Verity v SB [2011] NTSC 26

PARTIES:	BRETT JUSTIN VERITY
	v
	SB
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 3 of 2011 (21031838)
DELIVERED:	1 April 2011
HEARING DATES:	3 March 2011
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Sentencing – *Youth Justice Act* – Crown appeal against sentence – discretion not to record a conviction against youth – whether failure to record a conviction resulted in a manifestly inadequate sentence – differences between youth sentencing and adult sentencing with respect to recording of convictions – appeal dismissed

Criminal Code s 188, s 379(3)
Criminal Records (Spent Convictions) Act
Sentencing Act s 7, s 8
Youth Justice Act s 4, s 4(a), s 4(g), s 83, 83(1), s 83(1)(f), s 144

Carnese v The Queen [2009] NTCCA 8; *House v R* (1936) 55 CLR 499; *R v Lange* [2007] NTCCA 3, followed

Briese (1997) A Crim R 75; *R v McInerney* (1986) 42 SASR 125, applied

R v Bernath [1997] 1 VR 271; *DD v Cahill* [2009] NTSC 62; *DPP v Castro* [2006] VSCA 197; *Everett v The Queen* (1994) 181 CLR 295; *Ford v Nicholas* [2010] NTSC 53; *Hales v Adams* [2005] NTSC 86; *Hesseen v Burgoyne* [2003] NTSC 47; *R v Osenkowski* (1992) 30 SASR 212; *R v Riley* (2006) 161 A Crim R 414; *Wild v Balchin* [2009] NTSC 35, considered

REPRESENTATION:

Counsel:

Appellant:	D Dalrymple
Respondent:	P Maley

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Bar1103
Number of pages:	17

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

Verity v SB [2011] NTSC 26
No JA 3 of 2011 (21031838)

BETWEEN:

BRETT JUSTIN VERITY
Appellant:

AND:

SB
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 1 April 2011)

Prosecution appeal against sentence

[1] On 10 December 2010 the respondent pleaded guilty in the Youth Justice Court to a charge of aggravated assault contrary to s 188 of the *Criminal Code*. The aggravating circumstance set out in the charge was that the victim had suffered harm. The maximum penalty for this offence under the statute was five years imprisonment, but the Youth Justice Court was restricted in the case of the respondent to a maximum of two years detention or imprisonment.

[2] The sentencing magistrate dealt with the respondent in this way: without recording a conviction, she released him on a 12-month good behaviour

bond on his own recognizance in the sum of $500, and made an order that there be no publication of his name. The order for release on a bond is a sentencing option specifically authorised under s 83(1)(f) *Youth Justice Act*.

[3] The appellant has appealed to this Court pursuant to s 144 *Youth Justice Act* on the ground that the learned magistrate erred in law, arguing that the sentence was manifestly inadequate with respect to the "failure to record a conviction".

[4] There is no issue on appeal with respect to the release of the respondent on a 12-month good behaviour bond.

The proceedings in the Youth Justice Court

[5] The agreed facts on which the magistrate sentenced the respondent were read out in court by the prosecutor, and I summarize them as follows, in substantially the same terms as the transcript of proceedings:-

> On Monday 20 September 2010 at 5.00 pm, the respondent was driving along Trower Road [in the Darwin suburb of] Millner. He saw the victim, Michael Kelly, walking along the footpath and stopped his vehicle in Francis Street, Millner before approaching the victim and speaking with him.
>
> The respondent had an exchange of words with the victim and asked him, "Why did you follow Bryce on the weekend?" The respondent then grabbed the victim's shirt with his left hand at the front, and jabbed one punch to the victim's head. Specifically, he pulled back his right hand and with a clenched fist punched the victim to the left side of the jaw. The force of the punch knocked the victim to the ground.

> The respondent then stood over the victim and a further verbal exchange ensued. A police vehicle arrived shortly after and police spoke to both the respondent and the victim.
>
> On Wednesday 22 September 2010 the respondent participated in an electronic record of interview with police. He made admissions to the offence. When asked his reasons for assaulting the victim, he replied, "I just wanted to talk to him about why they threatened to bash my mate". At 1:43 pm on Wednesday 22 September the defendant was arrested by police, charged and bailed.
>
> As a result of the assault the victim suffered two fractures to the left side of his jaw, cuts to the inside of his mouth, pain and dizziness.

[6] A victim impact statement was tendered by the prosecutor. That statement referred to the victim's jaw having been fractured in two places, with a loose painful tooth over one of the fractures. The victim suffered a clicking jaw. There was reference to the specialist having treated the injury conservatively without pinning and plating because the victim was 15 years old and his jaw still developing. The victim stated that he had lived on fluids and mushy food for two months. In terms of the emotional impact, the victim referred to the fact that he did not like going past the corner where the assault had happened, and that he had suffered flashbacks. There was also reference to some ongoing difficulties with certain people, possibly friends of the respondent, described as “all their friends”.

[7] Additional facts relating to the offence were put before the court by the respondent’s counsel without objection, as follows:-

> “It was at 5.00 pm on 20 September and my client was travelling home. He saw the victim Michael Kelly who was a young boy who is well known to my client and apparently about a week or so prior there was an incident where Michael Kelly and some of his friends

had intimidated one of my client's friends and my client stupidly decided to stop and confront Michael Kelly about this.

He stopped, he got out. He said that he didn't plan to punch him at that stage, but there was a verbal exchange, they faced off and my client's grabbed him and punched him in the head. There was an exchange shortly thereafter. My client desisted voluntarily, he didn't continue on with the physical assault of Mr Kelly and shortly thereafter the police came."

[8] After those additional facts had been stated in court (together with a number of other facts relating to the respondent's personal circumstances, including his expression of remorse), the prosecutor told the magistrate, "I accept everything that my learned friend said today", before then making some further submissions emphasising that the assault was unprovoked, that the respondent had had to stop the vehicle which he was driving in order to get out and confront the victim, and then describing the details of the fracture to the victim's jaw and the pain, discomfort and inconvenience which the victim suffered.

[9] The prosecutor's stated acceptance of the additional facts put to the court by counsel for the respondent effectively converted those facts to evidence. Under s 379(2) of the Criminal Code, the prosecution "may admit on the trial any fact alleged by the accused person and such admission is sufficient proof of the fact without further evidence". In this context, "trial" includes proceedings before the Court of Summary Jurisdiction and proceedings subsequent to a plea of guilty.[1]

[1] *Criminal Code* s 379(3); s 1 definition of "trial".

[10] Counsel for the respondent at the end of his plea in mitigation asked the magistrate to deal with the respondent by imposing a bond without recording a conviction. The prosecutor said in response, "I have no submission to make in relation to sentence."

[11] The magistrate, in her sentencing remarks, described the offence in this way:-

> "Now this seems to me to be a pretty well classic example of the sort of things that happen between young men. There's a lot of, you know – there's threats, there's arguments, there's somebody said this and somebody did that and there's a confrontation and you seem to have reacted quite out of character because your referees say they never observed any violence in you and Mr Maley says well you have been on a football field most of your life and you've never over reacted there, but for some reason on this day you seem to have over reacted to the argument you got into. Thrown a single punch with pretty dire consequences for the young person that you struck.
>
> That's the problem, S, with acts of violence, that it may be a single punch, but that single punch can result in terrible injury to people. This young lad had his jaw broken. Fortunately he didn't have it pinned but eating soft mashed up food for two months wouldn't be much fun, I'd imagine, and I think there is considerable amount of pain associated with a fractured jaw."

[12] Her Honour proceeded to sentence the respondent as summarized in par [2] above. Her reasons for the decision not to record a conviction were closely bound up with the decision to release the respondent on a 12-month good behaviour bond and to suppress publication of his name. The magistrate said:-

> "I am satisfied that you have got to the age of 18 now, although I'm still dealing with you as a young person because you were 17 when this happened, that you are a young man who is prepared to think

about his conduct and not get involved in offending of this kind in the future.

You have been through no doubt as your whole family have a very stressful year [*a reference to the closed head injury suffered by the respondent's father as a result of falling from a horse, mentioned in one of the references contained in exhibit D2*] and as one of your referees says you have handled that with maturity. I think that you stand a very good chance of never coming back to court in the future.

For that reason I'm going to give you the opportunity to keep essentially a clean record by not recording a conviction against you. You will be released on a good behaviour bond, I'll make that $500 own recognizance to be of good behaviour for 12 months. …

If you stay out of trouble, and I am confident that you will, as confident as any court can be, then at the end of 12 months that's the end of the matter. … I am also going to make an order that [the respondent's] name and any information which is capable of identifying him be suppressed from publication. I think, notwithstanding that he is an older youth before the court, he has not had any history at all. His prospects of rehabilitation are extremely good and I think he should be entitled to keep this matter within the court at this point."

[13] It is apparent from those remarks that, in deciding not to record a conviction, the magistrate had regard in particular to the character, antecedents and age of the respondent, and to his prospects for rehabilitation. Her Honour was also conscious of the benefit to the respondent of his keeping a "clean record" for the future.

Issues arising on the appeal

[14] Mr Dalrymple for the appellant argued that the magistrate's characterisation of the respondent's offending was inappropriately benevolent; that the magistrate should have characterised it as a 'bullying thuggish act'; and that there was no other reasonable characterisation. Mr Dalrymple argued that

this was not an episode of pushing and shoving in the school playground, as her Honour's words suggested. The magistrate's error in her characterisation of the offending conduct led to error in the exercise of her sentencing discretion. By not recording a conviction, her Honour failed to sufficiently reflect the gravity of this offence. Mr Dalrymple argued further that the sentencing outcome was already sufficiently lenient without the additional leniency of there being no conviction recorded and that the unjustified additional leniency left the victim's legitimate expectations unfulfilled and did not address community concerns as to the prevalence of violence.

[15] The arguments put on behalf of the appellant are summarized in the following extracts from the appellant's written submission:-

> "… the learned sentencing magistrate placed too great an emphasis on the issue of rehabilitation and too little emphasis on the rights of the victim and the interests of the community, thereby failing to achieve the balance required under s 4(g) of the *Youth Justice Act*."

> "… the learned sentencing magistrate's decision not to record a conviction resulted in a sentence that was manifestly inadequate not just in terms of its failure to achieve an appropriate balance between rehabilitation and other important sentencing considerations but also in terms of its failure to effectively hold the respondent accountable and encourage him to accept responsibility for his behaviour (s 4(a) of the *Youth Justice Act*)." [2]

[2] Taken from paragraphs 28 and 37 of the appellant's submissions. Section 4 Y*outh Justice Act* sets out the general principles that must be taken into account in the administration of the Act: s 4(a) states "if a youth commits an offence, he or she must be held accountable and encouraged to accept responsibility for the behaviour"; s 4(g) states "a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community".

Consideration of the issues arising on appeal

[16] The decision in the present case as to whether or not to record a conviction was a decision involving the exercise of a judicial discretion by the sentencing magistrate.

[17] This Court will only interfere with the exercise of a sentencing discretion on the basis explained by the High Court in the well-known authority of *House v R* (1936) 55 CLR 499 at 504:-

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

[18] Where the ground of appeal is that a sentencing Judge failed to give due weight to a particular factor or, alternatively, gave undue weight to other factors, in contrast to a ground asserting that the sentencing Judge disregarded a factor altogether or took an irrelevant factor into consideration, an appellate court must be especially cautious not to

substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[3]

[19] There are special considerations in relation to a Crown appeal against sentence, explained by the Court of Criminal Appeal in *R v Lange*[4]: -

> "On a Crown appeal against the adequacy of a sentence, it is not enough that the Appeal Court is of the view that the sentence is too light. In the absence of a specific error by the sentencing Judge, the sentence must be so manifestly inadequate as to demonstrate that error of principle must have occurred. To put it another way, the sentence must be so low as to "shock the public conscience": *R v Osenkowski* (1992) 30 SASR 212 per King CJ at 213. The principles governing Crown appeals were discussed by this Court in *R v Riley* (2006) 161 A Crim R 414 at 419 [18] - [20] and 421 – 422 [34] and it is unnecessary to repeat that discussion."[5]

[20] I turn to a consideration of the appellant's arguments. In relation to the facts of the offending conduct, there were significant shortcomings in the evidence presented to the magistrate. There was very little information about the background to the offending. There were hints of there being two groups of male youths, with the respondent's friend, Bryce, and the victim being in opposing groups, but the facts were vague.

[21] The motivation for the assault was not well explained. The full context in which the assault occurred was not in evidence. The magistrate was not told what was said by each of the respondent and the victim to one another in their exchanges prior to and after the assault. The magistrate was not

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3 *R v Bernath* [1997] 1 VR 271 at 277 per Calloway J, approved by the Court of Appeal of the Supreme Court of Victoria in *DPP v Castro* [2006] VSCA 197 at [17].

4 [2007] NTCCA 3 at [31].

5 The discussion in *Riley* also included at [34] reference to the principles on Crown appeals set out in *Everett v The Queen* (1994) 181 CLR 295 at 299 - 300; 74 A Crim R 241 at 244-245.

provided with evidence to enable her to understand exactly what, if anything, triggered the one blow struck. Further, although the evidence disclosed that there was an age difference of two to three years between the respondent and the victim (the respondent was 17, almost 18 years old, and the victim was 15[6]) the magistrate was not given a physical description of the victim and would not have known whether or not the victim was of a similar physique and size to the respondent. The magistrate would not have known whether, in the 'face off' situation asserted by the respondent's counsel, the respondent was (or was not) more physically dominant or intimidating than the victim.

[22] A proper understanding of the offending conduct is thus made difficult on appeal because of the insufficiency of evidence provided to the magistrate.

[23] I am therefore unable to accept Mr Dalrymple's characterisation of the offending conduct. The expression "bullying thuggish act" could apply equally to school playground bullying as to hardened criminal standover behaviour. It is not a useful characterisation. I do not agree that the magistrate should necessarily have characterised the respondent's conduct in that way, or that she misapprehended the facts when she concluded that the offending conduct was a "pretty well classic example of the sort of things that happen between young men." I do not interpret her Honour's comment as a write down of the gravity of the offending. Rather it represents her understanding of the type of conduct which led to the offending.

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[6] discerned from the agreed facts and the victim impact statement.

[24] The appellant has not established on appeal that the magistrate wrongly characterised the respondent's offending conduct. On the contrary, the magistrate's assessment of and approach to the respondent's offending was consistent with the evidence placed before her. Her Honour also had a clear understanding of the serious consequences of the offending conduct in terms of the jaw fractures and the pain caused to the victim by those fractures.

[25] The appellant has not established any error on the part of the magistrate in relation to her having mistaken the facts.

[26] I next turn to consider whether the sentence whereby no conviction was recorded was so manifestly inadequate as to demonstrate that an error of principle must have occurred.

Significance of a conviction in youth offending

[27] A conviction is not a mere formality or an additional endorsement on the court file having no significance. The recording of a conviction is to be regarded as a component of the sentence. In *Carnese v The Queen*[7] the Court of Criminal Appeal approved the statement of Cox J in *R v McInerney*[8] that "a conviction is a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing." In *Hales v Adams*[9] Southwood J considered the factors under s 8 of the *Sentencing*

[7] [2009] NTCCA 8.
[8] (1986) 42 SASR 125.
[9] [2005] NTSC 86.

Act relevant to the exercise of the judicial discretion as to whether or not to record a conviction against an adult offender. His Honour said:-

> "It is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction. Mature age offenders who have led previously blameless lives may benefit from an exercise of the discretion not to record a conviction. The discretion may also be exercised in an offender's favour where the offender has no previous convictions, or where the offending related to ill health or where it would, in itself, be a significant additional penalty for a first offender. On the other hand, the recording of a conviction may be necessary where the offender is of mature age and deterrence is being given weight, especially in relation to breaches of regulatory or social legislation. A useful summary of these considerations may be found in RG Fox and A Freiberg, "Sentencing State and Federal Law in Victoria" 2nd Ed, at 190 – 193."

[28] The appeals which come before this Court concerning the discretion not to record a conviction include both cases where a conviction has been recorded and the appellant argues that the discretion should have been exercised in his or her favour and a conviction not recorded, and cases where a conviction has not been recorded and the Crown appeals against the exercise of the discretion not to convict.[10] Most of those appeals have related to adult offenders dealt with under the provisions of the *Sentencing Act*. However, *DD v Cahill*[11] was a successful appeal by a boy aged 12 against sentences which were said to be manifestly excessive on account of the fact that the magistrate recorded convictions in sentencing under the *Youth Justice Act*. In that case Riley J suggested the following approach to the

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[10] See, for example, *Hesseen v Burgoyne* [2003] NTSC 47; *Hales v Adams* [2005] NTSC 86; *Carnese v The Queen* [2009] NTCCA 8; *DD v Cahill* [2009] NTSC 62; *Ford v Nicholas* [2010] NTSC 53.

[11] [2009] NTSC 62.

matters to be taken into account in deciding whether to record convictions against young persons:-

> "The decision whether or not to impose a conviction on a young person requires careful consideration by a court. In relation to adult offenders there is some guidance to be found in the *Sentencing Act*. Section 8 of that Act requires a court, in deciding whether or not to record a conviction, to have regard to the circumstances of the case including the character, antecedents, age, health or mental condition of the offender; the extent to which the offence is of a trivial nature; and the extent to which the offence was committed under extenuating circumstances. Section 8 does not apply to the Youth Justice Court. The *Youth Justice Act* itself does not provide any guidance as to the matters to be taken into account in determining whether or not to record a conviction. The decision involves an exercise of discretion. However the discretion must be exercised judicially and, in that process, all of the relevant surrounding circumstances must be considered including factors of the kind identified in s 8 of the *Sentencing Act*."

[29] His Honour also made reference to the possible future impact of a conviction on the ability of a person to obtain employment; on the person's dealings with various licensing authorities, government departments and insurers; and on the ability of the person to travel to some countries. He concluded that (even for a young child) the prospect of adverse consequences was real, and that the recording of a conviction remained "a significant act of legal and social censure".[12]

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

[12] *DD v Cahill* [2009] NTSC 62 at [15]-[16]; the reference was to Fox and Freiberg, "Sentencing: State and Federal Law in Victoria" (second edition) at par [1.504]

court does record a conviction. As the Queensland Court of Appeal said in *Briese*[13]:-

> "It is reasonable to think that this power [*the power not to convict*] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression."[14]

[31] In my opinion, the *Youth Justice Act* gives effect to the desirability of avoiding the social prejudice and potential oppression occasioned to young persons by the recording of a conviction. This is seen specifically in the extensive range of sentencing orders which the Youth Justice Court has power to make under the *Youth Justice Act* without recording a conviction.

[32] For example, not only may the Youth Justice Court dismiss a charge, discharge without penalty, conditionally release on a good behaviour bond, impose a fine and/or impose a community work order for up to 480 hours, but the Youth Justice Court may order a youth to serve a term of detention or imprisonment, even a term of detention or imprisonment which is not suspended. All these options are available to the Youth Justice Court whether or not it records a conviction.[15]

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[13] (1997) 92 A Crim R 75 at 79, per Thomas and White JJ.

[14] cf *Wild v Balchin* [2009] NTSC 35, where Olsson AJ suggested that suppressing publication of an offender's name directly impacts on the issue of rehabilitation, but that recording convictions "does not necessarily have that effect".

[15] s 83 *Youth Justice Act*.

[33] In comparison, the options available to a court dealing with adult offenders under s 7 *Sentencing Act*, where the court does not record a conviction, are limited to dismissal of the charge, release of the offender, imposing a fine, and making a community work order. The options of imprisonment (suspended or otherwise) or a home detention order cannot be imposed without a conviction.

[34] In youth sentencing, therefore, a conviction is not a condition precedent to the imposition of even the most serious punishments. The power of the Youth Justice Court to punish, even severely, without recording a conviction, suggests that the Youth Justice Court may appropriately take into account quite separate and distinct considerations on the question of whether or not to record a conviction to such considerations as the seriousness of the offence.

[35] 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.[16]

[36] In sentencing, therefore, the Youth Justice Court should consider in the facts of each case whether sentencing principles lead to the need to record a

[16] See s 4 *Youth Justice Act*, principles (a) and (f).

conviction, bearing in mind that recording a conviction falls nowhere expressly on the scale of sentencing options set out in s 83(1) *Youth Justice Act*. 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.[17] 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.[18] As Riley J said in *DD v Cahill*[19], all of the relevant surrounding circumstances must be considered.

[37] However, in exercising its sentencing discretion, the Court should be alive at all times to the differences between youth sentencing and adult sentencing with respect to the recording of convictions. 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*.

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17 See generally s 81(2) *Youth Justice Act.*

18 For example, s 7(3) *Criminal Records (Spent Convictions) Act* provides as follows: "A criminal record of a finding or order made under section 83 of the *Youth Justice Act*, not being an order made under subsection (1)(a) or (b) of that section, without the court proceeding to conviction, is a spent conviction immediately the period specified in the order expires if the person subject to it has by that time complied with all of its requirements or where, before that time, he or she has complied with all of its requirements and there is no continuing obligation to be met, on the completion of those requirements."

19 [2009] NTSC 62; see par [28] above.

Conclusion

[38] In light of the foregoing discussion, I do not interpret the magistrate's decision not to convict as any indication that the offending was not serious. SB was a first offender, and the matters referred to in par [11] to par [13] above establish proper grounds for the exercise of the magistrate's discretion not to record a conviction.

[39] The appellant has failed to establish that the sentence was manifestly inadequate on account of the magistrate's decision not to record a conviction.

[40] There is no appeal against the magistrate's order that the respondent be released on a 12 month good behaviour bond.

[41] The appeal should be dismissed.
