CITATION:	*Thyer v Whittington* [2017] NTSC 66
PARTIES:	THYER, Cameron v WHITTINGTON, Robert Gregory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 29 of 2016 (21605916)
DELIVERED ON:	23 August 2017
DELIVERED AT:	Darwin
HEARING DATE:	3 March 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether impermissible reliance placed by judge on photographs depicting complainant's injuries – reasons for decision to be read as a whole – judge used photographs to assess and reject the appellant's account of the physical altercation with the complainant – injuries depicted in the photographs inconsistent with the nature of the contact and the degree of force which the appellant asserted – expert evidence in relation to cause and severity of injuries not required for that purpose – no error disclosed – trial judge preferred evidence of prosecution witnesses – no substantial miscarriage of justice – appeal dismissed.

Criminal Code Act (NT) s 27, s 29, s 188

Local Court (Criminal Procedure) Act (NT) s 177

Douglass v The Queen (2012) 290 ALR 699, *Liberato v The Queen* (1985) 159 CLR 507, *Bird v Peach* (2006) 17 NTLR 230, *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707, *R v Beserick* (1993) 30 NSWLR 510,referred to.

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentence was manifestly excessive – finding of good character and extenuating circumstances – conviction recorded because of not guilty plea and finding of guilt following trial – exercise of discretion not to record conviction not necessarily excluded by a plea of not guilty – evidence of unintentional contact rejected by the trial judge – relevant to the seriousness of the offending, remorse and character – relevant considerations in the exercise of the discretion – no error disclosed – appeal dismissed.

Sentencing Act (NT) s 8

Carnese v The Queen [2009] NTCCA 8, *Cobiac v Liddy* (1969) 119 CLR 257, *Jones v Morley* (1981) 29 SASR 57, *Toohey v Peach* (2003) 141 A Crim R 437, referred to.

REPRESENTATION:

Counsel:

Appellant:	PJ Maley
Respondent:	R Murphy

Solicitors:

Appellant:	Maleys
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	GRA1712
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Thyer v Whittington [2017] NTSC 66
LCA 29 of 2016 (21605916)

BETWEEN:

CAMERON THYER
Appellant

AND:

ROBERT GREGORY WHITTINGTON
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 23 August 2017)

[1] This is an appeal against both conviction and sentence brought pursuant to s 163 of the *Local Court (Criminal Procedure) Act* (NT).

[2] On 4 November 2016 the appellant was found guilty in the Local Court of one count of aggravated assault contrary to s 188 of the *Criminal Code* (NT).

[3] Following the finding of guilt the appellant was convicted of that offence and fined seven penalty units, which resolved to $1,181.

[4] A victims' assistance levy of $150 was also applied.

[5] The grounds of appeal are:

> 1. The learned trial Judge erred in law in rejecting the evidence of the appellant on the ground that it was not supported by the photographic evidence of the complainant's injuries.
> 2. The learned trial Judge erred in law in relying on the photographs of the complainant's injuries in the absence of expert opinion as to the nature, cause and severity of the injuries.
> 3. The learned trial Judge erred in law in formulating and then relying on his own opinion regarding the nature, cause and severity of the complainant's injuries depicted in the photographs.
> 4. The learned trial Judge erred in law in concluding that the injuries depicted in the photographs could not have arisen in the circumstances described by the appellant in his evidence.
> 5. The learned trial Judge erred in law in imposing a sentence that in all the circumstances of the case was manifestly excessive.

[6] The appeal is dismissed for the reasons which follow.

The conduct of the hearing

[7] At the outset, the prosecutor particularised the conduct said to constitute the assault in the following terms:[1]

> … on 26 January 2016 [the appellant] unlawfully assaulted [the complainant] by rolling her to the ground in circumstances where [the appellant] had hold of her in a bear hug; and, further, head-butting her by striking her to the nose and mouth area using his head.

[8] A number of facts were agreed for the purposes of the hearing. They were:

> 1. That the complainant was seen at the Emergency Department of the Royal Darwin Hospital on 26 January 2016.

1 Transcript of proceedings, 4 November 2016, p 6.

2. That the complainant was seen by a doctor while at the hospital.
3. That the following injuries were detected:
    a. a nosebleed which had stopped before the complainant arrived in the Emergency Department;
    b. a small amount of blood in the right nostril;
    c. tenderness to the bridge of the nose;
    d. an abrasion to the inside of the upper lip;
    e. an abrasion to the front of the right forearm;
    f. an abrasion to the side of the left thigh; and
    g. an abrasion to the front of the right thigh.
4. That no loss of consciousness or evidence of concussion was detected.
5. That the injuries did not require active treatment.

[9] In addition, photographs depicting the complainant's injuries were tendered by consent. Those photographs are generally consistent with the injuries said to have been detected at the hospital, but also depict areas of swelling and bruising which are not expressly described in the agreed facts.

[10] The general context in which the offending was alleged to have taken place was not in dispute. The appellant and the complainant were former friends and flatmates. On the day in question the complainant contacted the appellant by telephone and requested that he return keys to the premises they had previously shared. The appellant subsequently attended at the premises. The appellant and the complainant then engaged in an argument concerning money which the appellant claimed was owed to him for some building work he had undertaken. He claimed $400, but the complainant was only prepared

to pay him $220 on the basis that he had damaged her motor vehicle while she was on holiday.

[11] The appellant left the premises without returning the keys. He returned to his vehicle, started the motor, and remained on the footpath outside the vehicle. The complainant then came out of the premises, approached the vehicle, reached through the driver's side window, and removed the keys from the ignition. She thought that the keys to the premises were on that key ring.

[12] Three witnesses were called in the prosecution case.

[13] The complainant's disputed evidence[2] was that the appellant then grabbed her from behind, threw her to the ground and sought to remove the keys from her hands. The complainant agreed that she was struggling with the appellant while she was on the ground; that she was trying to push him away with her legs; and that her torso was at a 45° angle to the ground. The appellant was standing over her at which time he moved his head back and brought it forward into contact with her head. The complainant turned her head to avoid the contact, but his head made contact in the region of her nose and lips causing her torso to fall back to the ground and causing her to release the keys. She expressly denied providing any consent to a physical altercation with the appellant. The essence of that account was not undermined in

2 Transcript of proceedings, 4 November 2016, p 7-24.

cross-examination. While the complainant agreed that she was participating in a struggle with the appellant, that agreement fell well short of any concession that she had consented to the application of force by him.

[14] The evidence from the first non-participating witness to the altercation was as follows.[3] He heard an argument between the appellant and the complainant. The appellant then left the premises and started his vehicle. The complainant went over to the vehicle, reached through the driver's side window, turned it off, and removed the keys. The appellant then grabbed the complainant from behind and swung her to the ground. The appellant stood over the complainant holding her hands. The complainant's torso was at a 90° angle to the ground. The appellant then "forcefully head-butted" the complainant in the face. The witness then went to the scene of the altercation, said to the appellant "You shouldn't hit women", and stood between the appellant and the complainant in order to protect her. The appellant then got into his vehicle and drove off. The essence of that account was also not undermined by cross-examination. In particular, the witness expressly rejected the suggestion that it was an accidental "clash of heads".

[15] The evidence from the second non-participating witness to the altercation was as follows.[4] The appellant and the complainant had an

3 Transcript of proceedings, 4 November 2016, p 25-31.

4 Transcript of proceedings, 4 November 2016, p 31-36.

argument over keys and money. The appellant left the premises and went to his vehicle. As the appellant stood next to the vehicle the complainant walked quickly over to the car and removed the keys from the ignition. The appellant approached the complainant from behind and encircled her with his arms. He then span her around and pushed her to the ground. As he was standing over her, the appellant drew his head back and then moved it forward sharply so that it came into contact with the complainant's head. During the course of cross-examination she agreed that their heads clashed, but expressed the view that the appellant struck the blow with intent. This was because he had to move his head forward by approximately 50 cm in order to make that contact. It was not a case in which their heads made contact as the appellant was pulling the complainant towards him.

[16] The prosecution rested on that evidence.

[17] The appellant then gave evidence to the following effect.[5] As he was going to enter his vehicle the complainant pushed him from behind and removed the keys from the ignition. He then grabbed her hands to stop her running off with the keys. He then span her around and lowered her while still holding her by the hands so that she didn't hit the ground. As he was trying to remove the keys from the complainant's hands he pulled her towards him causing their heads to come into

5 Transcript of proceedings, 4 November 2016, p 37-45.

contact. That account was also not significantly undermined during the course of cross-examination. The appellant accepted that their heads clashed and accepted that the complainant may have sustained injury as a result, but denied intentionally head-butting the complainant.

[18] At the conclusion of that evidence the key issues for determination were whether the clash of heads was accidental or intentional; whether the application of force was justified to recover the keys;[6] and whether the appellant believed his conduct was both necessary to defend himself or his property and a reasonable response to the circumstances as he perceived them.[7] In terms of practical result, a finding that the appellant intentionally head-butted the complainant would negative the operation of both defence provisions.

Reliance on the photographs

[19] The four grounds of appeal against conviction all rest in one way or another on the reliance placed by the judge on the photographs depicting the complainant's injuries.

[20] The focus of the appellant's complaint is a passage which appears in the sentencing remarks in the following terms:[8]

> Mr Thyer, so I am just going to pull it all together. What you did on this day, what I've found you did on this day [was] because I disbelieved your evidence. And I disbelieved your evidence

6 *Criminal Code*, s 27.

7 *Criminal Code*, s 29.

8 Transcript of proceedings, 4 November 2016, p 96.

> because the objective evidence of the photographs of the injuries to [the complainant] tell a very different story from the story you told the court. That's why I rejected your evidence, that's why I went with the evidence of the other witnesses, and that's why I found you guilty.

[21] That passage is said to demonstrate a number of errors. First, the photographs were not rationally capable of sustaining the inference drawn by the judge. Secondly, there was no expert evidence in support of the inference drawn, and the matter was not one on which the judge could make findings in the absence of such evidence. Thirdly, the methodology adopted by the judge was in breach of the principle expressed by Brennan J in *Liberato v The Queen*,[9] in that a rejection of the appellant's evidence did not relieve the judge of the need to assess whether that evidence nevertheless gave rise to a reasonable doubt, and, if not, then to satisfy himself beyond reasonable doubt of the truth of the evidence given by the prosecution witnesses.

[22] In making that criticism counsel for the appellant accepted that *ex tempore* reasons delivered in the course of a busy listing schedule cannot be assessed in accordance with the counsel of perfection, and that it is "inappropriate to attempt to dismember *ex tempore* reasons and subject them to a vigorous analysis".[10]

[23] Similarly, an appeal court should approach the task of reading reasons at first instance "sensibly and in a balanced way, not reading passages

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9 (1985) 159 CLR 507 at 515.

10 See, for example, *Bird v Peach* (2006) 17 NTLR 230 at [13].

from the reasons for decision in isolation from others to which they may be related or taking particular passages out of context of the reasons as a whole".[11] Although those observations were made in relation to appeals from the decision of the Administrative Appeals Tribunal, they apply with equal force to the reading of the reasons of the court at first instance in this matter.

[24] It may be accepted at the outset that the photographs of the injuries to the complainant did not form a sound basis on which to prefer the evidence of the prosecution witnesses over the evidence given by the appellant for the purpose of determining whether the clash of heads was accidental. The appellant at all times accepted that there was a clash of heads and that the complainant sustained injuries as a result. The photographs of the complainant's injuries do not assist in determining whether that contact was intentional. At most, they demonstrate that the contact did not cause any severe injury to the complainant's facial region.

[25] In order to determine whether the use to which the judge put the photographs warrants intervention by this court, it is necessary to read the reasons as a whole. In particular, the passage identified by the appellant appears in the sentencing remarks. It does not appear in the judge's reasons for the finding of guilt. The assertion of error must be

11 *Politis v Federal Commissioner of Taxation* [1988] FCA 446; 16 ALD 707.

considered in light of the submissions and reasons for the finding of guilt, rather than limited to an observation made during the course of the sentencing remarks. A more extended reading discloses a number of relevant matters.

[26] First, the judge properly identified that while the prosecution witnesses could describe what they saw, that evidence was not necessarily determinative of the appellant's intention at the time his head clashed with that of the complainant.[12] The judge correctly cautioned himself that any speculation by the prosecution witnesses as to the appellant's subjective state of mind could not properly inform the determination of that matter.

[27] Secondly, the judge accepted that the complainant must necessarily be a less compelling witness because she was a participant in the altercation.[13] That caution was well-founded and militates against any conclusion that the judge placed inappropriate weight on the complainant's evidence, or failed to assess that evidence in its proper context.

[28] Thirdly, there was an exchange during which the judge expressed the opinion that the photographs of the complainant's face and the agreed facts suggested the head clash did not involve a great degree of force.[14]

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12 Transcript of proceedings, 4 November 2016, p 51.

13 Transcript of proceedings, 4 November 2016, p 52.

14 Transcript of proceedings, 4 November 2016, p 54-55.

The prosecutor agreed that there was no serious injury in the sense of a broken nose or blackened eyes. The judge then made the following comments: [15]

> Which is why that objective evidence of the photographs as essentially reproduced in the agreed facts isn't really evidence for one side or the other in terms of the intention of the [inaudible] head-butt.
>
> ....
>
> There is a photograph of the inner lip. I'm sure it's thoroughly unpleasant, but it was no big deal in terms of that individual injury. Blood nose, well any direct blow to the nose can cause a nose to bleed.
>
> ....
>
> I am only saying these things, Mr Riley, because the objective evidence of the forcefulness of a blow in my view is not there. The evidence of witnesses, that's a different story but the – any objective evidence of the force of the blow to the face in my view is not there.

[29] That passage contains a clear expression of opinion on the part of the trial judge that the photographs provided no objective support for a finding that the blow involved significant force, and no basis on which to disbelieve the account given by the appellant in evidence to the effect that it did not. That opinion is obviously significant in any reading of the observations subsequently made in the sentencing remarks, and in a fair reading of the reasons as a whole.

[30] The issue of intention was raised again during the course of the defence submissions in the following terms:[16]

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15 Transcript of proceedings, 4 November 2016, p 55.

HIS HONOUR: Your client's evidence is that any contact between his head and her face was inadvertent.

MR MALEY: Was an accident and I accept that. Okay, that's the first that was of course the position – –

HIS HONOUR: There isn't a secondary position for me to consider from his perspective.

MR MALEY: Okay well, your Honour, from a tribunal of fact position, there is the second so that is you might reject my client's assertions of no deliberate contact.

HIS HONOUR: Then I would look solely at the evidence from the other parties and it's all one way if I got to that point.

MR MALEY: Yes. Okay. So, your Honour, I don't look – that's alright so I'm saying look I don't want to go [to] it, of course, because it's a grey day for my client if his evidence is rejected outright but in terms of the level of force which the other three witnesses talk about the head-butt and the way it was conducted and the objective medical evidence which is not corroborative either way.

HIS HONOUR: Exactly.

[31] Two matters are plain from that exchange. First, the judge understood the determination came down to whether the appellant's evidence should be accepted over that of the three prosecution witnesses. Secondly, the judge considered that the objective evidence (which, having regard to the earlier exchange, included the photographs) was not corroborative either way on the issues of intention and force.

[32] The next matter to be noted on reading the submissions and reasons concerning the finding of guilt is that defence counsel urged the judge to have regard to the fact that the appellant had volunteered to give evidence under oath and was a man of good character.[17] The judge

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16 Transcript of proceedings, 4 November 2016, p 79.

17 Transcript of proceedings, 4 November 2016, p 79.

accepted those matters would no doubt inform the assessment of the appellant's evidence in isolation, or if there was some doubt attending the reliability of the evidence provided by the prosecution witnesses.[18] It is clear from the subsequent findings that the judge did not harbour any such doubt.

[33] There then followed an exchange between the judge and defence counsel which explains the precise use to which the photographs were put in the assessment of the appellant's evidence. The judge commenced by cataloguing the appellant's evidence concerning the incidents of physical contact between the appellant and the complainant during the course of the altercation. Those incidents were limited to taking hold of the complainant's hands; pulling the complainant away from the car in a manner which did not cause her to make contact with it; lowering the complainant to the ground in order to avoid impact; continuing to hold the complainant by the hands alone; pulling the complainant up by the hands (presumably in an attempt to retrieve the keys); and making inadvertent head contact with the complainant in the course of pulling her up.[19] Defence counsel agreed with that catalogue.

[34] The judge then catalogued the complainant's injuries as apparent from the photographs. Those injuries included bruising on the arm in the

18 Transcript of proceedings, 4 November 2016, p 80.

19 Transcript of proceedings, 4 November 2016, p 80-81.

region of the elbow away from the hand and wrist region; bruising and redness on the inner right thigh; and bruising near the hip on the outer part of the left thigh. It was common ground that all these injuries occurred during the course of the altercation. The judge observed that these injuries were inconsistent with the nature of the contact and the degree of force which the appellant in his evidence said he applied.[20] Defence counsel responded that while the court could take judicial notice of the existence of the bruises and the fact that an application of force would be required to cause injuries of that type, it was not possible to say that those injuries could not have been sustained during the course of the struggle described by the appellant.[21]

[35] While the judge was clearly of the opinion that the photographs were not corroborative of any witness's account concerning the appellant's intention at the time his head clashed with that of the complainant, the judge did consider it open to use the photographs to assess and ultimately reject the appellant's general account of the physical altercation with the complainant. So much is apparent from the following observations made by the judge in the course of his reasons:[22]

> His version of events was that his physical contact with her was limited to holding her; no doubt, with great firmness around the

20 Transcript of proceedings, 4 November 2016, p 82-84.

21 Transcript of proceedings, 4 November 2016, p 85.

22 Transcript of proceedings, 4 November 2016, p 88.

> hands. This could have encompassed wrists, lower forearms, fingers, or anything of that nature. There'd be no difficulty with any of that. Bruising injuries to the hands would have been expected. No doubt, he was attempting to pry open her hands to release the keys. All of that could be expected on the evidence he gave the court, part and parcel.
>
> ….
>
> … I do not believe that evidence and the reason I do not believe that evidence is because it is entirely inconsistent with the photographs.
>
> These injuries could not have come about in the circumstances described by [the appellant].

[36] The focus of the judge's attention was on the location of the bruises having regard to the appellant's evidence. The judge determined that the location of the bruises, and particularly the bruise in the region of the appellant's elbow, was inconsistent with the appellant's evidence. The judge further determined that the bruises required an application of force that was inconsistent with the appellant's account of lowering the complainant to the ground in order to avoid impact.

[37] On that basis, the judge considered that the account of the altercation given by the appellant was inherently unlikely, and so not reasonably possibly true. The judge's assessment in those respects did not constitute the formation of an opinion based on specialised knowledge. Rather, the judge was undertaking a practical comparison between the locations in which the appellant said he had applied force to the complainant, and those parts of the complainant's body which showed bruising. The submission from defence counsel that the injuries were

generally consistent with the complainant's evidence of the struggle was to miss the purpose of conducting the comparison.[23]

[38] The judge's assessment in that respect must also be seen in the broader context. Three prosecution witnesses gave evidence in direct contradiction of the appellant's account. As already noted, the judge cautioned himself against placing undue weight on the complainant's evidence for obvious and well-founded reasons. The judge made a positive assessment of the evidence given by the two witnesses who were not involved in the altercation. It was both permissible and necessary to take that evidence into account when assessing whether or not the appellant's evidence was reasonably possibly true.

[39] Against that background, the inconsistency which the judge found to exist between the appellant's account of the altercation and the number and location of complainant's injuries was simply another matter which warranted rejection of the appellant's evidence. It was not the sole or essential basis for the finding of guilt. As the respondent contended, even if it is accepted that the trial judge was in error in his reliance on the photographs, this court may and should dismiss the appeal on the basis that no substantial miscarriage of justice has occurred[24] having regard to the very clear and cogent evidence given by the prosecution witnesses.

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23 Transcript of proceedings, 4 November 2016, p 84-85.

24 *Local Court (Criminal Procedure) Act*, s 177(2)(f).

[40] In that respect, counsel for the appellant sought to draw attention to the fact that had this matter been tried by a jury there would have been a decision-making process in three steps.[25] First, it would have been necessary for the jury to determine whether to accept or reject the appellant's evidence. Even if the jury rejected the evidence, it would have been necessary for it to consider whether there was anything in the appellant's evidence which nevertheless gave rise to a reasonable doubt. Finally, a jury would have been required to satisfy itself beyond reasonable doubt of the truth of the evidence given by the prosecution witnesses.[26] Counsel for the appellant asserted that the trial judge eschewed that process.

[41] It is unnecessary for a judge conducting a summary trial to make some express demonstration of that process of determination in the reasons for decision. It was no doubt open to the trial judge to reject the appellant's evidence on the basis that the two prosecution witnesses who were not involved in the altercation gave very clear and contradictory evidence; and it would have been equally open to a jury to reject the appellant's evidence on that basis.

[42] It was also open to the trial judge, and would have been open to a jury, to conclude for the same reason that the appellant's evidence did not give rise to a reasonable doubt.

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25 *Liberato v The Queen* (1985) 159 CLR 507 at 515; *Douglass v The Queen* [2012] HCA 34; 290 ALR 699 at [13].

26 *R v Beserick* (1993) 30 NSWLR 510 at 528-529.

[43] Finally, the trial judge reminded himself that a rejection of the appellant's evidence was not a sufficient basis in and of itself for a finding of guilt. It was necessary to consider the evidence of the prosecution witnesses and to be satisfied of the reliability of that evidence to the requisite standard.[27] The trial judge was in the best position to assess the reliability of the prosecution witnesses. There is nothing apparent from the transcript which suggests unreliability on the part of those witnesses or error on the part of the judge in his assessment, and nothing to suggest that a tribunal of fact could not reasonably have accepted that evidence to the requisite standard.

[44] The appeal on this ground is dismissed.

Manifest excess

[45] The ground asserting manifest excess also relies on an error in principle said to arise from the sentencing remarks. Having found the appellant guilty, the judge said:[28]

> I have little fear that you will do anything like this again. This is a once, a one-off event. I will record a conviction even though that's a bad thing for a man in good standing in society to have against his name, a conviction for an aggravated assault. It has that effect. It also has the effect that if you commit another assault, mandatory sentencing will send you straight to jail. So that's another heavy burden that this conviction imposes on you. It's another reason why you've got to be very careful with your temper and your behaviour in the future.
>
> Because you again, because you didn't accept the situation, you've put the Crown to the proof, you've put the witnesses to the trouble

27 Transcript of proceedings, 4 November 2016, p 88.

28 Transcript of proceedings, 4 November 2016, p 97.

> under the stress of giving evidence today, there is a lack of any evidence of remorse, I am not going to release you on a good behaviour bond, which would have been entirely appropriate if you entered a plea of guilty at the earliest opportunity at the beginning. And as I say, you would have walked away with no conviction and a good behaviour bond because of the circumstances of provocation. That's not what has happened.

[46] The contention is that the appellant's plea of not guilty did not properly inform the discretion whether or not to record a conviction in these circumstances. The argument follows that it was entirely reasonable for the appellant to defend the matter on the basis that he and the complainant were engaged in a consensual scuffle during which their heads came into contact. The appellant says the legitimacy of that approach was illustrated by the judge's finding that there were significant circumstances of provocation because the complainant's conduct in taking the keys initiated the altercation.

[47] Conversely, the respondent says that the plea of not guilty was properly taken into account in the exercise of the discretion because it informed the level of the accused's remorse and prospects of rehabilitation. The respondent says further that the utilitarian benefit of a guilty plea was also a matter which the sentencing court could properly take into account in determining whether or not to record a conviction.

[48] Section 8(1) of the *Sentencing Act* (NT) confers the discretion in the following terms:

Conviction or non-conviction

(1) In deciding whether or not to record a conviction, a court must have regard to the circumstances of the case including:

(a) the character, antecedents, age, health or mental condition of the offender; and

(b) the extent, if any, to which the offence is of a trivial nature; and

(c) the extent, if any, to which the offence was committed under extenuating circumstances.

[49] A number of observations may be made concerning the operation of that provision.

[50] First, the three limbs operate disjunctively in the sense that a court does not have to find good character, triviality and extenuating circumstances before making a "non-conviction" order.[29]

[51] Secondly, in determining whether or not to record a conviction the sentencing judge must nevertheless give consideration to all three limbs before deciding the matter.

[52] Thirdly, the provision is inclusive rather than exhaustive of the matters properly taken into account in the exercise of the discretion. The court should properly give consideration to all relevant circumstances. So, by way of example, even where an offender's character, antecedents and age might militate in favour of a "non-conviction" disposition, it will still be necessary for the sentencing court to weigh those matters

29 *Toohey v Peach* (2003) 141 A Crim R 437 at 440-441; *Carnese v The Queen* [2009] NTCCA 8 at [16].

against the seriousness of the offending and the context in which it took place.

[53] The threshold requirement for any decision not to record a conviction is some satisfaction that one or more of the prescribed considerations would "provide a sufficient ground for a reasonable man [or woman] to hold that it would be expedient to extend the leniency which the statute permits".[30] The court must then actively determine whether the circumstances support the exercise of the discretion in that manner.[31] The existence of a prescribed state of affairs is not a "mere peg" on which to hang leniency.[32]

[54] It is plain that the sentencing judge found that the circumstances of provocation were extenuating and provided a *prima facie* ground on which to extend the leniency of not recording a conviction. The appellant's otherwise good character would also appear to have figured in that finding. If then fell to the sentencing judge to determine actively whether the discretion should be exercised in that manner.

[55] A plea of not guilty and subsequent finding of guilt will not necessarily exclude a disposition in which no conviction is recorded. In the present case, however, it was clearly open to the sentencing judge to record a conviction in circumstances where the appellant had given

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30 *Cobiac v Liddy* (1969) 119 CLR 257 at 276.

31 *Jones v Morley* (1981) 29 SASR 57 at 63.

32 *Cobiac v Liddy* (1969) 119 CLR 257 at 276.

evidence that the contact was unintentional but the court had preferred directly contradictory evidence from three prosecution witnesses to the effect that the appellant had intentionally head-butted the complainant.

[56] As the respondent contended, that finding informed a number of considerations relevant to the question whether a conviction should or should not be recorded, including the seriousness of the offending, remorse and character.

Disposition

[57] The appeal is dismissed.
