CITATION:	*Abbott v Wilson* [2017] NTSC 50
PARTIES:	ABBOTT, James v WILSON, Taryn
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LCA 8 of 2017 (21709910)
DELIVERED ON:	6 July 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	24 May 2017
JUDGMENT OF:	HILEY J

CATCHWORDS:

APPEAL – sentencing – appeal against imposition of mandatory minimum fine on youth for traffic offences – interaction between Youth Justice Act and Traffic Act - the Court may apply the kind of penalties applicable to an adult for such offending but it is not required to impose the minimum penalties mandated for adults in so far as fines are concerned – appeal dismissed

APPEAL – sentencing – Youth Justice Act – recording a conviction against youth – counsel made detailed submissions but did not request for no conviction to be entered until after Judge had proceeded to convict and sentence the appellant - whether Judge erred in failing to allow counsel to be heard then on that issue – held that offending was serious and counsel should not have assumed that a conviction would not be recorded - no error - appeal dismissed

APPEAL – sentencing – imposition of fine upon youth – s 71(2) Youth Justice Act requires Court to be satisfied that the fine is appropriate having regard to the financial circumstances of the youth - held that the Judge did have due regard to the financial circumstances of the appellant and was so satisfied – appeal dismissed

Fines and Penalties (Recovery) Act 2001 (NT) 123
Traffic Act 1987 (NT) s 22, s 31, s 32, s 33, s 34
Victims of Crime Assistance Act 2006 (NT) s 61
Youth Justice Act 2005 (NT) s 3, s 4, s 6, s 18, s 71, s 72, s 81, s 83, s 88, s 92, s 107

Goodwin v Phillips (1908) 7 CLR 1; *Police v MK* [20017] NTMC 047; *Westphal v O'Connor* [2011] NTSC 33; *R v DV* [2015] NTSC 21406182, 21414403 and 21406171 (31 August 2015) Sentencing remarks; *Qadir v Rigby* [2012] NTSC 90; *DD v Cahill* [2009] NTSC 62, referred to

Hales v Adams [2005] NTSC 86; *Verity v SB* [2011] NTSC 26, followed

Whitehurst v The Queen [2011] NTCCA 11, distinguished

D Pearce and R Geddes *Statutory Interpretation in Australia* (Lexis Nexis, 8th ed, 2014).

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	C Ingles

Solicitors:

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

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

Abbott v Wilson [2017] NTSC 50
No. LCA 8 of 2017 (21709910)

BETWEEN:

JAMES ABBOTT
Appellant

AND:

TARYN WILSON
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 6 July 2017)

Introduction

[1] On 24 February 2017 the appellant pleaded guilty in the Alice Springs Youth Justice Court to the following offences, all committed at about 9am on 23 February 2017 when he was driving a Holden Commodore sedan on Larapinta Drive, Alice Springs:

> Count 1 - driving a motor vehicle with a medium range blood alcohol content, namely 0.126 grams of alcohol per 210 litres of exhaled breath, contrary to s 22(1) of the *Traffic Act 1987* (NT) (**the drink drive charge**)

Count 2 - driving a motor vehicle whilst not being the holder of a licence, contrary to s 32(1)(a) of the *Traffic Act*

Count 3 - driving an unregistered vehicle, contrary to s 33 of the *Traffic Act*

Count 4 - driving a motor vehicle in respect of which a current compensation contribution has not been paid, contrary to s 34 of the *Traffic Act* (**the drive uninsured charge**)

[2] The appellant was convicted and fined an aggregate of $770, ordered to pay a victims levy of $450, and disqualified from holding or obtaining a driver's licence for six months. He was a bit more than 17 years and eight months of age at the time of his offending.

Grounds of Appeal

[3] The grounds of appeal are stated as follows:

1. That the learned Judge erred in finding that he had to impose a mandatory minimum fine on a youth.

2. That the learned Judge erred in recording a conviction without affording the parties a reasonable opportunity to be heard on the issue.

3. That the learned Judge failed to give due regard to the financial circumstances of the appellant in imposing a penalty in light of the *Youth Justice Act 2005* (NT).

Ground 1 – imposition of mandatory minimum fine

[4] After making submissions concerning mitigation, counsel for the defendant submitted to the Judge that "this matter can be appropriately dealt with by way of the 12 month mandatory minimum licence disqualification." Presumably counsel was (mistakenly) referring to the requirement in s 22(3) of the *Traffic Act* which provides that a person found guilty of a medium range blood alcohol content offence is disqualified from obtaining a licence for a period that is at least six months.

[5] Counsel then said that it was her understanding that, given that the defendant was a youth and that he was attending school full time, "it won't attract the mandatory fines." Following this there was a discussion between counsel and the bench as to whether the relevant provisions in the *Traffic Act* concerning mandatory minimum fines apply to youths. It seems that counsel and his Honour had in mind s 34(1) of the *Traffic Act* which mandates a minimum penalty of five penalty units, currently $770, for driving a motor vehicle in respect of which a current compensation contribution has not been paid, namely the offence in count 4.

[6] His Honour initially expressed doubt about counsel's contention that the defendant's offending would not attract the mandatory minimum fine. He noted that Blokland CSM, as her Honour then was, had previously declined to fine a very young youth for an offence under s 34 of the *Traffic Act*, and had applied provisions in the *Youth Justice Act* that require the Youth Court to take into account the ability of the youth to pay a fine. His Honour was thinking of the decision in *Police v MK*[1] which concerned a youth who had just turned 15. His Honour expressed the view that if the mandatory provisions in the *Traffic Act* were not to apply to a youth, one would expect that to be clearly reflected in the legislation. His Honour stood the matter down to enable counsel to research that point.

[7] After the lunch break counsel provided his Honour with a copy of *MK*. His Honour said that he had not followed *MK* for many years, but that there was one occasion when he followed *MK* in relation to a 13 year old who was not going to be working or really responsible for himself in any way for quite a number of years. Counsel made submissions stressing the apparent inconsistency between the mandatory provisions in the *Traffic Act* and the principles set out in the *Youth Justice Act* including s 71(2), which requires a court considering a sentence that involves a fine to "satisfy itself … that the sentence is appropriate having regard to the financial circumstances of the youth."

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1 [2007] NTMC 047 (***MK***)

[8] His Honour proceeded to say that a youth who is old enough to hold a learner's licence or a driver's licence should be subjected to the same regime, in particular in relation to penalties, as adult drivers, unless the legislation provides otherwise. Otherwise anomalies would arise if it was thought that a youth could ignore traffic rules and not be subject to the same sanctions and penalties as adult drivers.

[9] After counsel made further submissions about this topic and reiterated the submission that his Honour should give due regard to the financial circumstances of the defendant, his Honour said:[2]

> My view is, as I have said, if you drive a car, you should comply with the law … a young driver driving without complying with drink-driving legislation, particularly a young driver who is unlicensed who is driving a car that is unregistered, uninsured … and certainly persons who are within a range of 16 or 17 … should be responsible for their actions when it comes to dealing with motor vehicles. *I wouldn't think it would be good for this court to excuse them from liability* for things such as driving an unregistered or uninsured car.
>
> Clearly, this young person, to a certain extent, was pressurised maybe to drive when his elders were drunk or thought he may get in less trouble than they would, but it seems to me *it wouldn't be a good thing for this court to excuse him* of the mandatory penalties and, in a way, make it more of a temptation for older persons to get younger under 18s driving the unregistered and uninsured motor vehicles about town. So I will take into account, obviously, his limited ability to pay and not go beyond the mandatory minimum, but it seems to me I should impose that.
>
> (emphasis in italics and underlining added by me)

[2] Transcript of 24 February 2017 at pp 8-9

[10] Shortly after that his Honour proceeded to sentence the defendant. He observed that the defendant would soon be 18. He pointed out that his blood alcohol reading of 0.126 was nearly three times the limit set for people who have a full licence, and this, coupled with the fact that he was driving without a licence, had never had a licence, and was driving a car which was unregistered and uninsured, comprised "a bad mix of offending."[3] His Honour talked about the problems that this kind of offending causes including that "many people get killed driving backwards and forwards between communities, often because of drinking driving."[4] He said:

> That's an adult sort of offending and you are going to be somewhat punished like the (sic) adult by getting a conviction and fine.
>
> I note that you can't pay any fine immediately and that you will have to put off any payment through the Fines Recovery Unit to sometime in the future, but I am going to impose the minimum mandatory as an aggregate. So you are convicted and fined an aggregate of $770, a $450 levy and, in relation to Count 1, you are disqualified from driving for 6 months.[5]

[11] Three questions arise in relation to this ground:

(a) Did his Honour find that he was required to impose the minimum fine mandated by s 34(1)(a) of the *Traffic Act*?

(b) If so, was the Court in error in so finding?

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3 Transcript of 24 February 2017 at p 10
4 Ibid.
5 Ibid.

(c) If so, was there a substantial miscarriage of justice?

[12] Counsel for the respondent submitted that his Honour would have been in error if he considered that he was bound, in law, to impose the minimum mandatory fine on a youth. Rather, his Honour had a discretion to choose to apply the mandatory minimum fine. The respondent further submitted that even if his Honour erroneously considered he was bound to impose the minimum mandatory fine, this did not lead to an error in the final result, and, as such, there has been no substantial miscarriage of justice.

Question (a) – did his Honour find that he was required to impose the minimum fine?

[13] Counsel for the appellant contended that his Honour did find that he was required to impose the minimum fine mandated by s 34(1)(a) of the *Traffic Act*. This is apparent from his Honour's reservations about *MK* and about the absence of a clear legislative intention to permit departure from the mandatory minimum, his various references to mandatory minimum penalties such as in the passages that I have underlined in the extracts quoted in [9] and [10] above, and the fact that the fine that he did impose, albeit in respect of all four offences, was the same as that mandated by s 34(1)(a).

[14] I agree with counsel for the respondent that it is not clear whether or not his Honour considered himself bound to impose the mandatory

minimum fine, or whether he exercised the usual sentencing discretion and decided that the appropriate disposition was a fine that was equivalent to the mandatory minimum fine.

[15] I think it more likely than not that his Honour did not consider himself so bound and that he used his sentencing discretion to decide on the fine, albeit guided by what the legislature had stated the minimum penalty should be for like offending committed by an adult driver. I infer, particularly from the passages that I have italicised in [9] above, and from his Honour's considerations of the appropriateness of the fine, that his Honour did consider that he had a discretion to depart from the so-called "mandatory minimum". Accordingly, I consider the answer to the first question is "no" and that the essential premise to Ground 1 is not made out. There was no error.

Question (b) – is the Youth Justice Court obliged to impose the minimum penalty stipulated by s 34(1)(a)?

[16] Notwithstanding that conclusion I shall briefly address the other two questions, partly in case I am wrong about that conclusion, but more in deference to the submissions that were advanced both before his Honour and this Court and the lingering uncertainty about the correctness of *MK*.

[17] As I have noted, counsel for the respondent conceded that his Honour did have a discretion to impose a lower penalty than that ostensibly

mandated by s 34(1) of the *Traffic Act* in matters where the *Youth Justice Act* would apply. I agree with that concession.

MK

[18] In *MK* the offender, a girl who had just turned 15, had pleaded guilty to the same kind of driving offences as those in counts 2, 3 and 4 in the present matter and also to the unlawful use of a motor vehicle. Blokland CSM set out various provisions of the *Youth Justice Act* including s 3 (objects of the *Youth Justice Act*), s 4 (principles to be taken into account in the administration of the *Youth Justice Act*) and provisions regarding the imposition of a fine upon a youth in ss 83(1)(g) and 71(2).

[19] Section 83(1)(g) permits the Court to "fine a youth not more than the maximum penalty that may be imposed under the relevant law in relation to the offence."

[20] Section 71(2) states:

> If the Court is considering a sentence that involves a fine or restitution by financial compensation, the Court must satisfy itself (if necessary by requiring a report) that the sentence is appropriate having regard to the financial circumstances of the youth.

[21] Blokland CSM observed that a fine may be enforced under the *Fines and Penalties (Recovery) Act 2001* (NT) unless the Court also orders detention or imprisonment if the fine is not paid. She said that if the

Court is mandated to fix minimum fines on youths regardless of their ability to pay, the detention or imprisonment default provisions (if so ordered) would apply to detain youths irrespective of their age. This could bring about a result that defeats the objects, purposes and principles of the *Youth Justice Act*.[6]

[22] Her Worship also responded to a contention based on the fact that the *Youth Justice Act* did not fix a maximum fine that could be ordered against a youth, unlike s 53(c) of the *Juvenile Justice Act* (repealed) which had fixed a maximum of $500.

[23] At [13] her Worship said:

> I respect the argument put by Sergeant Marinov that if it were intended to limit fines, including mandatory fines in the *Youth Justice Act*, Parliament would have done so as it did in the *Juvenile Justice Act*. However, in my view the contrary is the case. The legislative intention manifest in the *Youth Justice Act* is that the Court should impose fines only in accordance with the *Youth Justice Act* and has legislated a reasonably elaborate process to ensure that fines are within the capacity of a youth to pay. The *Youth Justice Act* does not exempt mandatory fines from the provision of s 71(2) nor Division 5. Its approach is to ensure the *Youth Justice Court* satisfies itself of the capacity to pay. This obviously ensures against the danger that youths (especially those under 15) will not be detained for longer than the permissible statutory limits for failure to pay a fine.

[24] At [15] Blokland CSM said:

> I am compelled to conclude that the minimum penalty contained in s 34(1) of the *Traffic Act* defeats the very purpose, objects and principles of sentencing contained in the *Youth Justice Act*. Whether the process of interpretation is correctly categorised as

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6 *MK* at [8] and [12].

> a reading down of the minimum penalty to the extent of the inconsistency with the *Youth Justice Act* or, whether this is to be regarded as reconciling the two Acts by virtue of giving the *Youth Justice Act* prevalence over the *Traffic Act* on this point in the Youth Justice Court is moot – the result is the same - the minimum fine cannot apply.

[25] I interrupt at this point to note that the detention or imprisonment default provisions to which her Worship was referring would only apply if the Court makes an order to that effect under s 92(3) of the *Youth Justice Act*. Otherwise the fine would be enforced under the *Fines and Penalties (Recovery) Act*. Accordingly there would be no immediate risk of a youth of being detained or imprisoned unless the Court made such an order under s 92(3).

The interaction between the *Traffic Act* and the *Youth Justice Act*

[26] As counsel for the respondent pointed out, neither the *Youth Justice Act*, nor the *Traffic Act*, expressly states whether or not the mandatory sentencing orders specified in the *Traffic Act* apply to youths.

[27] The *Traffic Act* does not specifically refer to the *Youth Justice Act*.

[28] The *Youth Justice Act* refers to the *Traffic Act* in four sections.[7] Of most relevance to this issue appears to be s 18 of the *Youth Justice Act*. Section 18 is headed 'Interview of youth', and the first three subsections deal with police powers with respect to interviews of youths. However, s 18(4) states:

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[7] ss 18, 38, 88 and 107.

> This section does not affect the operation of Part V or VI of the *Traffic Act* and, subject to Part 6, a youth may be dealt with under those Parts of that Act as if he or she were an adult.

[29] Part 6 of the *Youth Justice Act* is headed '*Disposition by Court'*, and sets out the general principles that apply to the sentencing of youth offenders, as well as the types of sentencing orders that can be made. Part 6 also includes s 88 which gives the court power to impose a driver's licence disqualification on a youth and s 92 which gives the Court power to fine a youth.

[30] Given that s 18(4) is surrounded by provisions dealing with police powers and obligations, it is unclear why s 18(4) was included in this section. Part V and VI of the *Traffic Act* are primarily offence provisions, and deal with police powers only incidentally. Combined with the reference to Part 6 of the *Youth Justice Act*, it does not appear that s 18(4) was designed to deal specifically with police powers. Unfortunately, the explanatory memorandum and the second reading speech are silent on the reason for inclusion of s 18(4), or the intended interaction between the mandatory sentencing provisions of the *Traffic Act*, and the sentencing of youths.

[31] The respondent submitted that despite the context in which it is situated within the legislation, the meaning of s 18(4) of the *Youth Justice Act* is clear, and gives the Youth Justice Court power to sentence the youth offender as an adult, which would therefore require

imposition of mandatory fines and disqualification periods, as long as the Court also takes into account the matters set out in Part 6. The respondent submitted that this is discretionary power, not mandatory, given the use of the word 'may' instead of 'must' in the section.

[32] His Honour observed that this means that it may be appropriate to exercise a discretion not to apply the mandatory fines in the situation of a very young offender. However, it is also open for the Court to decide, as his Honour did in this case, that it is appropriate to treat a particular youth as an adult when sentencing him for an offence under Parts V and VI of the *Traffic Act*.

[33] In further support of this interpretation of s 18(4) and the Judge's decision, s 38 of the *Youth Justice Act* excludes traffic offences under Part V and VI of the *Traffic Act* from the operation of the diversion system. This is the system that diverts youths away from the Court system. The explanatory memorandum under the heading '*Clause 38 – Interpretation*' states:

> "Offence" is not to include an offence in relation to which an infringement notice… has been issued or is an offence against Part V or VI of the *Traffic Act* (the intention being that they be treated as adults for these offences).

[34] I agree with these submissions. The Court may apply the kind of penalties applicable to an adult for offending of this kind but it is not required to impose the minimum penalties mandated for adults in so far

as fines are concerned. I base these conclusions not only on the express references to the *Traffic Act* discussed above but also on the fact that the *Youth Justice Act* is specifically designed to apply to particular offenders, namely youths, whereas other statutes that identify offences and specify penalties for those offences apply to any person who commits the relevant offence irrespective of age. The "particular" should override the "general" except where expressly stated otherwise.[8]

Question (c) – no substantial miscarriage of justice

[35] Counsel for the respondent contended that even if the Judge incorrectly considered himself bound to impose the mandatory minimum penalty, such a penalty was an appropriate disposition in all the circumstances, and was, in no way, manifestly excessive or wrong at law. The respondent submitted that there was no substantial miscarriage of justice in this case. There is no upper limit on the fines that can be imposed on a youth specified in s 83(1)(g) and s 92 of the *Youth Justice Act*, other than the maximum prescribed for the offence. The Judge took care to state that he took into account the youth's limited financial circumstances, and the fact that he was at school and being

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[8] *Goodwin v Phillips* (1908) 7 CLR 1, 14; see also D Pearce and R Geddes *Statutory Interpretation in Australia* (Lexis Nexis, 8th ed, 2014) at p 328.

supported by his aunt.[9] That appears to be the reason he kept the fine at the level of the minimum fine for a first time offender.

[36] Counsel pointed out that his Honour referred to the fact that the family of a youth should not be encouraged to pressure a youth to drive because they will get lesser penalties,[10] or, as was part of the agreed facts in this case, because the youth is less likely to be pulled over by police.[11] This is consistent with the principles in s 4 of the *Youth Justice Act*, which are incorporated by s 81(1)(b) of the *Youth Justice Act* which is contained in Part 6 of the Act. These principles emphasise rehabilitation, but they also emphasise that '*…a youth should be made aware of his obligations under the law and the consequences of contravention*' (s 4(e)), '*be designed to give him an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways*' (s 4(n)), and that '*a responsible adult in respect of a youth should be encouraged to fulfil his or her responsibility for the care and supervision of the youth*' (s 4(l)). The Judge quite properly took those matters into account in reaching his decision.

[37] I agree with these contentions.

Ground 2 - entry of conviction

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9 Transcript of 24 February 2017 at pp 8 – 9.
10 Ibid at p 9.
11 Ibid at p 2.

[38] Counsel for the appellant stressed that the appellant appeared as a first offender in the Youth Justice Court. She contended that his Honour erred by convicting the appellant on the basis that his offending was "adult sort of offending" and that he should be "punished like the (sic) adult by getting a conviction and a fine".[12] Counsel said his Honour should not have characterised the appellant's offending, relevantly the drink driving, as being a category exempt from the ordinary determination of the appropriateness or otherwise of an imposition of a conviction.

[39] Counsel referred to passages from *Verity v SB*[13] at [35] and [37] which were cited with approval in *Westphal v O'Connor*.[14] Those decisions, and others, stress the need for a court to exercise caution before entering a conviction in relation to a youth offender, particularly in light of the fact that there is a wide range of other sentencing options available under the *Youth Justice Act*.

[40] Immediately after his Honour pronounced the conviction and penalties in the passage quoted at [10] above, counsel for the defendant queried whether a conviction was recorded. His Honour said that he did impose a conviction. Counsel then asked to be heard on that issue "given that this would be the first recorded conviction for this offender

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12 See passage quoted at [10] above.
13 [2011] NTSC 26
14 [2011] NTSC 33 at [12].

and that he has got the rest of his life ahead of him."[15] His Honour then said:

> No, I won't hear it. You had your chance. I mean the issue is, and I will make it clear, normally a first offender of any sort where the matters relate to matters of honesty or other things that may affect the ability to get jobs. I don't think that's the case in relation to drinking and driving. It is really to do with the system whereby he is now recorded on the system as someone with a drink driving offence. He is convicted of drink-driving.
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> Obviously if he is before the court again on a second offence, he will be subject to the fines that follow. He is nearly 18. I find generally that one needs strong reasons not to impose a conviction for driving offences of this nature, particularly the mix where it involves drink driving. If it was just unlicensed, it would possibly be somewhat different.

[41] Counsel for the appellant contended that his Honour did not afford the appellant procedural fairness after his counsel had asked to make submissions on that issue.

[42] During the hearing of the appeal I put to counsel for the appellant that I would normally expect that if counsel was contending for a particular result, such as the avoidance of a conviction, counsel would expressly so inform the court and make submissions aimed at that result. Counsel advised, and I accept, that in a large number of cases in the youth justice jurisdiction, no such contention is made because it is usually expected that no conviction will be entered in any event. However, while that may well be the case in relation to the kind of

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15 Transcript of 24 February 2017 at p 10.

offences more commonly dealt with in that jurisdiction such as relatively minor property offences and assaults, I do not think that such assumptions are, or should be maintained in respect of more serious offending such as that involved in the present matter. Indeed it would seem that his Honour, who has extensive experience in this jurisdiction, held no such assumption.

[43] As counsel for the respondent pointed out, his Honour made it clear early in the proceedings that he considered this was a serious example of regulatory offending against the *Traffic Act* because it involved drink driving at a relatively high level for someone who was 17 years of age, whilst he was also unlicensed and driving an unregistered and uninsured car.

[44] The Court made it clear that this was being treated as adult-like offending,[16] and the reasons for that were set out clearly prior to pronouncing sentence. The Court also gave the appellant's counsel time to prepare further submissions after expressing his preliminary views, and the appellant's counsel took up that opportunity.

[45] The respondent also submitted that this must be considered in the context of the matter being a summary proceeding. The appellant's counsel had opportunity to make submissions on the point of whether or not a conviction should be recorded, but did not do so until after

[16] Transcript of 24 February 2017 at pp 3, 4, 8- 10.

sentence had been pronounced. I can put aside the possible question as to whether his Honour would have had jurisdiction to reverse his decision once he had pronounced it.[17]

[46] The respondent submitted that it does not appear, based on counsel's submissions at that point, that there was any material (such as a character reference evidencing positive good character) over and above the submissions already made to justify the non-recording of a conviction. At the hearing of the appeal, counsel for the appellant did not identify any such material or further submission that counsel could have provided to his Honour had he then heard further from counsel on that point.

[47] The respondent also submitted that this ground should be considered against a background where the appellant should have been expecting a conviction to be recorded. It is well established that in most cases there must be a very good reason for refusing to record a conviction in the case of a regulatory offence.[18] Generally, the recording of a conviction for a regulatory offence does not, of itself, lead to a significant additional penalty, but signals to the relevant regulatory or licensing bodies that applications by this particular person for a licence

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17 The possible scope of s 141 of the *Youth Justice Act* is discussed in *Campbell v The Queen* [2016] NTSC 61 at [6] – [9] and *R v DV* [2015] NTSC 21406182, 21414403 and 21406171 (31 August 2015) Sentencing Remarks at p 2.

18 *Hales v Adams* [2005] NTSC 86 at [17] to [19] per Southwood J, most recently quoted in *Qadir v Rigby* [2012] NTSC 90 at [51].

(for example) should be more closely considered.[19] This principle should also be considered in combination with s 18(4) of the *Youth Justice Act*.

[48] The respondent conceded it is well established that the recording of a conviction against a youth should be considered differently than in the case of adult offenders, and that generally, the Court should be more reluctant to impose a conviction on a youth offender, than on an adult, for the same offending. However, the *Youth Justice Act* does not prohibit the recording of a conviction against a youth, nor does it state that it should be considered as a last resort (as in the case of imposing a sentence of detention or imprisonment). The discretion of the Youth Justice Court to impose a conviction, or not, is at large, although to be guided by factors including those that are considered for adults.[20]

[49] Neither case referred to by the appellant considered the situation with respect to regulatory offences. In *Verity v SB* the youth was sentenced for an assault, which is classified as a serious violent offence for sentencing and bail purposes. In *Westphal v O'Connor* the youth had committed an indecent assault, which is classified as a sexual offence for sentencing and bail purposes. In both cases, the sentencing court did not record a conviction, and the crown appealed. In both cases, the recording of a conviction against the youth had the potential to lead to

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19 *Hales v Adams* [2005] NTSC 86 at [18] and [19].
20 *Verity v SB* [2011] NTSC 26 at [28] quoting Riley J in *DD v Cahill* [2009] NTSC 62.

a significant additional penalty due to the type of offending against which the conviction would be imposed. This distinguishes those situations from that faced by the Court here.

[50] Once the appellant's counsel raised the issue, the learned Judge stated his reasoning for imposing the conviction. His Honour's reasoning was consistent with the principles in *Hales v Adams*, and s 18(4) of the *Youth Justice Act*, as well as with the broader principles of the *Youth Justice Act*.

[51] I do not consider that his Honour erred in recording a conviction or in declining to give counsel a further opportunity to be heard after he had done so. I dismiss Ground 2.

Ground 3 - due regard to financial circumstances

[52] Counsel for the appellant contended that prior to making the determination of what fine was appropriate his Honour should not have relied upon the minimum mandatory prescribed fines stipulated in the *Traffic Act* but should also have had regard specifically to s 71(2) and s 89(2) of the *Youth Justices Act* which require the Court satisfy itself that the sentence is appropriate, having regard to the financial circumstances of the youth and the youth's ability to comply with the order. Counsel contended that his Honour failed to have regard to those matters.

[53] As I have already noted, s 71(2)[21] required the Court to satisfy itself that the fine was appropriate having regard to the financial circumstances of the youth.

[54] Section 89(2) applies to orders for restitution or for performance of service as compensation for an offence. Such an order may be made in addition to other orders that may be made in relation to a youth who is found guilty of an offence. It does not apply to this case. In circumstances where it does apply, it requires the Court to consider the amount of loss or damage suffered as a result of the offence and the ability of the youth to comply with the order.

[55] Counsel for the defendant had contended that as a full-time student at Yirrara College with no income he had a limited capacity to pay any fine. This was acknowledged by his Honour in his sentencing remarks when he said:

> I note that you can't pay any fine immediately and that you will have to put off any payment through the Fines Recovery Unit to sometime in the future.[22]

[56] The *Fines and Penalties Recovery Act* now enables the Fines Recovery Unit (**FRU**) to proceed by way of an enforcement order if a payment plan cannot be set up within 28 days.[23] This may result in enforcement costs being added to the original amount and in due course can result in

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21 Section 71(2) is set out in [20] above.
22 Transcript of 24 February 2017 at p 10.
23 *Fines and Penalties (Recovery) Act 2001* (NT) s 123.

a person's licence or ability to apply for a licence being suspended until such time adequate repayments have been made.

[57] Counsel for the appellant submitted that his Honour erred in the application of s 89(2) as he acknowledged the appellant's inability to comply with the order in the foreseeable future but proceeded to make it in any event.

[58] In the case of *Whitehurst v The Queen*[24] the Court of Criminal Appeal reiterated the importance of the obligations created under s 71(2) and s 89(2). At [21] Riley CJ stated:

> The sentencing Judge did not address the issue of the financial circumstances of the applicant but simply made the order for restitution. It would seem his Honour did so contrary to the obligation imposed pursuant to s 71(2) of the *Youth Justice Act* which requires that when considering a sentence that involves an order for restitution by financial compensation the Court must satisfy itself that the sentence is appropriate having regard to the financial circumstances of the youth. Further, it would seem, his Honour did not have regard to s 89 (2) of the Act which requires the Court, in making an order for restitution by way of monetary compensation, to have regard to the ability of the youth to comply with the order. Had his Honour adverted to those matters it would be very likely that the order for restitution would not have been made.

[59] Although *Whitehurst v The Queen* discusses orders of restitution, counsel contended that this case is apposite in relation to the imposition of a fine upon offenders in the youth court jurisdiction.

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[24] [2011] NTCCA 11.

[60] In my opinion that decision has little relevance to the present matter, apart of course from the requirement that the sentencing Judge is required to have regard to the particular circumstances of the youth. Apart from the fact that that case, and s 89, relate to restitution and compensation, not to fines, the relevant wording is different. The particular circumstances of the youth to which s 89(2) refers are those concerning the ability of the youth to comply with the restitution order or the youth's ability to perform services as compensation. Those relevant in the present matter, under s 71(2), are whether "the [fine] is appropriate having regard to the financial circumstances of the youth."

[61] Contrary to the appellant's primary contention, and consistent with the observations in *Whitehurst v The Queen*, the Judge did have regard to the financial circumstances of the appellant. I have already referred to this briefly at [35] and [36] above. The appellant was 17 years and eight months of age, so was very close to being an adult. The Judge referred to setting a dangerous precedent by lowering the fines of youths in traffic offending, especially where the youth may have been pressured to drive by elder family members. The appellant was not of an age that he could not obtain employment, nor was it submitted that he was under any special disability, or unable to obtain access to his own income.

[62] Ground 3 is not made out.

Victims levy

[63] It appears that there was an error in the imposition of a victims levy of $450. The victims levy is imposed pursuant to s 61 of the *Victims of Crime Assistance Act 2006* (NT). A victims levy is imposed once a person is found guilty, but not sentenced to imprisonment. Section 61(3)(b) states that the victims levy for a child who commits an offence is $50. Given the appellant pleaded guilty to four separate counts, the victims levy in this case should have been a total of $200, rather than $450. The respondent submitted that the order to pay $450 in victims levies, should be quashed and an order made for payment of $200 in victims levies. I agree.

Conclusions and orders

[64] The order to pay $450 in victims levies is quashed and replaced with an order that the appellant pay $200 in victims levies. The appeal is otherwise dismissed.
