Court to decline to determine a charge summarily under s 56 of the *Youth Justice Act*. If the defence contention is correct, when the charge came to the Supreme Court, it would be precluded from considering those previous findings of guilt.

(d) Although the Supreme Court is obliged to engage in the rehabilitative sentencing exercise required by the *Youth Justice Act*, if the construction urged by the defence was to be adopted that exercise might be impaired or distorted. So, for example, where the Supreme Court deals with a youth by adjourning the matter for a period not exceeding six months under s 83(c) of the *Youth Justice Act* with a view to discharging the youth without penalty if he or she does not commit a further offence during that period (as envisaged in this case), the Supreme Court could not receive or take into account evidence of any offending within the terms of s 136 occurring during the adjournment.

(e) If the defendant's construction were to be adopted, when sentencing a youth for an offence the Supreme Court could not deal with any consequential breach of an order previously made by the Youth Justice Court on a finding of guilt falling within s 136 of the *Youth Justice Act*.[10] What is more, there would be no court

10 Cf *ML v The Queen* [2018] NTCCA 18.

empowered to deal with breaches of Supreme Court sentencing orders imposed for offences within the terms of s 136. That would be because the prohibition in s 136 is not simply against taking offences falling within the section into account on sentencing. It is that evidence of such offences may not be given, and that such offences may not even be mentioned.

(f) For the same reason, a defendant sentenced for an offence within the terms of s 136 of the *Youth Justice Act* by the Supreme Court would be unable to seek reconsideration in that Court under Part 7 if their circumstances changed. Nor could a defendant sentenced by the Youth Justice Court for an offence within the terms of s 136 appeal to the Supreme Court against either the conviction or sentence under s 144 of the *Youth Justice Act*.

[23] The Crown contends that such a result is not required by the legislative text and cannot have been the legislative intention.

Discussion and conclusion

[24] The proper method or approach to the construction of a statute is by "regard to the text of the statute as a whole, and the subject, scope and purpose of the statute and against the legislative history and antecedent circumstances".[11] That consideration may, in appropriate

11 *Coverdale v West Coast Council* (2016) 259 CLR 164 at [21]. See also *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14], [81] and [92]; *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431 at [23], [25], [28], [30] and [34]; *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at [10].

circumstances, involve reference to extrinsic materials to confirm the legislative purpose.[12] The question in the present case is not whether s 136 of the *Youth Justice Act* should be read in anything other than a literal or grammatical way.[13] The question is whether ss 81 and 82 of the *Youth Justice Act* should be read to extend the exception in s 136 to the Supreme Court when it is sentencing a youth offender. The legislative purpose of the scheme in which s 136 appears informs the question whether the reference to the "Youth Justice Court" in that section is limited to that court. This is because the "objective discernment of statutory purpose is integral to contextual construction".[14]

[25] The purpose and operation of s 82 of the *Youth Justice Act* was described by Martin (BR) CJ in *R v Gurruwiwi* in the following terms:

> […] the primary source of the sentencing powers of the Supreme Court is the *Sentencing Act 1995* (NT): *Braun v The Queen* (1997) 6 NTLR 94 at 100. However, s 82(1)(a) of the *Youth Justice Act 2005* (NT) provides that if a youth is found guilty before the Supreme Court the court may, in addition to its powers, exercise the powers of the Youth Justice Court. Speaking generally, therefore, when sentencing a youth, in addition to the powers found in the *Sentencing Act*, the Supreme Court may call upon the

---

12 Those circumstances include to conclude or confirm that the interpretation conforms with purpose described in the extrinsic materials (*Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431 at [30], *Comcare v Martin* (2016) 258 CLR 467 at [46]); and to ascertain purpose upon the identification of a clear ambiguity in the statutory language (*Coverdale v West Coast Council* (2016) 259 CLR 164).

13 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78]; cf *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47].

14 *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23].

> powers of the Youth Justice Court contained in the *Youth Justice Act*.[15]

[26] Similarly, Riley J observed:

> Section 82 of the *Youth Justice Act* provides the powers of the Supreme Court in sentencing a youth who is found guilty before that court of an offence […]
>
> […]
>
> In addition to the sentencing options available to the Supreme Court under the *Sentencing Act* it has available to it the powers of the Youth Justice Court which are found in Pt 6 of the *Youth Justice Act*.[16]

[27] It is significant that s 136 also appears in Part 6 and forms part of the scheme for the sentencing of youths created by the legislation. The intention of that scheme as a whole is that the Supreme Court can do everything that the Youth Justice Court can, and more. That is to say, by virtue of s 82(1) of the *Youth Justice Act*, the Supreme Court has all of its own powers plus all of the powers of the Youth Justice Court, and by virtue of s 136 of the Act, those powers (ie the powers of the Youth Justice Court conferred on the Supreme Court) are not affected by the prohibition in that section. Three particular observations should be made in relation to that conclusion.

[28] First, it may be accepted that s 136 of the *Youth Justice Act* is not a source of power. Rather, it is a prohibition coupled with an exception. However, s 82(1)(a) of the *Youth Justice Act* vests the Supreme Court

---

15 *R v Gurruwiwi* (2008) 22 NTLR 68 at [2]. See also *Anderson v The Queen* [2014] NTCCA 18 at [19].

16 *R v Gurruwiwi* (2008) 22 NTLR 68 at [48]-[49].

with "the powers of the Youth Justice Court". That investment carries with it all the incidents and conditions necessary for the proper exercise of those powers. One such incident and condition is the exception contained in s 136, and its characterisation as an exception rather than a grant of power cannot displace the requirement that a court empowered to sentence a youth offender under the scheme created by Part 6, Division 1 of the *Youth Justice Act* must consider "any history of offences previously committed by the youth" and "any previous order [made] in relation to an offence".

[29] Secondly, the conclusion reached in relation to the purpose and operation of the legislation does not involve reading s 136 of the *Youth Justice Act* as if it contained additional words in the manner discussed by the High Court in *Taylor v Owners–Strata Plan 11564*. The majority of the Court stated that a purposive approach does not permit a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".[17] As stated above, the proper approach to the present question of interpretation is to construe the phrase "the powers of the Youth Justice Court" appearing in s 82(1)(a) of the *Youth Justice Act* to include the power and obligation to consider a youth's full criminal history.

---

17 *Taylor v Owners–Strata Plan 11564* (2014) 253 CLR 531 at [38].

[30] Thirdly, s 136 has been in the *Youth Justice Act* since it commenced. The section was later amended by s 48 of the *Justice Legislation Amendment Act (No 2) 2006*, which came into operation on 3 November 2006. The amendment inserted s 136(2) of the Act in its current form. Otherwise, the section remains unchanged. During the second reading speech for the *Justice Legislation Amendment Act (No 2) 2006* on 30 August 2006, the Attorney-General described the intention of the amendment in the following terms:

> Section 136(2) is amended to clarify that it applies whether the findings of guilt of a youth who has turned 15 at the time were made before or after the commencement of the Act. Section 136(2) was a new provision that provides that the unrecorded conviction of a youth can be taken into account by any court if the offence resulting in the finding of guilt was committed after the youth turned 15 years of age. For removal of a doubt that has been raised, the amendment clarifies that from the date of the commencement of the Act, mention can be made in an adult court to the criminal history of findings of guilt where the offence was committed after 15 years of age, and whether those findings of guilt were made before or after the commencement of the Act.[18]
>
> (Emphasis added)

[31] The purpose of s 136 of the *Youth Justice Act* is to give people who have a history of committing criminal offences when they were under 15 years of age, for which no conviction was recorded, the benefit of such a history not being permitted to be raised in an adult court. That purpose extends beyond sentencing and criminal cases. For example, it limits the power of a civil court to receive evidence under Part 3.5 of

---

18 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 August 2006, 2964 (Peter Toyne, Attorney-General).

the *Evidence (National Uniform Legislation) Act 2011* (NT). The prohibition recognises the reduced moral culpability of offenders under the age of 15 years, their capacity for rehabilitation, and the importance of not stigmatising such young offenders who have not been convicted of a criminal offence so their prospects of rehabilitation are enhanced. The purpose of s 136 of the *Youth Justice Act* is not to preclude a court when sentencing a youth from taking into account the complete history of offences previously committed by the youth. For the reasons which have been described above, that information is important when determining a sentencing disposition which recognises the needs of the youth and at the same time appropriately holds the youth accountable for the offending conduct.

[32] When regard is had to the context in which s 136 of the *Youth Justice Act* appears, and the purpose of both that section and the provisions for the sentencing of youths generally, it is plain that the result contended for by the defence could not have been intended. The section was not intended to, and on proper construction does not, fetter the ability of the Supreme Court to carry out its functions, including the functions and duties conferred on it by the *Youth Justice Act* in sentencing youths. Rather, the intention and operation of the provision is to give defendants who had been found guilty of an offence or offences to which s 136 applies the benefit of having no mention of such offences made in legal proceedings once they have reached the age of majority.

[33] The defence acknowledges that the construction advocated by the Crown in many respects makes perfect sense, and would ultimately operate for the benefit of a youth offender, but says that questions of construction are not answered simply for the purpose of achieving a pragmatic result. The defence contends that the construction favoured by the Crown effectively involves rewriting s 136 so that the term "Court" is substituted for the term "Youth Justice Court" or the words "or the Supreme Court exercising the powers of the Youth Justice Court" are added at the end of the subsection. For the reasons given, we do not agree. The construction contended for by the Crown simply requires a recognition that what is conferred on the Supreme Court by s 82(1) is all of the powers of the Youth Justice Court – and that the powers of the Youth Justice Court so conferred are not encumbered by any prohibition under s 136.

———————————