CITATION:	*Scrutton v McKinlay and Scrutton v Heath* [2017] NTSC 71
PARTIES:	SCRUTTON, Denzel v McKINLAY, Matthew AND: SCRUTTON, Denzel v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the YOUTH JUSTICE COURT exercising Territory jurisdiction
FILE NO:	LCA 9 of 2017 (21707307) and LCA 10 of 2017 (21700617)
DELIVERED ON:	13 September 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	7 September 2017
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Appellant:	G O'Brien-Hartcher
Respondent:	S Tasneem

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Scrutton v McKinlay and Scrutton v Heath [2017] NTSC 71
LCA 9 of 2017 (21707307) and LCA 10 of 2017 (21700617)

BETWEEN:

DENZEL SCRUTTON
Appellant

AND:

MATTHEW McKINLAY
Respondent

AND BETWEEN:

DENZEL SCRUTTON
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 13 September 2017)

[1] On 6 January 2017 the appellant, who was then aged 16, pleaded guilty in the Youth Justice Court at Alice Springs to:

(a) one count of unlawful entry at night with intent to commit an indictable offence (stealing), the maximum penalty for which is imprisonment for 14 years;

(b) one count of stealing, the maximum penalty for which is imprisonment for seven years; and

(c) one count of unlawfully damaging property, the maximum penalty for which is imprisonment for 14 years.

[2] On 28 February the appellant pleaded guilty in the Youth Justice Court at Alice Springs to:

(a) one count of unlawful entry of a dwelling house with intent to commit an indictable offence (stealing), the maximum penalty for which is imprisonment for 10 years;

(b) one count of stealing, the maximum penalty for which is imprisonment for seven years; and

(c) one count of unlawfully damaging property, the maximum penalty for which is imprisonment for 14 years.

[3] He was sentenced for all of these offences on 28 February 2017. The learned sentencing judge recorded convictions on all the charges and sentenced the appellant to a term of detention for 12 months in relation to the offences to which he pleaded guilty on 6 January, and to a term of detention for eight months on the charges to which he pleaded guilty on 28 February. His Honour ordered that the two sentences be served concurrently as to three months and cumulatively as to the balance, bringing the total term of detention to one year and five months. The

appellant had been in detention on remand since 7 January (a total of seven weeks and three days). The sentencing Judge directed that the sentence be suspended forthwith on conditions and imposed a two year operational period. The conditions of the suspended sentence were:

(a) the youth must not, during the period of order in force, commit another offence (whether in or outside of the Territory) punishable on conviction by imprisonment;

(b) the youth is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions from a probation and parole officer, and must report to a probation and parole officer within two clear working days after the order comes into force;

(c) at the direction of a probation and parole officer, the youth must participate in education, employment and training;

(d) the youth will participate in assessment, counselling and/or treatment as directed by a probation and parole officer if available in remote community;

(e) the youth must reside at Timber Creek and not enter Alice Springs;

(f) the youth will adhere to a curfew, at the direction of a probation and parole officer;

(g) the youth must not associate with, or contact directly or indirectly, Leslie Marshall or Gilbert Thompson.

[4] The appellant has appealed against the sentence on the following grounds:

(a) that the sentence was manifestly excessive in all the circumstances;

(b) that the recording of convictions was in error as a matter of law; and

(c) that the learned judge gave undue weight to the general sentencing principles of specific and general deterrence without regard to their modified application within the sentencing regime established by ss 4 and 81 of the *Youth Justice Act 2005* (NT) ('*Youth Justice Act*').

Circumstances of the offending

[5] The facts of the offending to which the appellant pleaded guilty on 6 January are as follows:

> On the morning of Tuesday the 3rd of January 2017 the appellant was sitting at Charles Creek when approached by co-offender Leslie Marshall, and a large group of youths. Marshall asked the appellant if he wanted to "break in for grog" and he agreed. They formed the common intention to unlawfully enter a building for the purpose of stealing alcohol.
>
> At around 1 am the appellant and co-offenders approached the rear of the Northside IGA Supermarket (captured on CCTV footage). The appellant and co-offenders climbed up a pipe attached to the rear wall and onto the roof of the building.
>
> The co-offender (Thompson) used a yellow handled screw driver to jemmy up the roof sheeting and create a small opening, damaging the sheeting. The co-offenders then entered

the roof cavity and kicked a hole through the ceiling below them. The appellant remained on the roof, waiting for the co-offenders to pass alcohol to him.

At 1:07 am the co-offenders created a large hole in the ceiling and one of them jumped down into the liquor outlet of the Northside IGA. Co-offender (Thompson) then jumped through the ceiling, causing extensive damage (damage: $20,000), with a large portion of the roof collapsing into the store.

The co-offenders filled up three bags with the following items:

- Assorted alcohol
- Packets of cigarettes
- Packets of chips
- A number of bottles of Coca Cola

having a total value of $3,000.

The co-offenders searched the cash registers but located no money. They then passed the bags of stolen property up to the appellant and another co-offender who was in the roof cavity.

The appellant saw security arrive so he jumped down from the roof and ran from the scene. He left the co-offenders inside the building with the stolen property.

At 1:12 am the co-offender (Thompson) climbed back into the roof cavity and onto the roof where he took possession of a black back pack which contained the stolen alcohol. The co-offenders sighted a number of Talice Security vehicles arrive at the rear of the building so they jumped down at the front of the store where Thompson was apprehended.

The appellant’s and co-offenders actions were captured on CCTV footage.

[6] The facts of the offending to which the appellant pleaded guilty on 28 February 2017 are as follows:

> Sometime between the hours of 11 am on 27 December 2016 and 11 am on 1 January 2017 the defendant attended the residence of 10 Grosse Street, Alice Springs with the intention of unlawfully entering the premises for the purpose of stealing property.
>
> He approached the kitchen window which he broke with an unknown object. He then entered the premises through the broken window and searched and located and stole the following property; a thermal jacket, a Driza-Bone, seven bottles of wine and a cordless phone. He then left the location with the stolen property.
>
> Police forensics were later called to the scene and offender's palm print was located on the window sill of the kitchen window pointing entry. At no time did the defendant have permission to enter the victim's residence, damage or take any property from within.
>
> At about 10:20 am on Wednesday 8 February 2017 police attended the Alice Springs Youth Detention Centre. The defendant was offered the opportunity to participate in a formal record of interview which he declined and he was advised he would be summonsed.

Grounds 1 & 3: that the sentence is manifestly excessive, and that undue weight was given to specific and general deterrence without regard to their modified application under the *Youth Justice Act.*

[7] These two grounds are considered together. A contention that a sentencing court has accorded undue (or insufficient) weight to a particular factor is properly viewed as a particular of the ground asserting manifest excess, so that the contention that the sentencing judge placed excessive weight on the principles of general and specific

deterrence necessarily forms part of the contention that the sentence was manifestly excessive.[1]

[8] The principles governing appeals of this nature are well known.

> It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[2]

[9] In determining whether a sentence is manifestly excessive, an appeal court must consider the maximum penalty for the offence, the objective seriousness of the offence on the scale of seriousness for that particular offence, the standards of sentencing customarily imposed for the offence and the personal circumstances of the offender.[3]

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1 *Lantjin v Phipps* [2017] NTSC 39 at [20]; *Noakes v The Queen* [2015] NTCCA 7 at [15] quoting *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220; 24 VR 457 at 459-460

2 *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [4] ("*Edmond*") and the cases cited therein

3 Ibid at [30] quoting *Phan v Western Australia* [2014] WASCA 144 at [19]

The maximum penalties

[10] The appellant was sentenced to an aggregate term of 12 months detention for unlawful entry at night with intent to steal, stealing and property damage. The sentencing judge allowed a 25% reduction in the appellant's sentence for the early guilty plea which means that the starting point for that sentence was 16 months detention. In written submissions, the appellant submitted that that was manifestly excessive, *inter alia*, because the maximum penalty for unlawful entry at night is detention for two years. The factual basis for that contention is simply wrong. The maximum penalty for that offence is imprisonment for 14 years.

[11] The same submission was made in relation to the charge of unlawful entry of a dwelling house with intent to steal. The maximum penalty for that offence is imprisonment for 10 years, not two years. The appellant received an aggregate term of imprisonment for eight months for unlawful entry of a dwelling house with intent to steal, stealing and property damage.

[12] The maximum period of detention which the Youth Justice Court can impose is two years. However, that is not the relevant "yardstick" in sentencing. It is well established that the appropriate approach to sentencing is to take into account the statutory maximum penalties for

the offences in question (in this case 14 years and 10 years respectively) not the jurisdictional limit of the Court.[4]

The objective seriousness of the offences

[13] The appellant contended that the objective seriousness of the offending did not warrant a sentence of the magnitude imposed.

[14] In relation to the offences to which the appellant pleaded guilty on 6 January, the appellant relied on the fact that he had taken part in the offending on the invitation of an adult co-offender and a large number of other youths, he was not the architect of the planned enterprise and he took a relatively passive role, waiting on the roof for the alcohol to be passed up to him.

[15] In relation to the offences to which the appellant pleaded guilty on 28 February, the appellant submitted that the offending was opportunistic and unsophisticated, the property damage was "minimal" and appellant was under the influence of cannabis and was after liquor and clothing.

[16] A perusal of the sentencing remarks shows that the sentencing judge was aware of and took into consideration all of these matters, and it seems to me in any case that, in relation to the offences to which the appellant pleaded guilty on 28 February, none of the matters relied on

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[4] *Markarian v R* (2005) 228 CLR 357 at 372 per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Wheeler v Eaton* [2012] NTSC 80 at [17] citing*Taylor v Malagorski* [2011] NTSC 98 at [24]

by the appellant does much to reduce the seriousness of the offending. "[T]he absence of a factor which would elevate the seriousness of the offending is not a matter of mitigation."[5] In *Edmond*, the Court of Criminal Appeal quoted the Victorian Court of Appeal in *Hasan v The Queen*[6] on the question of intoxication:

> It is notorious that intoxication of the offender is a common feature of violent offending in general, and of sexual violence in particular. Not infrequently, sentencing judges are faced with a submission that the offender's intoxication made him/her behave in a manner that was 'out of character' and that his/her moral culpability for the offending should be seen as lessened accordingly. As already indicated, that is the submission which was advanced on this appeal.
>
> In the circumstances, it is timely to review the state of the law regarding intoxication as a sentencing consideration. As will appear, courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce the offender's culpability. An 'out of character' exception is acknowledged to exist, but it has almost never been applied. On the other hand, it is recognised that intoxication can be an aggravating factor where the offender is shown to have had foreknowledge of how he/she is likely to behave when affected by alcohol.[7] *[citations omitted]*

[17] The same can be said of the voluntary consumption of cannabis. The fact that the appellant was under the influence of cannabis at the time of the offending does not reduce his level of culpability. Nor do I think the fact that he was after clothing and liquor to be of particular

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5 *Emitja v The Queen* [2016] NTCCA 4 at [52], quoted in *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [44]

6 (2010) 31 VR 28

7 *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [45] quoting *Hasan v The Queen* (2010) 31 VR 28 at [20]-[21]

relevance. (It would be different if, for example, the appellant was hungry and committed the offence to steal food.)

[18] In written submissions, the respondent characterised the appellant's level of culpability in relation to both lots of offending as "moderate". In relation to the offences to which the appellant pleaded guilty on 6 January, the respondent submitted that the objective seriousness of the offences was mid-level to high given the value of the property stolen ($3,000) and the property damage ($20,000).

[19] The appellant submitted that the objective seriousness of that offending was less than mid-range, relying chiefly on the fact that the appellant did not enter the building but waited on the roof to receive the stolen alcohol as it was passed up and was not directly responsible for the property damage. In oral submissions, counsel for the appellant also pointed out that the threshold amount for aggravating the offence of stealing was $100,000 and that damage to property can (in some circumstances with some property) amount to millions of dollars, though he conceded that $20,000 damage was significant.

[20] To the extent that it is relevant, I would categorize the offending as mid-level. I do not agree that the appellant's level of culpability is reduced much, if at all, by the fact that he did not enter the building but stayed on the roof waiting for the stolen alcohol to be passed up to him, or the fact that he was not the one who broke through the ceiling.

The appellant and his co-offenders were actively engaged in a co-operative enterprise of unlawful entry and stealing that necessarily entailed causing damage to the ceiling to effect their common purpose. Someone had to go down into the property to take the alcohol and someone needed to stay on the roof to receive the stolen property as it was passed up. I do not see that there is any real difference in moral culpability between those who played different, equally essential roles in the joint criminal enterprise. A case like the present can be distinguished from, say, a robbery where one co-offender inflicts additional gratuitous violence on the victim, in which one can discern a clear difference in the moral culpability of the participants.

[21] Given offending which is in the mid-range of seriousness, and subject to the principles applicable to sentencing youths discussed below, it can hardly be said that a sentence of 10 months detention for three offences with maximum penalties of imprisonment for 14 years, seven years and 14 years, is disproportionate to the objective seriousness of the offending. The same can be said of the aggregate sentence of eight months detention for three offences carrying statutory maximum penalties of 10 years, seven years and 14 years.

Application of the totality principle

[22] In written submissions, the appellant complained that the sentence imposed offended against the principle of totality because the limited

concurrency resulted in a substantial total effective sentence and the two year operational period under supervision will result in considerable interference with the appellant's liberty for a lengthy period lasting until after he turns 18, thereby exposing him to the risk of adult prison. I disagree.

[23] The principle of totality requires the sentencing judge to "take a last look" to ensure that the total sentence reflects the overall criminality involved in the offending and does not result in a sentence which is crushing. The sentencing judge clearly had this principle in mind when considering the degree of concurrency to be ordered.

[24] Although his Honour remarked, "Normally the court would order concurrency for the penalties I am going to impose on you," in my view it would have been inappropriate to order total concurrency of the two sentences. The two lots of offending were committed on separate occasions and involved separate decisions to engage in criminal conduct. It was appropriate for the sentencing judge to order some degree of cumulation and the total sentence imposed was not such as to be crushing or disproportionate to the overall criminality of the conduct.

[25] Further, the appellant is only at risk of going to adult prison if he commits another offence punishable by imprisonment during the operational period (in which case he risks going to adult prison in any

case) or (possibly) is in deliberate and egregious breach of the conditions of his suspended sentence. Both of these things are entirely within the control of the appellant.

[26] Further as counsel for the respondent pointed out on the hearing of the appeal, s 121 of the *Youth Justice Act* which applies to breaches of suspended sentences by youths, allows more flexibility and confers a considerably wider discretion on the court than s 43 of the *Sentencing Act 1995* (NT) (‘*Sentencing Act*’). I agree with the submission by counsel for the respondent that an appeal court is entitled to assume that the discretion conferred by this section would be exercised appropriately in the interests of justice, so that the appellant would be not be sent to adult prison for the outstanding balance of his suspended sentence should he “slip up” and commit a minor breach of his suspended sentence – or relatively trivial offending, as counsel for the appellant contended might be the case.

Principles applicable to sentencing youths

[27] The appellant relies on authorities to the effect that the major concern of courts when sentencing youths is the young offender’s development as a law abiding citizen[8] and that the sentencing regime established by

[8] *Carcuro v Norris* [2007] NTSC 18 at [18]

the *Youth Justice Act* is designed as a non-punitive system aimed at rehabilitation of youthful offenders.[9]

[28] This is undoubtedly correct, but these submissions by the appellant are based on a false assumption, namely that the sentencing principles of deterrence and rehabilitation are incompatible. They clearly are not. It is often said that the principles of rehabilitation and community protection are not incompatible: the best form of community protection is a young offender who has turned away from offending and is leading a law abiding life. In the same way, personal deterrence and rehabilitation are not incompatible. The major point of a suspended sentence (especially one, like the present one, which was suspended forthwith) is to provide the offender with an incentive to rehabilitate.

[29] In written submissions, the appellant cited the often quoted decision of Mildren J in *P (a Minor) v Hill:*

> The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course, there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are for extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis. I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all

[9] Ibid; *Hallam v O'Dea* (1979) 22 SASR 133; *R v Homer* (1976) 13 SASR 377 at 382-383

> other options are inappropriate and the need for deterrence and to protect the community must be given special prominence.[10] *[citations omitted]*

[30] As Mildren AJ said in *SB v Andrew Heath,*[11] it is important not to take these remarks out of context. (They were made in connection with an appeal against a sentence nine months and 21 days detention which was only partially suspended imposed on a 13 year old boy for a series of property offences.) There is a considerable difference between a sentence of actual detention and a sentence of detention which is wholly suspended on conditions, including supervision.

[31] In this case the sentencing judge did not order continuing actual detention. The appellant had been in detention on remand and the sentencing judge ordered him to be released on conditions of residence and supervision which were not intended to be punitive but were aimed at the welfare of the appellant and trying to keep him out of trouble. In the course of sentencing, while noting that the appellant had been influenced by other young people "who want to do dumb things", and that his family were very worried about him, his Honour said:

> Now, in the pre-sentence report which I have ordered, it indicates to go to Timber Creek and be with your grandfather would be a very positive thing for you to do. He seems to have a good influence on you and you like to be with him.

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10 (1992) 110 FLR 42 at 48

11 [2017] NTSC 13 at [36] – [37]

…

I think the proposal for you to go to Timber Creek with your older brother and be with your grandfather is a very sound one for you to move forward in the future and get your life on track where it should be rather than getting into this sort of trouble.

…

So there will be a reasonably significant head sentence and you will have to make sure that you stay out of trouble for a couple of years. And if you listen to everybody that cares about you, your family, your brother, your grandfathers, I am sure you can make those good decisions.

[32] On the hearing of the appeal counsel for the appellant said that the appellant did not contend that a period of actual detention was not warranted, or even that the amount of time actually served was excessive. Rather it was the length of the head sentence, combined with the recording of a conviction and the fixing of a two year operational period which extended past the appellant's 18th birthday (giving rise to the risk of adult prison as a consequence of a breach) that combined to give rise to a sentence that was manifestly excessive.

[33] I disagree. Although contending that the present sentence was significantly higher than any head sentence the appellant had ever received in the past, counsel for the appellant was unable to point to comparative sentences which demonstrate a sentencing range for offences of this nature committed by a youth of comparable age and antecedents, and for the reasons set out above, I do not think that the

sentence was disproportionate to the objective seriousness of the offending.

[34] Further, as the sentencing judge pointed out, the appellant had a fairly lengthy history of offending. He had been dealt with six times for unlawful damage to property, six times for stealing, five times for aggravated unlawful entry, four times for unlawful use of a motor vehicle and four times for driving while unlicensed, once for driving a motor vehicle causing harm or death, eleven times for breach of bail and fifteen times for breaching Youth Court Orders. The third time he was dealt with for unlawful use of a motor vehicle and driving unlicensed a conviction was recorded, but he went on to do both again.

[35] I was not given details of the earlier offending for which the appellant received lesser sentences but the Information for Courts sets out the dispositions. Unless there is a mistake in the record, it appears that the appellant started offending when he was aged 12 years and eight months but was not dealt with for that offending until he was 14. In any event, when he was first dealt with by the court, the offences were found proved, no convictions were recorded, and no action taken. For the next 11 offences, no convictions were recorded and he was given community work orders of varying lengths which he breached. For the first three breaches of community work orders, no action was taken so to that point, the appellant had essentially experienced no practical consequences for any of his offending. There followed the recording of

a conviction and the imposition of a four week suspended sentence for his third offences of unlawful use of a motor vehicle and driving unlicensed. For the next five breaches of community work orders the appellant was resentenced to an aggregate term of three weeks detention suspended after nine days. For later offending (and breaches of Youth Court Orders) he received short sentences of from seven days to two months detention. Plainly those sentences had not had the desired effect of discouraging the appellant from committing offences of this nature.

[36] The sentencing judge said to the appellant:

> You are now 16 and you will turn 17 in September so you are getting closer and closer to becoming an adult in the eyes of the law which is 18 years of age. And if you were an adult today and I was sentencing you for this sort of trouble, I would be looking at locking you up for a minimum of about a year and a half for this type of trouble.[12] So that does reflect in the adult world at least the seriousness with which the courts view this type of offending.

[37] Later in the sentencing remarks his Honour referred to "trying to bring home" to the appellant the seriousness of the offending and in that context he said, "So there will be a reasonably significant head sentence and you will have to stay out of trouble for a couple of years."

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[12] In my view this can only be a reference to the minimum period of actual imprisonment which would be imposed on an adult offender and could not be construed (as counsel for the appellant contended) as a reference to an appropriate head sentence for an adult offender.

[38] On a fair reading of the sentencing remarks, it seems to me that his Honour was telling the appellant that if he continued to commit offences of this kind after he turned 18 he could expect to spend a significant period of actual prison time and that he was fixing the head sentence at the level he did (which was not disproportionate to the seriousness of the offending) in order to bring home to the appellant that the trouble he was in was serious. His Honour then suspended the sentence forthwith on conditions designed to facilitate the appellant's rehabilitation. I can discern no error in this approach. Nor do I think that the length of the operational period was excessive. In my view the sentence imposed was not manifestly excessive. Grounds 1 and 3 are dismissed.

Ground 2: that the recording of convictions was in error as a matter of law

[39] In support of this ground of appeal, the appellant relies on *Verity v SB*[13] in which Barr J said:

> The *Youth Justice Act* enables the Court in the case of youth offenders, to an extent which would not be possible in the case of adult offenders, to reconcile, on the one hand, the principle of holding the offender accountable and imposing condign punishment and, on the other, the rehabilitation principle of enabling the offender to move on after being punished without a conviction to hinder full re-integration into the community.[14]

and:

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13 [2011] NTSC 26

14 Ibid at [35]

> The question always has to be asked whether a conviction, "a significant act of legal and social censure" and "a formal and solemn act marking the court's and society's disapproval of wrongdoing", is required in addition to the wide range of sentencing options, some severe, which are available without conviction under the *Youth Justice Act*.[15]

[40] To that might be added the following further remarks of Barr J on the topic:

> Rather than asking why a conviction should not be recorded, the Court might well ask itself why a conviction should be recorded. The offender's age, maturity, character and previous offending would always be relevant. The nature of the offence and the seriousness of the offence would both be relevant considerations. It may also be relevant to consider the provisions of the *Criminal Records (Spent Convictions) Act* to assess the legal effect of a conviction or other sentencing order. As Riley J said in *DD v Cahill*, all of the relevant surrounding circumstances must be considered.[16] *[citations omitted]*

[41] The sentencing judge did address the question of why a conviction should be recorded. Having made reference to the desirability of the appellant going to Timber Creek; talking about his prospects for the future; referring to the Court's role under the *Youth Justice Act* "to give you an opportunity to get your life back on track"; taking into account the seriousness of the offending (and that it warranted a sentence of detention); and the appellant's guilty plea, the sentencing judge said:

> You have a reasonably lengthy history of criminal offending as a young person and as I am trying to bring home to you it is my

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15 Ibid at [37] (cited with approval in *Westphal v O'Connor* [2011] NTSC 33)

16 Ibid at [36]

> opinion that this further trouble is serious too, and weighing all of those things up I have decided to record convictions in respect of these matters.

[42] In written submissions the appellant contended that the appellant's "strong prospects of rehabilitation and re-integration into the community, acknowledged by his Honour's remarks, are unduly hindered by the recording of convictions." That may be pitching the sentencing judge's findings a little higher than is warranted by the words used. After warning the appellant against continued drug use, his Honour said:

> So that is something that you have got to think about and you are still a young man and on the information I have been given I think you have got good prospects for your future.
>
> But you have got to stop listening to people who want to do dumb things and start making good decisions for yourself. You are a bright fellow and I am sure that if you turned your mind to your education and any sort of trade or profession that you wanted to go into in later life you would be successful at it.

[43] In any case, it is clear from the sentencing remarks that his Honour took into account the appellant's future prospects when deciding to record convictions.

[44] The appellant further submitted that his Honour's primary focus was on denunciation and deterrence and contended that "his Honour was in error by allowing considerations of denunciation and deterrence to operate on the exercise of the discretion to record a conviction as well as on the formation of the sentencing disposition itself". The appellant

also contended that it was inappropriate for the sentencing judge to have taken the prevalence of this kind of offending into account when determining to record convictions.

[45] The principal fallacy in this submission is the starting premise that the sentencing judge's primary focus was on denunciation and deterrence. Despite the use of the term "deterrence" in connection with the recording of a conviction, a fair reading of the sentencing remarks shows that the primary focus throughout was on rehabilitation and giving the appellant both the opportunity and the incentive to get his life "back on track", and that his Honour took into account all of the relevant circumstances in deciding to record convictions.

[46] Further, although s 4 of the *Youth Justice Act* does not mention deterrence as a factor the court must consider, that does not mean that it is entirely irrelevant as a sentencing principle when sentencing young people.[17] Mildren J said in *LA v Kennedy* that when offending by a youth is minor, little or no weight should be given to general deterrence.[18] (He was dealing with a minor shop lifting offence by a 14 year old girl who had no prior record at the time of the offending,

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17 *LA v Kennedy* [2007] NTSC 56 at [15] per Mildren J

18 Ibid

and had since undertaken an apprenticeship.) His Honour made similar comments about the prevalence of the offence.[19]

[47] I do not agree that it was wrong in law for the sentencing judge to have placed some weight on general deterrence and the prevalence of the offending when deciding to impose convictions. A sentencing judge is entitled to take into account all relevant matters when determining the length of the sentence and when deciding to record a conviction. (In deciding whether to record a conviction when sentencing a youth, the court is not restricted to a consideration of the matters set out in s 8 of the *Sentencing Act*, although as Mildren J noted in *LA v Kennedy*,[20] in circumstances where it would not be appropriate to record a conviction against an adult, one should not be recorded against a youth.)

[48] In order to succeed on this ground the appellant would have to show that some error has been made in exercising the discretion, that the judge acted upon a wrong principle, took into account irrelevant matters or failed to take into account relevant ones, mistook the facts, or made a decision which is so unreasonable or plainly unjust, that the appellate court can infer that in some way there has been a failure properly to exercise the discretion.[21]

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19 Ibid at [17]

20 Ibid at [18]

21 *House v R* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ

[49] This, the appellant has failed to do. In this case the sentencing judge noted that the appellant had “a reasonably lengthy history of criminal offending as a young person”; that he had “not had a great record on complying with the court orders in the past”; and that he was nearly 17 years old and so approaching the time when, if he re-offends, he will be dealt with as an adult; but nevertheless formed the opinion that the appellant has “good prospects” for his future if he takes the opportunity being offered to him. In these circumstances, whether or not it is appropriate to record a conviction is a question on which reasonable minds might differ. No error of principle has been shown. The appeal on this ground is likewise dismissed.
