**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY**

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| **Case Title:** | **DPP v XK** |
| **Citation:** | **[2023] ACTSC 141** |
| **Hearing Date:** | 31 May 2023 |
| **Decision** **Date:** | 8 June 2023 |
| **Before:** | McWilliam J |
| **Decision:** | See [106] |
| **Catchwords:** | **CRIMINAL LAW** – Judgment and Punishment – Sentence – aggravated robbery – driving offences – young offender – history of disadvantage – childhood trauma – application of *Bugmy* principles – good prospects of rehabilitation – largely suspended sentence in recognition of offender’s youth, disadvantage and need for supervision |
| **Legislation Cited:** | *Crimes (Restorative Justice) Act 2004* (ACT) ss 6, 15, 17, 19, 24, 46  *Crimes (Sentencing) Act 2005* (ACT) ss 7, 10, 33, 35, 133C, 133D  *Criminal Code 2002* (ACT) ss 310, 318  *Motor Traffic Act* *1936* (ACT) s 191G  *Road Transport (Alcohol and Drugs) Act 1977* (ACT) ss 4F, 20,  *Road Transport (Driver Licensing) Act 1999* (ACT) s 31  *Road Transport (General) Act 1999* (ACT) ss 63, 68, 69  Road Transport (General) Bill 1999 (ACT) Explanatory Statement  *Road Transport (Safety and Traffic Management Act) 1999* (ACT) s 7  *Road Transport (Vehicle Registration) Act 1999* (ACT) s 22 |
| **Cases Cited:** | *Barrett v The Queen* [2016] ACTCA 38  *Beath v McCurley* [2018] ACTCA 48; 339 FLR 165  *Cooke (A Pseudonym) v R* [2022] ACTCA 44; 18 ACTLR 204  *Hall v The Queen; Barker v The Queen* [2017] ACTCA 16  *Markarian v R* [2005] HCA 25; 228 CLR 357  *McCurley v Beath* [2017] ACTSC 196; 268 A Crim R 263  *McLeod v The Queen* [2018] ACTCA 59  *Monfries v The Queen* [2014] ACTCA 46; 245 A Crim R 80  *MT v The Queen* [2021] ACTCA 26; 17 ACTLR 22  *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120  *R v Collins (No 2)* [2018] ACTSC 294  *R v Elphick* [2021] ACTSC 9  *R v Forrest* [2016] ACTSC 321; 11 ACTLR 311  *R v Forrest (No 2)* [2017] ACTSC 83  *R v Gorman* (Unreported, Supreme Court of the Australian Capital Territory, Acting Justice Refshauge, 5 June 2023)  *R v Jajou* [[2009] NSWCCA 167](http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2009/167.html); [196 A Crim R 370](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=196%20A%20Crim%20R%20370?stem=0&synonyms=0&query=title(%222017%20ACTCA%2016%22)) *R v Kilic* [2016] HCA 48; 259 CLR 256*R v Massey (No 3)* [2021] ACTSC 156*R v Shearer* [2020] ACTSC 100*R v Serena* [2019] ACTSC 231*R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252*Smith v Stivala* [2018] ACTSC 309; 341 FLR 359 |
| **Parties:** | ACT Director of Public Prosecutions  XK (Offender) |
| **Representation:** | **Counsel**  C Daly (DPP)  S Robinson (Offender) |
|  | **Solicitors**  ACT Director of Public Prosecutions  Fortify Legal (Offender) |
| **File Numbers:** | SCC 43, 44 and 131 of 2023 |

**McWilliam J:**

# The young offender (referred to by the pseudonym “XK” due to his age) has pleaded guilty to the following seven offences:

1. CC CAN 884/2022: One count of aggravated robbery contrary to s 310(b) of the *Criminal Code 2002* (ACT) (***Criminal Code***). The maximum penalty is 25 years’ imprisonment and/or 2,500 penalty units.
2. CC CAN 887/2022: One count of dishonestly driving a motor vehicle without consent contrary to s 318(2) of the *Criminal Code*. The maximum penalty is five years’ imprisonment and/or 500 penalty units.
3. CC CAN 888/2022: One count of driving with prescribed drug in oral fluid contrary to s 20(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (***Alcohol and Drugs Act***). The maximum penalty (for a repeat offender) is three months’ imprisonment and/or 25 penalty units.
4. CC CAN 889/2022 and CAN 891/2022: Two counts of aggravated dangerous driving contrary to s 7(1)(a) of the *Road Transport (Safety and Traffic Management Act) 1999* (ACT) (***Safety Act***). The maximum penalty (for a first offender) is three years’ imprisonment and/or 300 penalty units. The maximum penalty (for a repeat offender) is five years’ imprisonment and/or 500 penalty units.
5. CC CAN 892/2022: One count of driving without a licence contrary to s 31(2) of the *Road Transport (Driver Licensing) Act 1999* (ACT) (***Driver Licensing Act***). The maximum penalty (for a repeat offender) is six months’ imprisonment and/or 50 penalty units.
6. CC CAN 893/2022: One count of driving with an improperly issued numberplate contrary to s 22(1)(a) of the *Road Transport (Vehicle Registration) Act 1999* (ACT) (***Vehicle Registration Act***). The maximum penalty is 20 penalty units.

# Automatic licence disqualifications also attach to a number of the offences. They are as follows:

1. For the two aggravated dangerous driving offences:
   1. First offence: automatic disqualification for 12 months, or if the court orders a longer period, the longer period (s 63(4), *General Act*).
   2. Repeat offence: automatic disqualification for a minimum of 12 months, or longer if the Court so orders (s 63(4), *General Act*).
2. For the drive with drug in oral fluid offence (where a repeat offence): automatic disqualification for five years, or shorter if the Court so orders, with a minimum period of at least 12 months (s 34(2), *Alcohol and Drugs Act*).
3. For the drive while unlicensed offence: automatic disqualification for a minimum of three years, or longer if the Court so orders (s 31(3), *Driver Licensing Act*).

# Whether there is any discretion to order that those automatic disqualifications apply concurrently as opposed to cumulatively is a matter at issue between the parties, discussed at the end of these reasons.

## Facts of the offending

# The facts are agreed and summarised below. All the offences arose from the same day of offending.

### Aggravated robbery charge

# At about 7:30am on 15 August 2022, the victim of the robbery arrived at the Calwell Shopping Centre in his vehicle, a blue Ford Mustang sedan. As the victim exited his vehicle, the young offender approached him and requested the time. The victim gave him the time and went into the shopping centre without further interaction.

# At about 8:00am, the victim returned to his vehicle and sat in the driver’s seat. The young offender, who had remained in the area, approached the car and opened the driver’s door. The young offender produced a knife from his pocket and requested that the victim give him the car keys, his wallet and his mobile phone. The young offender threatened that he would stab the victim if he did not do so.

# The victim refused to comply, and the young offender became more aggressive. He began to abuse the victim, who attempted to de-escalate the situation. The victim went to exit the vehicle, at which point the young offender placed the knife back in his pocket with his right hand. The victim grabbed the young offender’s right arm to prevent him pulling out the knife, and in response the young offender punched the victim several times to the left side of his forehead (with his left arm).

# The young offender then pushed the victim in the chest and the victim fell back into the car. The young offender repeated the request for the car keys, and the victim handed them over before exiting the vehicle. The young offender then got into the car and drove from the area.

# The vehicle contained approximately $4,840 worth of electronic devices and personal items, as well as the keyring containing the car keys and other keys (including to the victim’s house and workplace). The victim called the police.

### Dishonestly drive a motor vehicle without consent and improper use of numberplate charges

# The young offender took the vehicle and drove from the area without the victim’s consent. At about 8:19am that same morning, the police attended the scene of the robbery and spoke to the victim. They viewed CCTV footage of the offence and noted the young offender’s clothing.

# Later that same day at about 3:00pm, police on patrol in Chisholm observed a blue Ford Mustang sedan bearing NSW plates travelling north on Goldstein Crescent, Chisholm. The police had a clear view of the driver as he passed a police vehicle, and the driver was identified as the young offender. The plates on the vehicle at that time were not those registered to the vehicle.

### Aggravated dangerous driving charges

# The two aggravated dangerous drive charges refer to two separate periods of driving on the same day of the aggravated robbery and dishonest driving.

# At 3.00pm when police observed the offender driving the car, they saw him turn onto Isabella Drive, Chisholm, and travel west. The police attempted to intercept the vehicle by deploying a tyre deflation device at the intersection of Isabella Drive and Ashley Drive, but the young offender spotted this on approach, he accelerated sharply and pulled onto the wrong side of the road to avoid the device.

# On the wrong side of the road, the young offender passed several cars and narrowly avoided a collision as he returned to the correct side of the road. There was another attempt to deploy a tyre deflation device a short time later at the intersection of Isabella Drive and Drakeford Drive, which failed. Again, the young offender travelled at high speed on the wrong side of the road in avoiding the device. The young offender fled police but was spotted several times driving through the suburbs of Richardson and Chisholm. Attempts to deploy another tyre deflation device in a residential driveway sometime later were, again, unsuccessful.

# The second period of driving occurred at about 3:49pm that same afternoon, when the offender was observed by police driving the same vehicle at speed along Goldstein Crescent, Chisholm. The young offender spotted police and pulled onto the wrong side of the road, mounting a pedestrian footpath. The young offender travelled on the wrong side of the road and straddled the footpath for a distance at speed, despite there being pedestrians in the area. Shortly after, the police observed the same vehicle travelling through a park/playground area just off Casson Street, where it became bogged in mud.

# Upon the vehicle becoming immobile, the young offender fled the area on foot. He was arrested a short time later. Police observed that the offender was wearing similar clothing to that depicted in the CCTV footage earlier in the day, and that he had the key to the Ford Mustang sedan on his person.

### Driving with drug in oral fluid and driving without a licence charges

# After being arrested, the young offender was required to undergo drug and alcohol screening tests. The drug screening test returned a positive result, and a subsequent oral fluid analysis indicated the presence of methamphetamine. The young offender stated to police he had used “MDMA” that day. A subsequent and further laboratory test confirmed that the offender had methylamphetamine and delta-9-tetrahydrocannabinol (THC, the principle psychoactive constituent of cannabis) present in his oral fluid on the afternoon of 15 August 2022, both of which are prescribed drugs for the purpose of the offence.

# The young offender has never held a driver’s licence.

## The offender’s present custodial status

# Following his arrest, the young offender spent a period of time in custody, although since 10 October 2022 he was the subject of a grant of bail. He has spent 16 days in custody referable solely to these offences. This has been taken into account, including by backdating the sentence ultimately imposed. It was accepted that no sentence other than a term of imprisonment was appropriate (s 10(2) of the *Crimes (Sentencing) Act 2005* (ACT)(***Sentencing Act***)).

## The Court’s sentencing task

# In sentencing the offender, the Court must have regard to the considerations of s 33 of the *Sentencing Act*. The nature and circumstances of the offence (s 33(1)) have already been set out above and their objective seriousness is discussed below. To the extent that other considerations listed in s 33 are relevant, they have been interwoven in the discussion that follows below.

# The Court must also sentence the offender having regard to the relevant sentencing purposes in s 7 of the *Sentencing Act* and I consider it instructive in this case to set them out. They are as follows:

7 Purpose of sentencing

(1) A court may impose a sentence on an offender for 1 or more of the following purposes:

1. to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
2. to prevent crime by deterring the offender and other people from committing the same or similar offences;
3. to protect the community from the offender;
4. to promote the rehabilitation of the offender;
5. to make the offender accountable for his or her actions;
6. to denounce the conduct of the offender;
7. to recognise the harm done to the victim of the crime and the community.

# It will be apparent from the above list (and it has been noted in the authorities many times over the years) that the sentencing objectives do not all point in one direction. There is a tension that the Court must balance between denouncing the conduct, punishing the individual offender and deterring him (in part by making him accountable for his choices), deterring others from committing the same offence, recognising the harm to the victim and the community, and protecting the community, while still promoting the rehabilitation of the offender.

# Whilst not giving the objective described in s 7(1)(a) of the *Sentencing Act* any greater weight or significance (s 7(2)), it is worth noting that the section refers to “adequate” punishment and draws attention to the way in which punishment may be imposed as being “just and appropriate”.

# I am focussing on explaining the sentencing objectives here in order to then build upon them when considering the legislative requirements where the person being sentenced is a young offender. Because the offender is under the age of 18, rehabilitation and crafting individualised justice for the young offender is front and centre in the Court’s task. An entire chapter (Chapter 8A) is devoted in the *Sentencing Act* to what the Court is to consider, promote and address when the offender is a young offender. Section 133C provides:

133C Young offenders—purposes of sentencing

(1) Despite section 7 (2), in sentencing a young offender, a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes stated in section 7 (1).

(2) Also, in sentencing a young offender, a court must have particular regard to the common law principle of individualised justice.

# I will return to the application of the principle of individualised justice below. There are also additions considerations the Court must consider (s 133D), including:

(a) the young offender's culpability for the offence having regard to his or her maturity;

(b) the young offender's state of development;

(c) the past and present family circumstances of the young offender.

# Those matters carry significance for the reasoning process and ultimate conclusion for this young offender.

## Pleas of guilty

# The young offender has entered a plea of guilty for all the offences in the ACT Childrens Court, prior to committal.

# Applying s 35 of the *Sentencing Act*, he is entitled to a maximum discount of 25 percent for the utilitarian value of his plea for the aggravated robbery offence. Although there was CCTV footage of the robbery, because of various features referred to by Counsel for the offender in submissions (which highlighted problems with making definite conclusions about the identity of the offender), I do not consider that the prosecution case for that offence was “overwhelmingly strong” such as to invoke s 35(4) of the *Sentencing Act*. Following *Cooke (A Pseudonym) v R* [2022] ACTCA 44; 18 ACTLR 204 at [26],if the court is not so satisfied, the strength of the prosecution case then becomes irrelevant in assessing the value of the plea.

# However, as acknowledged by the offender, the position is different for the offences occurring in the afternoon of 15 August 2022, where there was direct observation and involvement by police and the drug test result was also not open to challenge. In respect of those offences, I have taken into account that the pleas were entered at the earliest opportunity. Giving effect to s 35(4) of the *Sentencing Act*, if a “significant reduction” under the *Sentencing Act* is the maximum discount of 25 percent, it is appropriate that the discount here be roughly equivalent to 22 percent for each of the remaining offences.

## Objective seriousness

# When considering the seriousness of the case before it, the Sentencing Court considers where the facts of the particular offence and offender lie in the “spectrum” from the least serious instances of the offence to the most serious: *R v Kilic* [2016] HCA 48; 259 CLR 256at [19].

# That task is an objective one. It is determined without reference to matters personal to the offender. It is to be determined wholly by reference to the nature of the offending: *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at [27]. The maximum penalties provide yardsticks against which to assess the objective seriousness of the offences before the court: *Markarian v R* [2005] HCA 25; 228 CLR 357 at [31], which is why those penalties were included at the commencement of these reasons. Without repeating them, they inform what follows.

# The after-effects of offending are considered separately, for example, as part of the context of factors listed in s 33 of the *Sentencing Act*: see *McLeod v The Queen* [2018] ACTCA 59 at [12].

# The parties provided some assistance in the relevant factors to consider when assessing each of the offences which I have endeavoured to incorporate in the consideration below, to the extent that I have accepted them.

### Aggravated robbery

# It suffices to refer to *Hall v The Queen; Barker v The Queen* [2017] ACTCA 16 (***Hall***) where the Court of Appeal stated at [49]-[51]:

49. The guideline judgment of the New South Wales Court of Appeal *in R v Henry* (1999) 46 NSWLR 346, while not binding on this Court, is persuasive. In that case, the Court described a category of aggravated armed robbery cases with the following features at [162]:

(a) young offender with little or no criminal history;

(b) weapon like a knife capable of killing or inflicting serious injury;

(c) limited degree of planning;

(d) limited, if any, actual violence but a real threat thereof;

(e) victim in a vulnerable position such as a shop keeper or taxi driver;

(f) small amount taken;

(g) plea of guilty, the significance of which is limited by a strong Crown case.

50. In *R v Henry,* the Court of Appeal considered that an offence in that category should generally attract a sentence of between four and five years imprisonment. It may be noted that, like the ACT, the maximum sentence for aggravated armed robbery in New South Wales is 25 years imprisonment.

51. The category of case described in *R v Henry* involves a young offender with no or little criminal history. …

# The courts have always held that the use of knives is a seriously aggravating feature: *R v Jajou* [[2009] NSWCCA 167](http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2009/167.html); [196 A Crim R 370](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=196%20A%20Crim%20R%20370?stem=0&synonyms=0&query=title(%222017%20ACTCA%2016%22)) at [[72]](http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2009/167.html#para72), cited in *Hall* at [17].

# Here, the young offender did use a knife to threaten the victim, and separately, used actual violence by punching the victim in the head, which is itself a vulnerable area. The offence was somewhat brazen, in full daylight, on a weekday morning in a carpark, with a number of passers-by seemingly unaware of what was taking place. I do not consider there was any particular degree of advance planning, and although the victim fell into the car and was vulnerable in that sense, he was not a ‘vulnerable’ person in the sense of a taxi driver.

# As a car was the property taken, the amount was not small. I agree with the Director’s submission that although there were other valuable items in the car (the victim’s wallet, passport, electrical items), this was not part of the offender’s intention in taking the car and I have not included those matters in assessing the objective seriousness. They do, however, come into consideration indirectly when considering the impact to the victim.

# The guilty pleas have been addressed separately above.

# Taking those matters into account, this was an offence of medium objective seriousness, and I would even say it is approaching the high end of that part of the spectrum, given the use of the knife. There is obviously a range of conduct where the amount taken is less, with no violence used, but there is also a clear range of conduct where the moral culpability is higher – such as offences involving a higher value robbery, a known vulnerable victim, and a higher degree of planning.

### Aggravated Dangerous Driving

# The factors that I consider to be relevant for the two aggravated dangerous driving offences are:

1. The number of people put at risk;
2. The degree of speed;
3. The degree of intoxication or of substance abuse;
4. Erratic or aggressive driving;
5. Competitive driving or showing off;
6. Length of the journey during which others were exposed to risk;
7. Ignoring of warnings;
8. Escaping police pursuit;
9. Degree of sleep deprivation; and
10. Failing to stop.

# Subject to one exception, I have drawn those factors out of *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 (***Whyte***) at [216]-[217]. While not binding on this Court, the list has been accepted as relevant to the offence of culpable driving causing death in this jurisdiction: see *Monfries v The Queen* [2014] ACTCA 46; 245 A Crim R 80 at [89] per Murrell CJ, at [126]-[129] per Burns J, and at [196]-[199] per Ross J. The exception is that I have omitted from the list set out in *Whyte* “extent and nature of the injuries inflicted”. While that matter is plainly relevant to an offence which includes as an element that the driving caused death or grievous bodily harm, it is not an element of the aggravated dangerous driving under consideration here. Otherwise, the matters specified are the types of considerations that would similarly affect the objective seriousness of an offence of aggravated dangerous driving.

# It will be seen that a number of the features outlined are present in the offending here. On each occasion, the dangerous driving occurred at the point where police were attempting to halt the vehicle using a tyre deflation device. There was, on each occasion, an implied ignoring of warnings and a complete failure to stop.

# On each occasion, the offender was under the influence of illicit substances. While the exact degree of intoxication is not known, the offender admits being intoxicated to an extent that he is unable to recall parts of the offending. However, given that the drug driving is the subject of a separate charge, it is excluded from the objective seriousness consideration here.

# With regard to the first charge (the driving at 3:00pm), people were put at risk in other cars driving the opposite direction, with the offender driving on the wrong side of the road, narrowly avoiding a head-on collision, then driving at speed at a roundabout intersection.

# With regard to the second charge (the driving at 3:49pm), again the offender put people at risk by mounting a pedestrian footpath and travelling along it at speed while pedestrians were walking in the area, all with a view to avoiding police.

# The two charges are a course of conduct, but the second in time offence is a repeat offence (s 7A(4)(b) of the *Safety Act*). I assess each of the offences as being of a medium level in objective seriousness.

### Drive motor vehicle without consent

# Applying *R v Massey (No 3)* [2021] ACTSC 156 at [29], the following considerations inform the objective seriousness of the offence:

1. The period of driving and the length of distance driven;
2. Whether the vehicle was used in the commission of another offence;
3. Whether the offender was the driver and not only the passenger;
4. The manner of driving, unless subject to a separate charge;
5. Whether the vehicle was damaged; and
6. Whether the vehicle was returned to the owner.

# Here, the young offender was the driver. Again, the commissions of further offences, including the manner of driving, are all subject to separate charges and therefore not assessed as part of the objective seriousness. The period of driving commenced at 8:00am and the known driving time occurred in the afternoon. However, it is not known for how much of the day the offender drove the vehicle. The evidence before the Court which I accept as a proven fact (it was not contested) is that the vehicle was written off by the insurer, so I have taken that as the vehicle being damaged and not ultimately being returned to the owner.

# Because some of the features of the objective seriousness of the offence are the subject of separate charge, that brings the objective seriousness down to an offence approaching a medium range.

### Drive with drug in oral fluid (repeat offence)

# The young offender had two prescribed substances in his oral fluid. The presence of the prescribed substances are statutory features of aggravation for the purposes of the aggravated dangerous drive charges (and I accept that a significant level of concurrency will ultimately be appropriate because of this). However, the offence is a repeat offence (s 4F(2)(a) of the *Alcohol and Drugs Act*), in that the offender had a charge of drug in oral fluid committed, proved – that is, he was found guilty – and dismissed on 22 February 2023. That creates a level of objective seriousness for this charge that is not minimal.

## Victim impact statement

# In a victim impact statement from the victim of the robbery provided to the Court, the victim talks about how all he did was get a coffee at local shops on the way to work on a Monday morning. That activity (I interpolate, by many Canberrans everyday), ended with a robbery perpetrated at knife point.

# The victim was fearful that he would be stabbed, he was punched in the head two or three times and his vehicle stolen and ultimately written-off when it was recovered by ACT Police. He can no longer attend the shops where the offending occurred and he has had intrusive thoughts even months later, replaying the incident in his head.

# His wife and family have also been deeply frightened by the thought that the victim may have been seriously injured or killed that day.

# The victim then describes the financial and practical impacts that he has faced in having to replace items that were in the car when it was stolen, and never recovered, including the very great inconvenience of securing another vehicle to drive, which was ultimately not a vehicle of his choice due to unavailability of replacement stock for more than a year. The theft of his work laptop also meant that the business he runs was disrupted for a period, incurring flow on costs.

# The statement demonstrates the wide-reaching impact of the conduct on the victim.

## Subjective circumstances of the offender

# The subjective circumstances of the offender are outlined in two Pre-Sentence Reports (**PSR reports**) provided to the Court, the most recent of which is dated 24 May 2023. There is also before the Court a report of psychologist Mr Peter Watt, dated 17 May 2023, as well as a number of letters both from the offender and reference letters in support of the offender.

# The young offender is 17 years old. At the time of the offending, he was 16 years old. He was raised in the ACT by his maternal grandparents since age six, at which time his parents had separated and he was placed with his grandparents after emergency action was taken by Child and Youth Protective Services (**CYPS**). He continues to reside there and has the ongoing support of his grandparents.

# His biological parents have ongoing substance abuse problems, and his father has been “in and out of jail” since his childhood. He does not share a positive relationship with either of his parents. The offender advised the PSR author that this was due to a long history of neglect from his parents, his mother’s drug use and his father’s criminal problems.

# The effects of living with such parents until age 6, followed by the continued association and knowledge of their lifestyles and life choices of those parents through being raised by his maternal grandparents, cannot be underestimated.

# There are a number of CYPS reports and interventions referred to by the author of the PSR reports that elaborate on the young offender’s difficult childhood and neglect at the hands of his biological parents. It suffices to note that the young offender was repeatedly put at risk of harm during his childhood, was exposed to domestic violence and drug use, and was himself assaulted. The offender has suffered complex trauma as a result of this, and it is clear to me that the trauma and adversity the offender has faced have played a significant role in his life choices. The trauma cannot be divorced from the young offender’s behaviour, attitudes and emotional development.

# In this respect, the report of the psychologist diagnoses the offender as having some cognitive impairment, a major depressive disorder, ADHD and an underlying post-traumatic stress disorder. The psychologist is of the opinion that these are attributable largely to the history of trauma described above, as well as the young offender’s drug use (described further below). The young offender has previously been prescribed anti-depression medication.

# This is a case where the principles articulated in *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571at [40]-[44] apply. The ‘*Bugmy* principles’ were explained by Loukas-Karlsson J in *R v KN* [2020] ACTSC 218 at [97]-[98] (references omitted):

97. In *Bugmy*, the High Court found that the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way: at [40]. Further, the High Court held that the effects of profound deprivation do not diminish over time and should be given “full weight” in determining the sentence in every case: *Bugmy*[42]-[43]. A background of that kind may leave a mark on a person throughout life and compromise the person’s capacity to mature and learn from experience. It remains relevant even where there has been a long history of offending: at [43]. Attributing “full weight” in every case is not to suggest that it has the same (mitigatory) relevance for all the purposes of punishment: *Bugmy*at [43]. Social deprivation may impact on those purposes in different ways. The court in *Bugmy*explained at [44]-[45]:

An offender’s childhood exposure to extreme violence and alcohol abuse may explain the offender’s recourse to violence when frustrated such that the offender’s moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

98. In summary, a history of disadvantage and deprivation may be a mitigating factor on sentence: see *Bugmy*[41]-[44]. What is clear from *Bugmy*, and subsequent case law, is that:

(a) the effects of disadvantage and deprivation do not diminish with the passage of time: *Bugmy*at [44];

(b) the *Bugmy*principles do not diminish in relevance where an offender has an existing criminal record: *Bugmy*at [44] and *R v Irwin*[2019] NSWCCA 133at [3] (*Irwin*); and

(c) the application of the *Bugmy*principles is not discretionary: *Irwin*at [3].

# I (again) respectfully adopt her Honour’s encapsulation and discussion of the principle. In the present case, the disadvantage is acute. Its effect has been significant and lasting, and I consider the principles apply to the young offender’s circumstances with full weight.

# Indeed, on the day of the offending, the young offender reported that he had just found out his mother had relapsed and his father had been arrested. This reminded the young offender of how he was unable to develop a positive relationship with his parents due to drugs. He was in a distressed mental state and unable to regulate his emotions. He was not sober. Consequently, he has difficulty recalling the entire circumstances of his offences on that day.

# The young offender attended school until year 10. He struggled with attendance as well as disciplinary problems. The offender stated to the author of the PSR reports that he does not wish to engage in future formal education but is open to pursuing qualifications relevant to his work. The young offender has been employed by his uncle and aunt in their formwork business for over six months, and his uncle reports in a letter to the Court that he is a reliable and dependable worker. Employment by his extended family increases the likelihood that he will be employed into the future, in circumstances where his uncle has demonstrated his support for the offender.

# The young offender has engaged in drug use for a number of years. The author of the PSR reports states that the offender is a chronic cannabis user who is dependant on the drug. At the time of the offending, he was smoking cannabis every day. He has used other drugs such as MDMA, LSD and Xanax, although infrequently. He reports that the majority of his criminal offences were committed under the influence of illicit substances, including the offences for which he is presently being charged.

# The author of the PSR reports formed the view that the young offender has some insight into the harmful effects of his substance abuse but stated that while he is aware his cannabis use was a problem, he maintains that he “just smoke[s] a bit of pot, it doesn’t do anything to me.” The author concludes that that the offender’s attitude and approach to drug use is a concern. The young offender attributes his substance use to his depressive disorder and his conflict with his mother over her own substance use.

# I consider that the young offender’s insight into his substance abuse is consistent with his age, maturity and level of drug dependency. The young offender’s comments are to be viewed as an expression of the level of the offender’s addiction, not just as indicative of any lack of understanding into the consequences of his behaviour or a lack of desire to rehabilitate.

# The young offender has engaged with the Ted Noffs Foundation, and in particular a drug rehabilitation program for young people, intermittently since October 2022 (including a period of residential rehabilitation). A letter from the Foundation reports that the offender made positive progress under the program, including in the areas of anger management and emotional regulation. Currently, it appears the offender is not engaging meaningfully with this service since he left residential rehabilitation. Clearly, the young offender has a long way to go with addressing his drug use.

## Remorse and Restorative Justice

# In relation to the present offences, the offender has demonstrated some insight into his behaviour and expressed his remorse for his offending. As much is demonstrated in the two letters from the offender that the Court has before it, where the offender recognises the pain that his “bad choices” have caused. In his correspondence with the Court, he does not seek to diminish or blame his conduct on his unfortunate history or mental health issues. The offender knows that if he continues his pattern of behaviour into the future, he will come into further contact with the justice system as an adult, not a child.

# The offender has indicated to a number of different people that he wishes to participate in the restorative justice process so that he can apologise to the victim of the aggravated robbery offence directly.

# The process is governed by the *Crimes (Restorative Justice) Act 2004* (ACT) (***RJ Act***). The offence is a serious offence (defined in the *RJ Act*) to which the young offender has pleaded guilty, which gives rise to the applicability of the *RJ Act* here: s 15. There is an eligible victim (s 17) and, having accepted responsibility for the commission of the offence, the offender is also eligible (s 19).

# It does not appear that an order for restorative justice has yet been made. Under s 25 of the *RJ Act*, before an offence is referred for restorative justice, the Court (as referring entity) must ensure that reasonable steps are taken to explain to the eligible offender the process. Prior to the sentence being delivered today, that explanation was given to the offender and he again confirmed his agreement to take part. I am therefore satisfied that the statutory conditions for a referral specified in s 24 of the *RJ Act* are met.

# The mere fact of participation in the restorative justice process may or may not, of itself, be sufficient evidence of remorse: see *R v Forrest* [2016] ACTSC 321; 11 ACTLR 311 at [63]. However, s 33(1)(y) of the *Sentencing Act* requires the Court to take into account the acceptance of responsibility of an offender to take part in restorative justice and the participation of an offender in restorative justice is a relevant consideration independently of statute: see *R v Forrest (No 2)* [2017] ACTSC 83 at [154] and the cases there-cited.

# Bearing in mind that one of the objectives of the sentencing process is to recognise harm done to a victim, it is worth emphasising that the objective of the restorative justice process is victim-focussed. Among the objects of the *RJ Act* (s 6) is a desire to “enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences”.

# As s 46 of the *RJ Act* provides, the process can take many forms. It does not necessarily involve a face-to-face meeting. It may involve the exchange of written or emailed statements between participants, of pre-recorded videos between participants, teleconferencing or videoconferencing. It is entirely a matter for the victim whether he wishes to participate. In my view, the young offender needs all the mentoring, insight and support that the justice system can muster, and the victim’s involvement in this case may be a really powerful tool, both in assisting the victim’s personal recovery and in assisting the rehabilitation of the offender.

## Criminal history

# The offender has a criminal record, which while not extensive, compromises a number of driving, theft and drug related offences. Some of these are identical offences to the current offences and are relevant to the present sentence. In that regard, I have applied *Kelly v Ashby* [2015] ACTSC 346 at [38], where Refshauge J emphasised the purpose in considering an offender’s criminal record by reference to what was set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477-8. In short, the criminal history does not mean that the young offender is given a longer sentence, but it speaks against leniency on account of no prior offences.

# It is relevant that the offender was subject to bail conditions at the time of the offences, including specific conditions relating to vehicles. That is an aggravating feature.

## Comparative cases

# The court was taken to a number of cases as indicative of a sentencing practice or pattern. They include *R v Collins (No 2)* [2018] ACTSC 294, *R v Serena* [2019] ACTSC 231, *R v Shearer* [2020] ACTSC 100 and *Barrett v The Queen* [2016] ACTCA 38.

# In respect of the last of those mentioned, *Barrett v The Queen* [2016] ACTCA 38, the Director drew attention to the Court of Appeal noting (at [40]) that “most” aggravated robbery sentences in the ACT sentencing database, after a plea of guilty, were between “30 months and four years”. However, Counsel for the offender submitted, and I accept, that this is no guide for a young offender.

# In my view, while of some assistance, none of the cases are directly correlative for this particular young offender’s circumstances, in light of the subjective features I have discussed above.

## Crafting “individualised justice” for this young offender

# In sentencing a young offender, as discussed above, Chapter 8A of the *Sentencing Act* is engaged. The operative provisions were discussed at length in *MT v The Queen* [2021] ACTCA 26; 17 ACTLR 22 at [33]-[90]. At [53]-[54], the Court discussed how the sentencing principles contained in s 7 of the Sentencing Act are to be applied to a young offender (emphasis added):

53. In the case of young offenders, the Sentencing Act alters the way in which the s 7 sentencing purposes are to operate (to emphasise rehabilitation), **elevates the importance of “individualised justice”** (including by requiring that a sentencing court consider additional matters relevant to the particular young offender), **tightly restricts a court’s capacity to impose a sentence of imprisonment**, excludes the parole provisions, **and promotes combined sentences as the preferred way in which a young offender should serve any sentence of imprisonment**.

54. Despite s 7(2), in the case of young offenders the sentencing purpose of rehabilitation is prioritised; it may be given more weight than other purposes. Further, the sentencing court must pay “particular regard” to “individualised justice”.

# Specifically, the relevant parts of s 133G provide (emphasis added):

(1) …

(2) The sentence of imprisonment must be a last resort **and for the shortest appropriate term**.

(3) The court must consider making **a combination sentence** consisting of—

(a) the sentence of imprisonment; and

(b) a good behaviour order with a supervision condition.

# That is the course that the Court must take here. The offender’s rehabilitation is of paramount importance. He has had a terrible start to life and has been let down by the very people who should have been guiding his future, his parents. He has lasting consequences that his grandparents are now trying to sort out and have been grappling with for years. They have a battle on their hands, and it is certainly the case that the young offender is now at a point where he needs to take the initiative to save his own life from one that repeats the history that he has seen with his parents.

# Consistent with s 133G, the sentence that will be imposed is for the shortest term appropriate given the number of offences and gravity of offending. It is also one that reflects the idea of a young life that needs to be supported and nurtured through close supervision, further education in a manageable way for him, and support from any relative, supervisor or mentor that he can access. That is not to in any way minimise the objective seriousness of the crimes that have been committed. Those factors will be recognised in the length of the head sentence and the other ways in which individualised justice for this young offender may be crafted, such as restorative justice.

# The sentence has a high degree of concurrency and individual combination sentences, in order to achieve totality and to give effect to the young offender provisions discussed above. I have taken into account the recommendations and risk assessment contained in the pre-sentence report. I agree that he is at high risk of reoffending and that is why the lengthy period of close supervision through a suspended sentence and support of the Director-General will be required.

### Does s 69 of the General Act create a discretionary power in the Court to order that the automatic disqualification periods operate concurrently?

# As stated at the outset of these reasons, for four of the offences, there are automatic disqualification periods of varying lengths. Sometimes a minimum automatic disqualification period is specified. For other offences a maximum period is specified. For each offence under consideration here, the legislation has given the Court a discretion to change the period of disqualification (that is, to lengthen or shorten it).

# None of those matters are controversial. What is in dispute is what happens, in terms of concurrency, in cases where there are multiple automatic disqualification periods applying, and the Court does not intervene to vary any of those automatic disqualification periods. The issue is whether there is any ability for the Court to order that a sentence be served concurrently.

# The starting point is that the period of licence disqualification begins on the date of conviction unless the Court orders a later date: s 68 of the *General Act*.

# The issue is governed by the proper construction of s 69 of the *General Act*,which is in the following terms:

69 Multiple disqualifications cumulative unless court orders otherwise

If—

(a) a person is disqualified (whether or not by court order) from holding or obtaining an Australian driver licence because of being convicted or found guilty by a court in Australia of an offence against the law of any jurisdiction; and

(b) before the period of disqualification has ended, the person is again so disqualified;

the periods of disqualification are cumulative unless a court in Australia orders otherwise.

# In *Smith v Stivala* [2018] ACTSC 309; 341 FLR 359 (***Smith v Stivala***), Burns Jstated at [36] (emphasis added)*:*

**In my opinion s 69 of the *General Act* is not a source of judicial power to order that multiple disqualifications, and in particular multiple automatic disqualifications under s 63 of the *General Act*, may operate other than cumulatively.** It is a provision directing how multiple disqualification periods, perhaps from multiple jurisdictions, are to have effect for the purposes of ACT laws. It informs individuals and relevant authorities of how multiple disqualification periods are to be taken to apply in the ACT. The basic rule is that they are taken to be cumulative, but this is subject to where “a court in Australia otherwise orders”. Such an order would need to be based upon a power in the relevant State or Territory legislation allowing the court imposing the disqualification to order that it be served concurrently with other disqualifications.

# As submitted by the Director, the decision has been followed by single instance judges in cases such as *R v Elphick* [2021] ACTSC 9 at [160]. However, recently in the *R v Gorman* (Unreported, Supreme Court of the Australian Capital Territory, Acting Justice Refshauge, 5 June 2023) (***Gorman***), Refshauge AJ stated in relation to s 69:

A question arises as to the operation of this provision. On its face, it appears to mean that a court can order that a period of disqualification can be ordered to run concurrently with an earlier disqualification, if the interests of justice require. There has, however, been a consideration of this provision to the contrary. Thus, in *Smith v Stivala* [2018] ACTSC 309, the court considered that the section did not permit the order making the disqualification concurrent, unless there was power elsewhere in legislation for such an order to be made.

# His Honour went on to state:

In my respectful view, *Smith v Stivala* is plainly wrong. There seems no reason why section 69 should not be read as permitting an ACT court to specify that the disqualification that is imposed should not be concurrent with any other disqualification currently being served, so long as it is in the interests of justice to do so.

# Refshauge AJ referred to *McCurley v Beath* [2017] ACTSC 196; 268 A Crim R 263 (***McCurley***), where Mossop J briefly discussed the legislative history to s 69, in the context of submissions considering whether s 69 could qualify the cumulation rules in other statutory provisions in the *General Act* and *Driver Licensing Act*. His Honour considered at (at [57] and [71]) that s 69 did provide such a power. However, the decision was later overturned (see *Beath v McCurley* [2018] ACTCA 48; 339 FLR 165), albeit for a different reason relating to the power of the court to entertain the appeal to the primary judge in the first place.

# Given there are decisions of single instance judges either way and the research conducted by the parties in the limited time available did not identify binding authority at appellate level, I will briefly set out my reasons for reaching the same conclusion as that arrived at by Refshauge AJ in *Gorman* and Mossop J in *McCurley.*

# First, the plain words of the section indicate that there is a particular outcome in favour of cumulation, *subject to* the Court ordering otherwise. That is, the section itself appears to expressly acknowledge that the Court may otherwise order. There are no additional words to indicate that the power must be found elsewhere, such as “under this Act” or “in accordance with this Act or another law of the Territory”.

# The interpretation given by Burns J in *Smith v Stivala* that the source of the power must be found elsewhere appears to read that limit into the provision, in the form of “if the Court has power to do so”.

# Second, the context of s 69 seems to support an interpretation favouring the Court’s discretion to otherwise order arising under the provision itself. Section 69 is expressed to apply to multiple disqualification periods “whether or not by court order” which clearly contemplates that the court may otherwise order, even where automatic disqualification periods apply.

# The context of the provision itself must then be read in the context of the other provisions in the General Act. Section 63 refers to automatic disqualification for certain other driving offences. Under s 63(5):

(5) If the person is already disqualified from holding or obtaining a driver licence, or the person's driver licence is suspended, the disqualification under this section takes effect at the end of the existing disqualification or suspension.

# The interplay between s 69 and cumulation rules such as the above (see also s 62(3) of the *General Act,* s 32(7) of the *Driver Licensing Act*) was not addressed by any words in s 69, such as the provision being sub-ordinate to more specific provisions. However, there may be force in the analysis of the provisions as set out by Mossop J in *McCurley* (admittedly in *obiter*)at [55]-[66]. The effect of the analysis relevant to this case was summarised at [65]:

… s 69 would not operate to permit concurrency as between periods of disqualification in existence at the time of the offending conduct and which continued as at the date of conviction but would permit an order rendering concurrent a number of periods of disqualification arising from convictions on a single occasion.

# The purpose of s 69 appears to be self-evidently a general provision providing certainty in the absence of any court order specifically addressing the issue of how disqualification periods are to operate. The provision does not appear to be directed to limiting or excluding the power of the Court that is at least impliedly, and in my view expressly, given by the words “unless the Court orders otherwise”.

# For completeness, I observe that the legislative history to s 69 is not particularly enlightening on this particular point of interpretation. The explanatory statement to the Road Transport (General) Bill 1999 (ACT)provides:

Section 69 provides a person that is disqualified and incurs a further disqualification by a court, then the further disqualification is cumulative unless ordered otherwise. This proposed section in part re-enacts the provisions of section 191G of the (*Motor Traffic Act 1936).*

# Section 191G of the now repealed *Motor Traffic Act* *1936* (ACT) provided:

191G Multiple disqualifications—cumulative or concurrent

Where, by force of, or under, a law of the Territory—

(a) a person is disqualified from holding a driving licence for a period; and

(b) while so disqualified, the person is again disqualified from holding a driving licence for a period;

the periods are cumulative unless a court orders otherwise.

# It will be apparent from what I have said that, properly construed, sufficient words are provided in the text of s 69 to create the source of the Court’s power. Having regard to the purpose of the section, read in the context of the *General Act* as a whole, there does not appear to be any reason to adopt a contrary view. Accordingly, I propose to construe s 69 as permitting the Court the discretion to order concurrency in respect of automatic disqualification periods arising out of convictions on a single occasion.

# During the hearing I indicated (for totality considerations) that pursuant to s 20(1) of the *Alcohol and Drugs Act*, I was minded to reduce the disqualification period for the offence to the 12 month minimum, and for the same reasons, I will make an order under s 69 of the *General Act* that the disqualification period run concurrently with the three other automatic licence disqualification periods. That is because they all arose from convictions on a single occasion. The two aggravated driving offences were accepted as part of the same course of conduct. The drug driving and unlicenced driver offences were also overlapping with that conduct and the intoxication could have formed part of the conduct falling within the aggravated driving offences. The discretion of the prosecution as to how a person’s conduct is charged should not then have a disproportionate effect on statutory licence disqualification periods.

## Sentence

# The orders of the Court are as follows:

1. Pursuant to s 24 of the *Crimes* (*Restorative Justice Act) 2004* (ACT), the young offender is referred for participation in the restorative justice process.
2. For the offence of aggravated robbery contrary to s 310(b) of the *Criminal Code 2002* (ACT) (**Criminal Code**) (CC CAN 884/2022), a sentence of 2 years’ imprisonment is imposed (reduced from 2 years 8 months to take account of the guilty plea), backdated to commence on 23 May 2023.
3. For the offence of dishonestly driving a motor vehicle without consent contrary to s 318(2) of the *Criminal Code* (CC CAN 887/2022), a sentence of 9 months and ten days’ imprisonment is imposed (reduced from 12 months’ imprisonment to take account of the guilty plea), to commence on 12 September 2024.
4. For the offence of driving with prescribed drug in oral fluid, contrary to s 20(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (CC CAN 888/2022), a sentence of to 23 days imprisonment is imposed (reduced from 1 month’s imprisonment to take account of the guilty plea), to commence on 12 September 2024.
5. For the first offence of aggravated dangerous driving contrary to s 7(1)(a) of the *Road Transport (Safety and Traffic Management Act) 1999* (ACT) (CC CAN 889/2022), a sentence of 9 months, 11 days is imposed (reduced from 12 months’ imprisonment to take account of the guilty plea), to commence on 12 November 2024.
6. For the second offence of aggravated dangerous driving contrary to s 7(1)(a) of the *Road Transport (Safety and Traffic Management Act) 1999* (ACT) (CC CAN 891/2022), a sentence of 9 months, ten days is imposed (reduced from 12 months’ imprisonment to take account of the guilty plea), to commence on 13 February 2025.
7. For the offence of driving without a licence contrary to s 31(2) of the *Road Transport (Driver Licensing) Act 1999* (ACT) (CC CAN 892/2022), the offender is sentenced to 1 month and 17 days’ imprisonment (reduced from 2 month’ imprisonment to take account of the guilty plea), to commence on 13 February 2025.
8. For the offence of driving with an improperly issued numberplate, contrary to s 22(1)(a) of the *Road Transport (Vehicle Registration) Act 1999* (ACT) (CC CAN 893/2022), pursuant to ss 13 and 17(2) of the *Sentencing Act*, a non-conviction order is made with the appellant required to sign an undertaking to comply with the good behaviour obligations prescribed in s 86(1) of the *Crimes (Sentence Administration) Act 2005*(ACT)for a period of 6 months from the date of these orders and accepting the supervision of the Director-General for that period.
9. The total sentence is to commence 23 May 2023 and is suspended from 23 August 2023 upon the offender:
   1. entering into a good behaviour order for a total period of 2 years and 3 months ending on 22 November 2025,
   2. signing an undertaking to comply with the good behaviour obligations prescribed in s 86(1) of the *Crimes (Sentence Administration) Act 2005*(ACT), and
   3. accepting the supervision of the Director-General for that period.
10. Pursuant to s 69 of the *Road Transport (General Act)* 1999 (ACT) the offender is prohibited from holding or obtaining an Australian driver licence for a total of 3 years from 8 June 2023, comprising the following:
    1. For the first aggravated dangerous driving offence (CC CAN 889/2022): the automatic disqualification for 12 months applies, to commence on 8 June 2023.
    2. For the repeat aggravated dangerous driving offence (CC CAN 891/2022): the automatic disqualification for a minimum of 12 months applies, to commence on 8 June 2023.
    3. For the drive with prescribed drug in oral fluid offence (where a repeat offence) (CC CAN 888/2022): the automatic disqualification period is reduced to the minimum period of 12 months, to commence on 8 June 2023.
    4. For the drive while unlicensed offence (CC CAN 892/2022): the automatic disqualification for a minimum of three years applies, to commence on 8 June 2023.

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|  | I certify that the preceding one hundred and six [106] numbered paragraphs are a true copy of the Reasons for Sentence of her Honour Justice McWilliam.  Associate:  Date: 8 June 2023 |