CITATION:	*CQH v Rigby & Ors* [2025] NTSC 15
PARTIES:	CQH v RIGBY, Kerry Leanne and KIRBY, Paul Michael and FIRTH, Justin Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	LCA 18 of 2023, LCA 19 of 2023, LCA 20 of 2023
DELIVERED:	31 March 2025
HEARING DATES:	7 July 2023
JUDGMENT OF:	Blokland J

CATCHWORDS:
CRIMINAL RESPONSIBILITY – immature age – two different sections of the *Criminal Code* relevant to specific charges – capacity to know that youth ought not do the act – knowledge of wrongness of act – presumption against capacity – whether presumption discharged on evidence – appeal allowed.

Statutes
Criminal Code ss 212; 218(1); 241(1); 38(2); 43AQ.
Evidence (National Uniform Legislation) Act (NT); s 144
Weapons Control Act s 8(2)
Youth Justice Act; s 51

(A Minor) v Director of Public Prosecutions [1996] AC 1; *BDO v The Queen* (2023) 277 CLR 518; *Gattellor v Westpac Banking Corp* [2004] HCA 6; *KG v Firth* [2019] NTCA 5; *M v The Queen* (1994) 181 CLR 487; *R v F* [1998] QCA 97; *RH v Director of Public Prosecutions (NSW)* [2024] NSWCA 305; *Rigby v ND* [2022] NTSC 51; *RP v The Queen* (2016) 259 CLR 641; *Rye v Western Australia* [2021] WASCA 43; cases referred to.

REPRESENTATION:

Counsel:

Appellant:	C Dane
Respondent:	C McKay

Solicitors:

Appellant:	Territory Criminal Lawyers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO2505
Number of pages:	43

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

CQH v Rigby & Ors [2025] NTSC 15
LCA 18 of 2023, LCA 19 of 2023
& LCA 20 of 2023

BETWEEN:

CQH
Appellant

AND:

KERRY LEANNE RIGBY
First Respondent

AND:

PAUL MICHAEL KIRBY
Second Respondent

AND:

JUSTIN ANTHONY FIRTH
Third Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 31 March 2025)

Background

[1] This is an appeal against findings of guilt made in the Youth Justice Court on 28 February 2023 in relation to Files 22227802, 22228429 and 22233809. The appellant was found *not guilty* on File 22215901.

[2] The facts were not in dispute across the four files. The sole issue was whether, by reason of *immature age*, the appellant was excused from criminal responsibility. At that time, the Youth Justice Court was required to consider both ss 38 and 43AQ. Section 38 was in a different format to the current s 38A.

[3] On the day of the hearing, 12 of the 16 files which were before the Youth Justice Court were withdrawn.

[4] The appellant was found guilty of the following:

File 22227802: Assault with intent to steal, with circumstances of aggravation. The date of the offending was 8 September 2022, charged under s 212 of the *Criminal Code*.

File 22228429: Unlawfully use a motor vehicle. The date of the offending was 14 September 2022, charged under s 218(1) of the *Criminal Code*.

File 22233809: Without lawful excuse use an offensive weapon. All offences on this file were committed on 31 October 2022, charged under s 8(2) of the *Weapons Control Act*. Further, intentionally or recklessly cause damage to property (two counts), charged under s 241(1) of the *Criminal Code*.

[5] The offence the appellant was found *not guilty* of was the first file in time, File 22215901. In that matter, it was alleged he had assaulted a welfare

worker by stabbing the worker with a penknife causing, on the agreed facts, a minor shoulder injury.

[6] The allegation which formed the basis of the charge on File 22227802 was that the appellant threatened a taxi driver with a hammer and attempted to rob him. The charge on File 22228429 concerned the appellant taking a car while the owner had left the car to lock a gate. The allegations which were the basis of the charges on File 22233809 were that the appellant used a hammer at a service station to threaten the victim, an employee, and then damaged a glass door. He then went to other premises (Pizza King) and used the hammer to damage another glass panel.

[7] Exhibit P1, which is also before this Court set out the agreed facts. The exhibit was substantially amended to remove references to the facts which were relevant to the withdrawn files. The amendments are somewhat confusing. The facts relevant to File 22215901,[1] were crossed out. That file proceeded to hearing in the Youth Justice Court and as above, the appellant was acquitted. For File 22233809, the facts are set out twice in Exhibit P1. Those facts are relevant to three individual charges on that one file.[2]

[8] File 22233809 was the last file in time. Section 43 AQ (children over 10 but under 14) in Part IIAA of the *Criminal Code* applied to two of the charges on

1 [48]-[56] of Exhibit 1.

2 Exhibit 1 [79]-[89] is in identical terms to [106]-[116].

that file. The balance of the charges came under s 38(2) (Immature Age) within Part II of the *Criminal Code*.

[9] Section 38 of the *Criminal Code* at the time provided:

> **38 Immature age**
>
> (1) A person under the age of 10 years is excused from criminal responsibility for an act, omission or event.
>
> (2) A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.

[10] Section 43AQ of the *Criminal Code* provides:

> **43AQ Children over 10 but under 14**
>
> (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is one of fact.
>
> (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.

[11] Section 43AQ applies to all Schedule 1 or "declared offences". Section 43AQ has been held to codify the common law doctrine *doli incapax*.[3]

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3 *KG v Firth* [2019] NTCA 5 relying on *RP v The Queen* (2016) 259 CLR 641 at [9].

[12] To rebut the *doli incapax* presumption, the prosecution must adduce 'evidence that the child knew that it was morally wrong' to commit the offence under consideration.[4] Awareness of 'moral wrongness' has been held to be distinguished from awareness that the conduct is 'merely naughty or mischievous'. That approach to distinguish 'moral wrongness' from naughty or mischievous conduct is also evident in some Griffith Code jurisdictions as stated in *Rye v Western Australia* ('*Rye*').[5]

[13] As pointed out by counsel for the appellant, there have been divergent views between Griffith Code jurisdictions on the approach to be taken. While *Rye* assimilated the common law test to the Code which meant that moral wrongness was distinct from conduct that is 'naughty, mischievous or rude',[6] the Queensland CCA rejected such an approach.[7] While confirming that all that is required under the *Criminal Code* (QLD) is evidence 'establishing a capacity to know that he ought not to do the act',[8] the approach taken elsewhere which differentiates between a child's understanding of what they 'ought not do' as opposed to whether something was naughty or mischievous was rejected.[9]

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4 *RP v The Queen* (2016) 259 CLR 641.

5 [2021] WASCA 43 at [51]; 288 A Crim R 174.

6 *Rye* [2021] WASCA 45 at [51].

7 *R v F* [1998] QCA 97 ('*R v F*').

8 *R v F* at 160.

9 In part adopted in *Rigby v ND* [2022] NTSC 51 at [36].

[14] On the approach to be taken to s 38(2), it's clear that since *BDO v The Queen*[10] the Griffith Code equivalents require proof of the *capacity* to know as distinct from proving *actual knowledge*.[11] The plurality said that in many cases a capacity to know will necessarily mean a child has actual knowledge. This question must be determined on the facts of the relevant case. The correct approach to the application of s 38(2) is directed to the 'capacity of the child to know or understand the wrongness' of the conduct. This may be contrasted with s 43AQ which requires proof of *actual knowledge* of the moral wrongness of the conduct.

[15] Observations made by the plurality in *BDO* also confirmed what was said in *RP v The Queen*:[12]

> The rationale for the presumption at common law, as explained in *RP v The Queen*, is that a child under 14 years of age is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong, and therefore lacks the capacity for *mens rea*. The rationale for the presumption encompassed in s 29 may be taken to be the same.
>
> At common law the presumption may be rebutted by evidence that the child "knew that it was morally wrong to engage in the conduct that constitutes the physical elements of the offence." It is evident from the reasons of the plurality in *RP v The Queen* that what is spoken of is the child's actual knowledge. The Code states that the presumption may be rebutted by evidence of the child's "capacity to know that [they] ought not do the act or make the omission." (footnotes omitted)

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10 (2023) 277 CLR 518 ('*BDO*').

11 *BDO* at [18].

12 (2016) 259 CLR at 649.

[16] In terms of confirming a similar approach to the common law test of moral wrongness, the Court said:[13]

> The requirement of the common law that it could be shown that the child had knowledge of the moral wrongness of an act or omission, before the presumption can be rebutted, is not new. Drawing on what Bray CJ discussed in *R v M*, the plurality in *RP v The Queen* held that the nature of the knowledge on the part of the child necessary to rebut the presumption is that an act is wrong according to the standards or principles of reasonable people. The standard, obviously enough, is that of an adult person. The knowledge is the wrongness of the act as a matter of morality, not as contrary to the law. Because it is knowledge of a child it is necessary to prove knowledge of a serious wrongness, as distinct from mere naughtiness.

[17] On adopting what was said in *RP* concerning the proof required, the Court said:[14]

> The plurality in *RP v The Queen* went on to say that what suffices to rebut the presumption that a child defendant is doli incapax will vary according to the nature of the allegation and the particular child. No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. There needs to be evidence from which an inference can be drawn, beyond reasonable doubt, that the child's development is such that they knew it was morally wrong, in a serious respect, to engage in the conduct. The development in question is the intellectual and moral development of the child.

[18] On the difference between 'knowledge' and 'capacity' to know:[15]

> Section 29(2) does not use the term "knowledge" in its requirement as to what the prosecution must prove. It states that it must be proved

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13 *BDO* at [13].

14 *BDO* at [14].

15 *BDO* at [15].

> that "at the time of doing the act or making the omission" the child "had capacity to know that [they] ought not to do the act or make the omission". There is clearly a difference between what is meant by a person's capacity to know and their knowledge. The former has regard to the ability to understand moral wrongness, the latter to what in fact they know or understand. Whether the difference is great when applied to the circumstances of a particular case is another matter.

[19] In terms of the sufficiency of evidence to rebut the presumption including disability or lack of disability the Court said:[16]

> What will be sufficient to rebut the presumption in s 29(2) beyond reasonable doubt will vary from case to case. It will depend on the nature of the allegations and the child. It may, however, be that much of what was said in *RP v The Queen* about matters of proof is relevant to the question of a child's capacity to know or understand that the act in question is morally wrong. In the first place, wrongness is expressed by reference to the standard of reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child standard of naughtiness. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development. It may be added that there may be a disability from which the child suffers which affects the capacity to know or understand. Such a disability may be a factor which is relevant, but the lack of disability - or proof that a child is of "normal" mental capacity for their age - will clearly not be sufficient to prove the capacity to know or understand. (footnotes omitted)

[20] The Court said to undertake the task of determining capacity, it was necessary for the prosecution to point to evidence from which an inference could be drawn beyond reasonable doubt that the appellant had to requisite capacity at the time the specific act is said to have occurred.[17]

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16 *BDO* at [23].

17 *BDO* at [52], citing *RP* at [9] and *RYE v Western Australia* (2021) 288 A Crim R 174 at [55].

[21] Before making a finding of guilt, the Youth Justice Court was required to be satisfied, for offences dealt with by reference to s 38(2), that the appellant had the capacity to know that his conduct was morally wrong in the sense described in *BDO* and *RP* and for offences dealt with under s 43AQ, that the appellant *knew* it was morally wrong in the same sense.

[22] In fairness to the Youth Justice Court and counsel who appeared, *BDO* had not been decided before the hearing in this matter. Some of the cases which were relied on by the Youth Justice Court, properly at the time for certain propositions[18] must now be read down in the light of *BDO*, which also affirmed the approach to proof taken in *RP*.

[23] The grounds of appeal contend the Youth Justice Court incorrectly stated the relevant test under s 43AQ of the *Criminal Code* (relevant only to File 22233809); failed to afford procedural fairness by taking judicial notice "that he had been arrested after each of the offences" when such a finding was made without notice or opportunity to be heard, and the finding that the presumptions against criminal responsibility created by ss 38(2) and 43AQ were properly rebutted was unreasonable and/or could not be supported by the evidence.

18 *Rigby v ND* [2022] NTSC 51.

Proceedings in the Youth Justice Court

[24] The evidence before the Youth Justice Court was the Agreed Facts,[19] a Court Report made under s 51 of the *Youth Justice Act*,[20] and a confidential Psychological Report[21] by Senior Clinician, Ms Melanie Moore, with agreed redactions.

[25] Counsel for the prosecution in the Youth Justice Court made the following submissions on the evidence with reference to the facts. On File 22215901, the appellant slapped the victim, who was his carer. The victim told the appellant that what he did was wrong and asked him not to do it again. This caused the appellant to get angry and abuse the victim/carer.[22] The slap took place without provocation, simply after the victim/carer moved the car they were both in. There was no reason for him to be angry. The appellant had the capacity to know the slap was wrong, he was told it was wrong but still became angry again and started to abuse the victim. The victim became aware the appellant had a knife, asked the appellant about it, but the appellant denied having it. After being requested to get out of the car, the appellant went to the car window, produced a pen sized knife and stabbed the victim to the right shoulder, causing, on the facts, a very small wound.

[26] On File 22227802, the count of assault with intent to steal while armed with an offensive weapon, the facts in brief were the appellant approached the

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19 Exhibit 1.

20 Exhibit 2.

21 Exhibit 3.

22 *Police v CH*, Youth Justice Court, 28 February 2023 at 11.

victim taxi driver and asked for a lift to his grandmother's house. At another location the co-offender entered the taxi minibus. On arrival at the destination the appellant and co-offender left the minibus to obtain money from the grandmother for the fare. The appellant returned to the minibus and asked to be taken to an ATM. The victim told him to get out of the minibus. The appellant climbed to the rear of the bus and the victim followed so he could remove the appellant. When the appellant left the minibus he produced a hammer and said "give me your money right now". The co-offender took the hammer and began to swing it. The victim closed the door of the taxi. The appellant was arrested the next day.[23]

[27] Counsel for the prosecution in the Youth Justice Court emphasised that the appellant and the co-offender had to be physically removed from the taxi when they were asked to get out. The taxi driver used his legs to stop them getting back into the taxi. He made it clear he did not want them in the taxi. It was then that the appellant offended. It was submitted that the progressive actions by the taxi driver by using his legs and closing the door, should have made it clear to the appellant that the driver did not want to take him to an ATM or to have him present in the taxi.[24]

[28] On File 22228429, unlawful use of a motor vehicle, in brief, the facts were that the appellant was present in the vicinity of the Palmerston Medical Centre. An employee parked his car, walked back to lock the gate, but before

23 Exhibit 1, [69]-[77].

24 *Police v CN*, Youth Justice Court, 28 February 2023 at 13.

he could lock it, the appellant walked past him and got into the driver's seat. He pushed the start button and drove towards the Oasis Shopping Centre. He was arrested later that same day. He told police where the car was parked. Counsel for the prosecution submitted the appellant knew he had stolen the vehicle as he told police of the location of the car was so they could retrieve it. The carpark has a gate with a lock for keeping cars safe and it was submitted the appellant had the capacity to know the carpark had a lock to stop people taking cars.[25] The appellant was 13 years old at the time of that offending.

[29] The facts in relation to the charges on File 22233804, in brief were that the appellant went to United Petroleum Casuarina. He went into the store, picked up a bottle of drink and attempted to leave. An employee locked the exit doors, spoke to him and reclaimed the drink. The appellant was directed to leave the store. He stepped out, removed a hammer from his pants, held it up and threatened the employee. The victim picked up an object and threatened the appellant who ran away. The appellant returned with a hammer and smashed a glass panel of the sliding door. He ran away, returned and smashed the glass again, four more times. Shortly after, he attended Hibiscus Shopping Centre with the hammer and struck a glass panel at Pizza King. He then kicked the panel. He caused a small hole and reached in and attempted to

25 *Police v CN*, Youth Justice Court, 28 February 2023 at 13.

unlock the door but was not successful. He was arrested at his home on the same day. The appellant was 13 at the time of that offending.[26]

[30] Counsel for the prosecution submitted the appellant had the capacity to know the offending was wrong because there were clear signs his conduct was wrong. Those signs included the fact the Hibiscus Shopping Centre was locked at the time; hence he knew he had no permission to try to enter the shopping centre. The bottle of drink he attempted to take had been retrieved.[27]

[31] Counsel for the prosecution drew attention to the s 51 Report which recorded the appellant had a history of substance abuse and that he had been to the Royal Darwin Hospital Accident and Emergency Department on three occasions with drug induced paranoid delusions. A paediatrician agreed he should try medication for ADHD. He had started smoking weed and did not want to go to school. Counsel submitted the appellant had "made a choice to smoke weed and he made a choice not to attend. He's got the capacity to make choices. Whether they're right or wrong he has got the capacity to make choices".[28]

[32] Attention was also drawn to comments in the s 51 Report that he is a "smart young person" and "highly energised, willing and able to engage in programs". However, counsel for the prosecution also submitted to the Youth

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26 Exhibit 1, [79]-[89].

27 *Police v CN*, Youth Justice Court, 28 February 2023 at 15.

28 *Police v CN*, Youth Justice Court, 28 February 2023 at 16.

Justice Court the appellant made the choice not to go to school and "develop[ed] substance abuse".[29]

[33] It was also submitted that given the appellant's interest in creative activities and in sports, he had the scope to make decisions and choices. He was suspended for three days in April 2022 for assaulting a child at school and many attempts were made to re-engage him at school, but he had told service providers he did not have an interest in attending school. This level of interaction was said to show he had the capacity to let people know what he wants to do.[30]

[34] In terms of the psychological report (Exhibit 3) referencing the appellant's cognitive ability, attention was drawn to a portion of the report:[31]

> The result of [CN's] cognitive assessment suggests he does not have an intellectual disability. Rather, his ADHD symptoms are the primary factor impacting on his functioning.

[35] The point was made that there was no diagnosis of an intellectual disability, although there was recognition that ADHD impacts his functioning. Reference was also made with respect to an intention to engage occupational therapists to implement self-regulation strategies and accessible supports at home and school. Counsel submitted there was no report of any cognitive barriers to prevent the appellant's capacity to know what he did was wrong.

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29 *Police v CH*, Youth Justice Court, 28 February 2023 at 15-16.

30 *Police v CH*, Youth Justice Court, 28 February 2023 at 16.

31 Ibid.

[36] Attention was drawn to information in the psychological report that the appellant had attended 13 different schools, he had different attendance records from 67.3 percent up to 96 percent which later dropped to 35.6 percent. As a result of the ADHD, attendance and concentration levels, the appellant required substantial adjustments.

[37] Reliance was placed on *Rigby v ND* ('*ND*')[32] which states, after discussion of less serious examples of offending that it would not make sense for the prosecution to have to prove:

> [T]he child had the capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults in circumstances where the conduct may not be seriously wrong by such standards.

[38] From that part of *ND*, counsel for the prosecution submitted the prosecution case did not rely on "seriously wrong" but rather "capacity to know what he did was wrong".[33]

[39] In further reliance on *ND*, it was submitted that the low academic standard and poor school attendance does not mean the appellant did not know the difference between right and wrong or did not have the capacity to know what he did was wrong.

[40] It was emphasised that the prosecution relied on an assessment of the appellant's capacity to know, rather than to know that his conduct was

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32 [2022] NTSC 51 at [36].

33 *Police v CH*, Youth Justice Court, 28 February 2023 at 17.

seriously wrong. In summary, the prosecutor said the submission was that the appellant did not have a cognitive impairment and the ADHD did not mean he did not know what was right or wrong and that his actions showed he was making the choice to do the wrong thing.[34]

[41] No submission was made along the lines of *RP* and *BDO*, the latter authority of course was not yet decided, to the effect that the capacity to know the conduct was wrong was according to the standards or principles of reasonable adults, and seriously wrong according to morality, not as contrary to the law.

[42] In the Youth Justice Court, counsel for the appellant submitted the prosecution had adduced no evidence to rebut either presumption in ss 38 or 43AQ. The appellant's age was highlighted, that he was 12 at the time of the first offending in time and 13 for the balance of the offending. It was emphasised that the fact that no intellectual impairment was present did not overcome the presumption *against* capacity. In this instance the presumption must be considered against a child with ADHD.[35] To find that the appellant was normal and therefore has the capacity does not address the presumption. The Youth Justice Court was reminded of observations in *RP v The Queen* ('*RP*')[36] to the effect that no matter how obviously wrong the conduct is, the presumption cannot be rebutted merely as an inference from engaging in the conduct. To overcome the presumption in s 43AQ the prosecution must

34 *Police v CH*, Youth Justice Court, 28 February 2023 at 20.

35 Ibid.

36 (2016) 254 CLR 641.

adduce evidence the child knew the conduct was morally wrong as distinct from merely naughty or mischievous.[37]

[43] In respect of s 38(2) and the decision in *ND* which followed the Queensland Court of Appeal, on the question of capacity, it was submitted there was nothing before the Youth Justice Court to rebut the presumption on capacity to know the conduct was wrong to the requisite standard. The prosecution must point to evidence from which it can be inferred that the child's development was such that they knew it was morally wrong to engage in the conduct. It was submitted to be more likely on the material before the Court that the appellant was not raised in a manner to suggest that he knew his conduct was wrong in that sense.

[44] Reference was made to the information in the psychological report that the appellant had been the subject of 51 child protection notifications between 2011 and 2022. Eleven were investigated and two substantiated. He had multiple out-of-home care placements over a 10-year period which commenced when he was three years old. There was no evidence before the Court about what happened in those homes in terms of moral development in the context of "an incredibly tumultuous and incredibly difficult upbringing with a lot of trauma which has no doubt led him to engage in the criminal justice system."[38]

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37 *Police v CH*, Youth Justice Court, 28 February 2023 at 21.

38 *Police v CH*, Youth Justice Court, 28 February 2023 at 20-22.

[45] It was submitted that as a result of the appellant's background, his capacity to understand the wrongness of the offending was lowered. The psychological report also found he was likely to be behind his peers academically and socially. In all of the circumstances, including his low attention span, the ADHD, being at a primary school level academically indicated the presumption was not discharged. In the circumstances, the conduct itself was not sufficient as if it was, the presumption would not exist.[39]

[46] The learned Youth Justice Court Judge delivered the decision *ex tempore*.

[47] The Judge acknowledged the majority of charges fell to be decided under s 38 of the *Criminal Code*. Charges 2 and 3 on File 2223809 were to be decided under s 48AQ. The Judge remarked the decision of *ND* would be relied on, as well as *RP* in terms of the evidence which may be considered to rebut the presumption. The appellant was 12 and 13 throughout the offending period.

[48] After summarising the prosecution arguments, the Judge said there must be some evidence about his background. It was acknowledged that learning and maturity may point to capacity. The Judge accepted there was no evidence as to the appellant's response to people in authority in his life or to carers. There was no evidence of discussion around his actions from people in authority or carers.[40]

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39 *Police v CH*, Youth Justice Court, 28 February 2023 at 22.

40 *Police v CH*, Youth Justice Court, 28 February 2023 at 24-25.

[49] One of the Judge's considerations which does not sit well with *BDO* and *RP* is the remark: "While he has a diagnosis of ADHD there is nothing in the reports which says he does not have the capacity to know that he ought not act in a particular way." It is unclear whether this was a summary of the prosecution submissions or was adopted by the Judge. In the light of what was said in *BDO* and *RP*, the approach should be to consider whether the reports show that as a child with ADHD and other difficulties, he has the capacity to understand the conduct was morally wrong in the sense described in *BDO* and *RP*.

[50] The Judge acknowledged that the only evidence about the appellant's background was in the two reports before the Court. The s 51 Report confirmed a childhood which featured neglect, medical neglect, domestic violence and substance abuse. There was no evidence of counselling the appellant in relation to his offending; however, "judicial notice" would be taken of the fact that he had been arrested after each of the episodes of offending. It should be understood, as pointed out in this Court by counsel for the appellant, that the appellant was not arrested after the first set of offending on File 22215901, in the sense of being arrested immediately. He was apparently arrested later for that offending but unlike the other offences, according to the facts, he was not arrested at the time of the offending.

[51] The Judge remarked that the psychological report confirmed that while the appellant had ADHD, he did not have a cognitive impairment but had an

inability to concentrate on task for more than 15 minutes, yet up to 40 minutes for activities he enjoys such as rugby.

[52] It was noted he was described in the s 51 Report as "a smart young man but because of his lack of education and inability to concentrate for lengthy periods of time, performance of academic tasks is at a lower standard than would be expected in someone of his age."

[53] The Judge was satisfied beyond reasonable doubt the appellant had the capacity to learn from experience and make an assessment as to his own actions which was said to be reflected in the psychologist's report where the appellant made an assessment of his drawings not being perfect. Further, the Court assessed he was able to understand the consequences of his own choices, for example taking his ADHD medication which he accepted helps him to concentrate. The Judge also noted he wiped off graffiti when asked to do so, indicating some understanding of what was wrong or seeking approval.

[54] The Judge acknowledged that with respect to each occasion the question was whether the appellant had the capacity to know he ought not do what he did, taking into account his personal circumstances and the circumstances of the offending.

[55] The Judge acknowledged it is not enough to consider the presumption only on the basis that objectively his actions were clearly wrong and he ought not to

have undertaken them. “However, the circumstances on each occasion are relevant.”[41]

[56] On the first file in time, File 22215901, assault a worker and possess a weapon, the Judge noted there was no evidence the appellant had any other contact with the criminal justice system before that offending or whether he had been violent before. There was no evidence he had been told not to be violent towards his carer. The evidence was to the contrary given his experience at that time included exposure to domestic violence where it could be concluded people around him had turned to violence when frustrated and angry. There was no evidence in his background that would have led to a capacity to understand that he should not turn to violence when angry. He was told by the victim that it was wrong and was asked to hand over the knife. As he was already in a heightened state and may have acted on impulse when he offended, the Judge concluded that he did not have the learned experience which would give him the capacity to know what he should not do. On that reasoning it was concluded the presumption could not be rebutted.

[57] The Judge differentiated the subsequent offending, stating it could not be said the appellant did not have “learned experience”. It was noted again he had been arrested on each occasion and those arrests “had learning experience

41 *Police v CH*, Youth Justice Court, 28 February 2023, 25-26.

which would have built on his capacity to know what he ought not to do".[42] The Judge also noted that for two files the appellant was not in company.

[58] The conclusion was that save for the first file in time, File 22215901, there was sufficient evidence to rebut the presumption. The appellant knew what he was doing was wrong. The conclusion the appellant had the relevant capacity was based on the evidence in the agreed facts and the "ability of the defendant to learn from experiences as evidenced in the psychologist's report".

Considerations on appeal

[59] Ground 3 will be discussed first: That the finding that the presumptions against criminal responsibility were properly rebutted was unreasonable/or could not be supported by the evidence.

[60] The basis for such a ground is set out in *M v The Queen*.[43] To succeed on this ground, the appellant must show the finding was not open on the evidence. In my view it was not. The few indications relied on by the Youth Justice Court taken from the reports were not productive of proof of capacity. The indications relied on lacked probative to force. Very little changed between the appellant being in custody before the first offending in time and subsequent episodes of offending.

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42 *Police v CH*, Youth Justice Court, 28 February 2023 at 26.

43 (1994) 181 CLR 487.

[61] As this case proceeded on the papers without oral evidence being called, the cautions usually required which privilege the first instance fact finder have little application. Reasonable doubt as to capacity exists. In any event, as above the test for capacity under *BDO* and *RP* was not applied to either the capacity to know or to know. The moral wrongness of the offending was not assessed. 'Wrongness' is expressed by reference to the standard of reasonable adults, from which the moral dimensions are assessed. Similarly, for those offences governed by actual knowledge under 43AQ the same was not applied.

[62] As illustrated by the outline of arguments before the Youth Justice Court, the proceedings were conducted as though the principal question with respect to rebutting the presumption was simply whether the appellant had the capacity to know the offending acts were wrong. Counsel for the prosecution submitted "we are not pitching the reliability of our submissions on seriously wrong. But we are pitching our argument to the capacity to know that what he did was wrong."[44] The thrust of the submissions put to the Youth Justice Court was that the appellant did not have a cognitive impairment, he has ADHD which does not mean he does not know what's right or wrong and his actions show he knows what is right and wrong.

[63] This was partly correct in terms of the inquiry being one of *capacity* rather than *actual knowledge* for the charges covered by s 38(2). However, it was an

44 *Police v CH*, Youth Justice Court, 28 February 2023 at 17.

error to suggest that a lack of cognitive impairment somehow went towards discharging the onus. Similarly, the submission that the presence of ADHD with no indication of how it impacts on the capacity to understand the moral significance of the offending in the sense outlined by the High Court in *BDO* and *RP* contributed to showing the appellant had the relevant capacity was not the correct approach. It was capacity in the light of the known ADHD and other relevant factors which was important.

[64] The submissions made by counsel for the prosecution were largely accepted by the Youth Justice Court. The approach adopted led to a somewhat off kilter approach to the question of capacity. The presumptions in s 38(2) and 43AQ are presumptions *against* capacity. The presumption cannot be rebutted on an assumption that a child is of 'normal' mental capacity for their age.[45] The presumption operates in any event, in respect of a child without any cognitive or developmental difficulties. To use a finding of no quantitative disability to assist with proof of capacity is an error and tends to reverse the onus of proof. It is apparent this influenced the approach by the Youth Justice Court:[46]

> The submissions of the prosecution were that as the defendant does not have cognitive impairment as assessed by Ms Hughes and has the ability to make choices for himself as demonstrated by him choosing not to attend school, for example.

45 *BDO* at [23], citing *(A Minor) v Director of Public Prosecutions* [1996] AC 1 at 33.

46 *Police v CH, Youth Justice Court*, 28 February 2023, at 24.

> While he has a diagnosis of ADHD there's nothing in the reports which says he does not have the capacity to know what he ought, that he ought not act in a particular way.

[65] It may be that the Youth Justice Judge was merely referencing the prosecutor's submissions. However, the reasons for finding guilt save for the first in time File 22215901 return to facts that tend to be on the periphery of the discussion of the ADHD and its lack of impact and not the fundamental question of capacity. Substantial weight was placed on the fact the appellant was arrested for each subsequent episode of offending after the first episode.

[66] Before the Youth Justice Court substantial reliance was placed upon the facts of offending by counsel for the prosecution. While in some cases there may be, because of the particular circumstances, reasons to consider whether the facts shed light on the relevant capacity, the High Court has rejected that the presumption could be rebutted merely as an inference from the conduct:[47]

> No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of the act or those acts.

[67] Counsel for the respondent on appeal submitted the Court should consider all of the interventions which had taken place with respect to the appellant, along with some indications of capacity said to arise from the facts of the offending. It was accepted the offending alone could not determine the question. It is acknowledge the interventions should be considered but in

47 *R v P* at [9].

most instances, it is not known what took place during or as a consequence of any arrest. The facts are silent on that issue.

[68] It was pointed out the first intervention of significance was the arrest in relation to the first episode of offending which did not take place immediately after that offending and for which the appellant was acquitted on File 22215901. He was arrested in the intervening period. This fact was implied in the reports. No facts about the arrest were before the Youth Justice Court. Counsel for the respondent pointed out that given the appellant was already on bail at the time of the offending on File 22227802 which was five months after the offending on File 22215901, he must have been arrested for the earlier offending.

[69] Counsel for the respondent submitted that there were matters in the facts of File 22227802 which the Youth Justice Court correctly took into account in determining whether the presumption had been discharged. It was submitted that the appellant understood a request accompanied by threats with a hammer might get him what he wanted and went some way towards showing his understanding of the significance of his overall conduct and went some way to showing capacity.

[70] Counsel emphasized he was arrested on the day of that offending and six days later committed the offences while on bail for File 22228429. With respect to the unlawful use of the motor vehicle it was submitted he demonstrated

forethought or a strategy as he used the opportunity of the driver getting out of the car to take the car.

[71] On appeal the Court was told the appellant was bailed and on 31 October 2022 committed the offences on File 22233809, six weeks after the first incident involving a court. Counsel for the respondent drew attention to the fact it was not the first time the appellant had contact with police for being in trouble for using a hammer. The continuing offending showed that he was prepared to continue with criminal conduct, even after he was challenged and then attended the second premises as above.

[72] The respondent acknowledged the High Court in *BDO* reiterated that the presumption was *not* a "low standard"[48] and submitted it was evident in the Youth Justice Court's findings in relation to the first offending in time on File 2221501 that the learned Judge understood that the presumption was not a "low standard". Attention was also drawn to the fact that courts have recognised that in relation to some offences, the presumption might be less difficult to overcome than others. For example, a child is more likely to understand the seriousness of theft as it will likely concern values that the child is directly concerned with in relation to their own possessions.[49]

[73] The respondent submitted the arrests were capable of properly informing the Youth Justice Court's decision. Given the position of authority held by police

48 *BDO* at [48].

49 *RP* at [12].

and given the appellant's young age, it was submitted to be appropriate for the Youth Justice Court to take into account the involvement of police in relation to the appellant's conduct which would ordinarily mean that the young person would become aware that their conduct was wrong and that the material before the Court supported the availability of such an inference.

[74] Counsel for the respondent asked the Court to note the date of the s 51 Report was 14 July 2022, which preceded all of the offending dealt with on appeal. It was submitted the Youth Justice Court did take all of the matters in the s 51 Report into account, but they were not matters which negated the capacity of the Crown to overcome the presumption. Those matters and all of the subjective matters needed to be taken into account with the other evidence.

[75] Attention was drawn to part of the s 51 Report which stated:

> Since coming into Don Dale Youth Detention Centre, CQH has shown commitment to taking medication and has agreed to engage with the psychologist for his cognitive assessment.

[76] The Court was told that the appellant was in the Don Dale Youth Detention Centre ('DDYDC') prior to 14 July 2022, which precedes all of the appeal files. As above, by implication he must have therefore been arrested prior to the first offending. He was at least for some period in the DDYDC. The Court was asked to note that at that time, the reports indicate he had a change of attitude towards a number of rehabilitative interventions and programs, including taking medication for his ADHD and engaging with a psychologist.

There is no indication any assessments or treatments were directed to or contributed to gaining capacity. Counsel also emphasised that three psychological assessments took place before the production of the Report of 29 September 2022[50] and that he was in the DDYDC at that time. The first time he was seen for assessment he was in the DDYDC. The second time he was seen for the purposes of the psychological Report, he was residing in bail supported accommodation. The third time he saw a clinician he was residing in supported accommodation, Life Without Borders, which was likely to have represented a reduction in bail conditions.

[77] At the time of incident on File 22215901, the appellant was being seen by the paediatric team at Danila Dilba. The psychological report notes an intervention and involvement with a youth justice diversion team. Counsel for the respondent submitted and I accept, such programmes are usually run by police officers with the assistance of other services, including in this instance, Danila Dilba.

[78] The appellant was subject to psychological interventions at the Royal Darwin Hospital. The psychological report states that at that time he did not want to start stimulant medication. Comment was also made about his escalating behaviour and recent involvement with the law. It was pointed out that the appellant's attitude changed by around April 2022 when his care was assumed by Danila Dilba health service. It was noted he was previously not agreeable

50 Exhibit 3.

to medication, but on 1 April 2022 he reported that he was. The psychological report states "We discussed the beneficial role medication may have in helping CQH slow down and reduce impulsive behaviours. This may in turn aid him in remaining in school. I have urged him to stop smoking cannabis."[51] The Court was asked to note the increasing involvement with the criminal justice system and yet at the same time, the treatment providers were advising him of how to manage the ADHD.

[79] The respondent also pointed out that the appellant was considered in August 2022 to be consistently polite to the clinician. This was said to demonstrate he had a capacity to conduct himself in an appropriate manner in various social settings. He had said to the clinician that his medication "helped him concentrate and not get as angry or frustrated". This was said to demonstrate an understanding of the impact that his ADHD had in relation to his behaviours and a commitment to taking the medication to improve his behaviour and the way that he was feeling. This is in turn would contribute to his capacity to understand his behaviour.

[80] Attention was drawn to comments taken from the appellant's teachers which indicated the appellant's inability to improve academic performance was related to lack of attendance. Further, it was put that the references in the Judge's remarks concerning lack of an intellectual disability should be seen as simply noting that intellectual disability was not a matter the Court needed

51 Exhibit 3 at 3.

to concern itself with. As a matter of fact, it was correct there was no diagnosis of an intellectual disability. Counsel for the respondent also reminded the Court of *KG v Firth*:[52]

> It is not incumbent on the prosecution to prove that the child's circumstances did not give rise to any risk that he or she did not know the conduct was wrong in a moral sense. It is only necessary for the prosecution to identify evidence which rebuts to the requisite standard, the presumption that the child did not understand the conduct was morally wrong.

[81] In all of the circumstances, considering the offending itself and the content of the reports, it was submitted it was open for the Youth Justice Court to find the presumption under both s 38(2) and s 43AQ rebutted. Notwithstanding the test under s 43AQ was not addressed, the respondent submitted the result would be the same.

[82] In summarising the various arguments before the Youth Justice Court and this Court, mention has been made of the two reports before the Court. Those are important as they give some insight to the subjective circumstances of the appellant. As above, it is accepted here as submitted by counsel for the appellant that the current state of the law is that the Court must examine subjectively whether a child under 14 years, in this instance the appellant, had the *capacity* to know (for s 38(2) matters) or *knew* (for s 43AQ matters) the conduct was wrong according to the standards or principles of reasonable adults; wrong in the sense of morality, not as contrary to the law.

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52 [2019] NTCA 5 at [29].

[83] As above the appellant has a long history of serious involvement by Territory Families with multiple notifications. He was exposed to domestic violence, neglect, medical neglect and substance use. At the time of the offending, he was on a Long Term Protection Order which will not expire until he reaches 18. His family are from Groote Eylandt and Ngukurr. He has had unofficial family and kinship placements which also involved family and domestic violence notifications and relinquishment of his care by family members who had cared for him from time to time.

[84] Foster care arrangements have not been successful due to the appellant's violence towards others in the same household. Territory Families have struggled to find appropriate placements. At the time of the s 51 Report, the appellant's parents were in CAAPS alcohol rehabilitation. It was reported the appellant wanted to stay connected to family, identity and culture.

[85] The appellant was diagnosed with ADHD. The s 51 Report stated he was not taking his medication regularly. He had also attended at Head Space. He stated he smoked weed and has a history of substance misuse with three admissions to hospital after suffering drug induced delusions. A paediatrician expressed concerns over multiple disrupted attachments and the experience of early childhood trauma. When he went into DDYDC he showed commitment to taking medication and agreed to see a psychologist.[53]

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53 Exhibit 2, 3-4.

[86] On the potentially positive factors reported in the s 51 Report, as above the appellant is described as a ‘smart young person’ who is ‘highly energised, very willing and able to engage in programmes, enjoys being creative with hands on activities and sport, especially rugby.’

[87] In April 2022 he began to attend school but was suspended due to assaulting a student and despite encouragement has stated he has no interest in school. The psychological report[54] states the first assessment with the appellant was when he was in DDYDC. His out of home care placements commenced when he was three years old.

[88] A medical and developmental history from 2013 referred to in the psychological report stated the appellant had ‘a diagnosis of significant speech developmental delay, middle ear dysfunction, and behavioural difficulties.’ It was recommended he see a speech pathologist, but no information was available at the time of the psychological assessment on whether that had ever taken place.

[89] Both the appellant and his brother were assessed during primary school given reports of agitation and aggressive behaviours. In 2021 after being seen by a doctor at the Royal Darwin Hospital it was concluded the appellant, at age 12 had ‘a complex and traumatic background’, ‘unknown exposures to toxins in-

54 Exhibit 3.

utero', 'exposure to significant trauma and neglect' which are 'likely contributing to disruptive attachment'.[55]

[90] The diagnosis of ADHD was stated to combine inattentive and hyperactive subtypes with multi-factorial symptoms. At that time, (July 2021) the appellant preferred not to trial stimulant medication.[56] He had missed significant amounts of school and was likely to be significantly behind his peers academically and socially. He had a history of delayed speech and language which could contribute to academic difficulties. He refused to attend school and had escalating behaviours. He engaged with cigarettes and marijuana use. He experienced ongoing emotional trauma and was an 'at risk' individual. A trial of Ritalin (which the appellant then refused) and ongoing mental health support was recommended.

[91] The appellant continued to be regarded a 'high risk' youth who had not engaged in paediatric follow-up by April 2022. He had engaged in a diversion program following 'a few incidents'. At that time, he was agreeable to ADHD treatment. He was said to have a poor attention span, was hyperactive and movement seeking. It was considered the management of ADHD symptoms may reduce his aggressive and violent behaviours. The beneficial role of medication was discussed.[57]

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55 Exhibit 3 at 2.

56 Exhibit 3 at 3.

57 Exhibit 3 at 3.

[92] The appellant's education history was that he had been enrolled in 13 different schools since preschool in 2013. His average attendance into year three was 67.3%, the best attendance was 96% when he was in transition. From year four it dropped to an average of 10.22%. Lack of attendance alongside attention and concentration difficulties interfered with achievement in all areas of curriculum. He was assessed as requiring 'substantial' adjustments in the social/emotional category in 2021.[58]

[93] At the time of the psychological report, he had been in detention three times and was on bail.[59]

[94] At the time of the psychological report the appellant was working at a primary school level academically, needing 1:1 support to start and remain on task. He was overall positive, willing to try but easily frustrated and showing signs of anxiety manifesting in perfectionism. When his drawings were not 'perfect' he screwed them up. He is regulated by music and physical activities. He was noted to be at a lower primary level academically with an attention span of 15 minutes maximum or 40 minutes if the activity involved sports[60].

[95] At the assessment of August 2022, he was asked about the ADHD diagnosis and said he had started to take the medication while at DDYDC which helped

58 Exhibit 3 at 4.

59 Ibid.

60 Exhibit 3 at 6.

him concentrate and not get as angry or frustrated. His attention issues were described as 'obvious'.[61]

[96] It was during the third assessment at Life Without Borders that the appellant started to graffiti a desk but wiped it off when asked. On visual puzzles the same distractibility, impulsivity and inattention was noted.[62]

[97] The testing revealed a clear and significant impact of ADHD symptoms. He does not have an intellectual disability. At 13 years he was described as having experienced 'complex and ongoing trauma' due to multiple placement disruptions. He has attended little formal education. He was attending school at TESoFL consistently for a few weeks. He had only been agreeable to medication for five months and had only started taking it consistently while in DDYDC. It was unknown how compliant he was with his medication.[63]

[98] The Youth Justice Court relied largely on the fact of arrests after the offending on each file and that given the appellant could learn from experience, the arrests contributed to the relevant capacity.

[99] Although it may well be the case as counsel for the respondent submitted an ordinary person would learn from arrests, or indeed lesser interventions, the extent to which such interventions can be relied on in the appellant's circumstances is not clear. There was no evidence that a person of the

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61 Exhibit 3 at 7.

62 Exhibit 3 at 8.

63 Exhibit 3 at 11.

appellant's profile, with serious ADHD impacts, ongoing trauma, academically of primary school level, is likely to absorb such interventions necessarily in a way which will contribute to gaining the necessary capacity.

[100] Counsel for the appellant pointed out that the appellant had been in DDYDC before the offending the subject of the appeal. He had at times been on remand and at times been on bail. As above 12 of 16 files were withdrawn and nothing is known about them that could inform the decision in the Youth Justice Court or this Court further. There is no evidence of what happened on arrests or subsequent detention that might inform capacity. The totality of the available information points to the ADHD in this particular case as having a serious detrimental impact on the appellant. The psychological report notes a 'clear and significant impact' of the ADHD symptoms on the appellant's ability to show his cognitive ability and reach his potential.

[101] In any event the issue is not how an arrest would impact the moral development of an ordinary person, even an ordinary young person. Knowing what is known of the appellant through the reports it is how he subjectively deals with any learnings from an event such as an arrest and how it contributes to his own subjective capacity that is relevant. A similar issue arose in *RH v Director of Public Prosecutions (NSW)*[64] where at first instance a Magistrate reasoned that 'it would have been appreciated by' a youth, that a fire station existed for a specific or important purpose. It was held that such

64 [2024] NSWCA 305.

an objective approach was wrong. An objective test might have been applied in the absence of evidence relating to knowledge of the state of mind of the accused in that instance, but a subjective test was to be applied as is the case here in terms of capacity to know he ought not do the act.

[102] The reports point clearly to lack of capacity when the age, educational level, history, ADHD and trauma are considered. However, there were some minor positive comments which the Judge reasoned showed there was capacity. While those points should be considered, they should not engulf the substantial material which points to a continuing lack of capacity. The type of offending, although very difficult for those offended against, possesses little or no features which will shed light on the capacity or knowledge.

[103] The author of the s 51 Report, a Youth Justice Officer wrote that the appellant was 'a smart young man'. The context of that remark does not allow a conclusion to be drawn that the appellant was 'smart' in the sense of academically smart or intelligent. That remark from a lay person should not be taken in a way to obscure the expert assessments.

[104] Throughout the psychological report, reference was made to the appellant's documented difficulties which made testing difficult and some elements of the cognitive testing were not carried out.[65] Those 'difficulties' referred to aspects of the manifestation of ADHD. The psychological report refers to not reporting some of the results as given the 'difficulties', the scores are not

65 Exhibit 3 at 6 and 8 under 'Wechsler Intelligence Scale for Children – Fifth edition (WISC – V results)'.

considered an accurate representation of the appellant's true ability in the cognitive areas. Although it is undoubtedly the case that the appellant does not have an intellectual disability, the ADHD was an inhibitor to more comprehensive testing and a clear contributor to the appellant's 'difficulties'. As above the appellant was assessed as being at primary school, even lower primary school standard. In all of the circumstances the 'smart young man' comment could not be seen as of great value contributing to moral awareness or capacity to know that certain acts were seriously wrong in a moral sense.

[105] The Judge remarked that an example of understanding the consequences of the appellant's choices was that he would take his medication for ADHD and he accepted it would help him to concentrate. This would appear to be a reference to parts of the s 51 Report.[66] As above, the history was that he did not agree initially to take the medication. However, by the assessment in 2022 he had started to take the medication, but that was when he was in DDYDC. He said it helped him concentrate. Outside of the particular environment of DDYDC it was unknown whether he would be compliant.

[106] At the time of the s 51 Report, the appellant was either at Head Space or other accommodation as there was reference to a time that the appellant was not in custody. The appellant was clearly not compliant with medication when he was in the community. This may be contrasted to when he was in DDYDC.[67] He had just started to take the medication again while in DDYDC,

66 Exhibit 2.

67 Exhibit 3 at 7.

and as above said that it helped him concentrate, and not get as angry or frustrated.[68] The psychological report also noted that the appellant's attention and concentration difficulties were obvious throughout that assessment. The 'Summary' of the psychological report states the appellant has only been agreeable to medication for five months, and had only started taking it consistently while he was in DDYDC.[69] It was unknown how compliant he was with his medication on a daily basis when not in DDYDC. One of the 'Recommendations' in the psychological report was that he have a medication review with his paediatrician. The material before the Court indicates that the appellant was in fact non-compliant with ADHD medication when in the community but compliant when in DDYDC. In the end the medication compliance issue did not take the capacity issue very far.

[107] The Youth Justice Court also relied on the remark in the psychological report[70] where it is stated that the appellant was starting to graffiti on the desk in an office space where an assessment was conducted. He wiped it off when the clinician asked him to. Nothing further was said about that incident in the report and seems to indicate nothing more than following a verbal instruction during the assessment.

[108] The Judge also mentioned that the appellant was reported to have recognised that some of his drawings were not perfect. Such recognition was taken by the

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68 Ibid.

69 Exhibit 3 at 11.

70 Exhibit 3 at 8.

Judge as evidence of him learning from experiences. The Report however refers to this as a sign of anxiety believed to be in addition to his concentration difficulties. He was observed to screw up multiple pages of work if he perceives it as not 'perfect'.[71]

[109] The series of points isolated in the Youth Justice Court remarks as potentially showing a capacity to appreciate moral wrongness in the sense understood through *BDO* and *RP* is far outweighed by the accumulation of the appellant's poor social and educational circumstances, trauma history, life events and conditions which in combination point strongly to lack of capacity. It was not to the point the Judge accepted lack of capacity with respect to the first file. Nothing changed in the evidence save for further arrests or detention which the appellant had in any event experienced before the offending. The evidence pointed to by the prosecution on this occasion was insufficient to discharge the presumption. There was little or no evidence to show the appellant had learned from 'experience' in the months following the first offending, despite valiant efforts by counsel for the respondent to argue the case of the value of interventions.

[110] It was not shown that in respect of Files 22227802, 22228429 and Count 1 on 22233809 the appellant possessed the capacity to know he ought not to the acts. In respect of counts 2 and 3 on File 22233809 it has not been shown the appellant knew the conduct was wrong. The presumption was not rebutted.

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71 Exhibit 3.

[111] Ground 2: The Youth Justice Court erred by taking judicial notice that the appellant 'had been arrested after each of the offences' without notice or opportunity to be heard, hence failed to afford procedural fairness.

[112] Section 144 of the *Evidence (National Uniform Legislation) Act* (NT) permits a court to take notice of facts which are not reasonably open to question and are either common knowledge or capable of verification from authoritative documentary sources. Section 144 replaced the common law 'judicial notice'.[72]

[113] As above, the Judge said 'judicial notice' would be taken of the appellant being arrested after each offence on each file. Neither counsel in the Youth Justice Court addressed the question of how arrest, without further information might inform the question of capacity to know he ought not to do the act or know it was wrong in the sense described in *BDO* and *RP*.

[114] As has been made clear on appeal, it can be inferred from the reports that the appellant was in fact arrested on the first file in time and subsequently. In these circumstances, the Judge was relying on the facts and not the form of judicial notice provided by s 144.

[115] Nevertheless, neither party made submissions below on the relevance of subsequent arrests and may have been taken by surprise by the use of evidence of the arrests. However, given it was a fact before the Youth Justice Court, Ground 2 not made out.

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72 *Gattellor v Westpac Banking Corp* [2004] HCA 6; 78 ALJR 394.

[116] In the light of the conclusion under Ground 3, it is unnecessary to consider Ground 1.

[117] Orders:

1. The appeal is allowed.

2. The findings of guilt made on 28 February 2023 on Files 22227802, 22228429 and 22233809 are quashed and order of acquittal entered.

3. The reasons and orders are to be sent to counsel with a courtesy letter.

4. If any party seeks to make an application for costs, leave is granted to contact Chambers in the next 28 days.
