R v Morton [2010] NTSC 26

PARTIES:	THE QUEEN
	v
	MALCOLM MORTON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20720094
DELIVERED:	24 MAY 2010
HEARING DATES:	22 APRIL 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – mental impairment – not fit to plead – juvenile – charge of murder – special hearing – qualified verdict of guilty of manslaughter due to diminished responsibility – level of disability – custodial supervision order – period of supervision order – relevant factors – meaning of "the appropriate sentence if he had been found guilty of the offence charged – whether time spent in custody prior to special hearing can be taken into account

Criminal Code, Division 4 of Part IIA, Division 5 of Part IIA, Part IIA, s 43, s 43C, s 43K(3), s 43V, s 43X(2), s 43X(3), s 43ZA, s 43ZD, s 43ZG, s 43ZG(1), s 43ZG(2), s 43ZG(3), s 43ZG(4), s 43ZH(1), s 316(1)
Prisons (Correctional Services) Act
Sentencing Act
Youth Justice Act, s 82(1)

R v Verdins (2007) 16 VR 269; *Waye v The Queen* [2000] NTCCA 5; applied

The Queen v Faulton [2004] NTSC 12; followed

R v Gurrwiwi (2008) 154 NTR 1; *R v Morton* (2001) 11 NTLR 97; *R v Tsiaris* [1996] 1 VR 398; *The Queen v Lavender* (2005) 222 CLR 67; *Veen v The Queen [No 2]* (1988) 164 CLR 465; referred to

REPRESENTATION:

Counsel:

Crown:	Dr N Rogers SC
Accused:	D Grace QC & T Collins
Department of Justice:	G McDonald
Chief Executive Officer, Department of Health & Families:	D Baldry

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service
Department of Justice:	Solicitor for the Northern Territory
Chief Executive Officer, Department of Health & Families:	Cridlands MB

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

R v Morton [2010] NTSC 26
No. 20720094

BETWEEN:

THE QUEEN

AND:

MALCOLM MORTON

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 May 2010)

Introduction

[1] Malcolm Morton (Morton) was indicted for the murder of his uncle, Simon Wallace (the deceased) which allegedly occurred at Santa Teresa in the Northern Territory of Australia on or about 17 July 2007.

[2] On 17 November 2009, I found that Morton was not fit to plead in accordance with s 43 of the *Criminal Code*. A special hearing was thereafter conducted under Division 4 of Part IIA of the Code.

[3] At the conclusion of the special hearing on 26 November 2009, the jury returned a qualified verdict of guilty of manslaughter by reason of diminished responsibility. I then made a declaration under s 43K(3) of the Code that Morton is liable to supervision under Division 5 of Part IIA of the Code and ordered:

1. That Morton be remanded in custody until a supervision order is made.

2. That Morton undergo an examination by an independent psychiatrist with the assistance of an interpreter in either Luritja or Eastern Arrante.

3. That the report of the result of that examination be produced before the Court.

4. Further consideration be adjourned sine die.

[4] On 22 April 2010, I heard submissions from counsel as to the appropriate orders to be made under Division 5 of Part IIA of the Code. It was not in contest that I should make a custodial supervision order pursuant to s 43ZA of the Code and that the accused should be committed to custody in the Alice Springs Correctional Centre (ASCC), there being no practicable alternative given the circumstances of the offender. For the reasons that follow, I am satisfied that those concessions were properly made.

[5] The principal issue debated before me is the length of the term of the order to be fixed in accordance with s 43ZG of the Code and what ancillary orders are also required.

The evidence relating to the offending

[6] Morton was born on 30 December 1990. He was 16 years of age at the time of the deceased's death. At the age of 13 months, he was diagnosed as suffering from epilepsy. He also has brain damage, although it is not clear whether the epilepsy caused the brain damage or vice versa.

[7] Morton's mother was unable to care for him whilst he was a child because she had an acquired brain injury. Until 1997, he lived with his maternal grandmother in Titjikala, a community approximately 120 kilometres south of Alice Springs via the Old South Road. Even at the age of six, he was reported by a paediatrician, Dr A Jacquiery, as difficult to control and prone to violent behaviour, as well as having had several life threatening seizures requiring admissions to the Alice Springs Hospital.

[8] At the age of nine, Morton was seen at the Royal Adelaide Children's Hospital for a month, where an MRI scan and EEG study were performed. The results of those studies revealed an abnormality in the right temporal lobe. A decision was made not perform an excision or temporal lobectomy, because there was a fear that Morton might have the same problem in the left lobe as well.

[9] After his grandmother's death in 1997, he moved to Santa Teresa,[1] 80 kilometres south east of Alice Springs, where he resided with his uncle, Peter Wallace, the deceased's brother.

[10] At the age of nine, Morton was placed in the respite care of Mr Brody Parsons, who was working at the Acacia Hill Special School in Alice Springs. Initially, he travelled to the school once a week. Over a period of two or three months, his attendance increased to three days per week. He was taught hygiene and how to use picture cards to identify and match objects. Eventually, he attended the school full time, living with the Parsons family and returning to Santa Teresa on weekends. He remained in this environment until 2001. During this period, he was taught house rules, standard bed times, helping with cleaning, making his bed, to stay in the confines of the yard and to share with other children. At the school, he was involved in a gardening program, working in a "chook pen" and in a greenhouse. He learned to shower himself, attend to his toiletries, to dress himself and feed himself using a knife and fork. At some stage, he was given a Gameboy, which enabled him to play certain computer games when the equipment was linked to a TV screen. He had learned to communicate in English. He was given his medication regularly, although he still had seizures. By 2001, because his behaviour had become erratic, it was decided that he could no longer live with the Parsons family and he returned to live

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[1] Also known as Ltyentye Apurte.

in Titjikala where he remained for the next two years. During this period, his level of interaction changed and he became withdrawn. Although he was provided with food and housing and attended the Titjikala Primary School, no family member took responsibility for him and the placement ended when the community decided he had become "too much". At this time, he was under the supervision of Dr Hope at Santa Teresa. In 2003, he returned there to live with his uncle, Peter, and his de facto wife, Ruth Oliver, and also an aunt, Eucharia Wallace, on a shared basis.

[11] There is little in the history available to me concerning his father, except that he died in December 2001.

[12] In October and November 2004, he again attended at the Acacia Hill Special School and was reported in May 2004 as living between Santa Teresa and a foster home near St Mary's in Alice Springs under the care of the Parsons family again. In May 2004, he was reviewed by a consultant child and adolescent psychiatrist, Dr Konyu Roy. According to his report dated 18 May 2004, there were concerns about aggressive and violent episodes of increasing frequency during the course of that year. Dr Roy was unable to find any evidence of a psychiatric illness. He felt that, as Morton had grown rapidly in height and weight over the last three months, his medication levels may be below the therapeutic range and if this proved unsuccessful, he suggested a low dose of anti-psychotic medication.

[13] In a letter written by consultant paediatric physician, Dr Tors Clothier, dated 4 October 2004, he described Morton's behaviour as:

> "…challenging for at least ten years. He is impulsive, hyperactive, easily distracted, destructive and aggressive. He has had periods of head banging, running away, drinking his own urine, terrorising younger children and the elderly and vulnerable and being cruel to animals, once dismembering a puppy with an axe and on other occasions, biting the head of a brown snake. He has had two overdoses of his anti-convulsant medications and has been bitten by a yellow faced rip snake that he was playing with. Malcolm's social interaction is impaired. He talks to himself a lot and makes little eye contact."

[14] Mr Graham Giles, a disability support worker who had contact with Morton whilst at Santa Teresa, reported that Morton was often:

> "the subject of teasing, ridicule, abuse or rejection. He was known as 'Mad Malcolm' from a young age and… when he first went to Ltyentye Apurte his kids were warned about the 'crazy kid'".

[15] When he first met Morton, he witnessed an occasion when children and adults (many of the latter drunk) were throwing rocks at Morton and yelling at him:

> "He was known as the dirty, neglected kid who pissed his pants.

> But when he moved to Titjikala in 2001, he became much more introverted, rarely leaving the house and yard, being relatively in a vegetative state. During this time he had no friends, when family went out he was left behind and there was little or no interaction between Morton and his family."

[16] In 2003, Ruth Oliver died and in 2004, he began to live with the deceased. By 2006, the deceased became his main carer. In December 2006, Mr Peter Ward arrived in Santa Teresa as the coordinator of the Disability Access Program. This was a support program, albeit not an advanced one. Mr Ward provided assistance with Morton's medication morning and night and arranged for him to have respite care at Titjikala with relatives. Morton also received meals at lunchtime from Kelly Nugent at the Santa Teresa Women's Centre four days a week. In 2007, Morton was diagnosed with diabetes and prescribed medication for that condition by Dr Hope. The deceased and Morton shared house 141, which consisted of two rooms, one of which was the deceased's bedroom. The other room contained the kitchen, dining and lounge facilities and the place where Morton slept.

[17] By July 2007, Mr Ward described Morton's abilities as follows. He liked children's jigsaws, kicking a football, throwing and catching a ball and so-called computer games like Atari. He could attend to his own toiletries, but would leave his clothes in a mess on the floor. He could use a microwave oven to heat up food and do some basic cooking. Although he "spoke" three

languages, Luritja, Western Arrernte and English, his ability to understand English was at a very basic level. He could not maintain even a simple conversation. To the extent that he could communicate at all, it was limited to a single word.

[18] The deceased had worked in the workshop at Santa Teresa since at least 1994. He usually attended the workshop at 8:00 am and left at 4:00 pm. He was a conscientious worker. If he took time off to look after Morton, he usually advised the workshop supervisor, Mr Stuart.

The events relating to the deceased's death

[19] On Tuesday 17 July 2007, some young men who were relatives of the deceased, Calvin Williams, Patrick Wallace, Alvin Wallace and Jeffrey Wallace, had been drinking beer at a drinking place outside Santa Teresa known as the Boundary Gate. At some time before 1:00 pm, they drove into the township to get a flat tyre fixed. This was attended to by the deceased. When this was done, they all drove to Alice Springs in the deceased's car, arriving there at between 1:00 and 2:00 pm. After buying alcohol and groceries, they all returned to Santa Teresa. The deceased dropped off the young men at a drinking place outside of the township known as the Rooster Gate and returned home. Having dropped off his groceries, the deceased drove to the Rooster Gate where he consumed the alcohol with the others. It is not known where Morton was that day after about 8:30 am when he was seen by Mr Ward who gave him his medication.

[20] The deceased was dropped off home by the young men at around midnight in a very intoxicated state. At about 7:30 pm the following evening, Calvin Williams, Alvin Wallace and Jeffrey Wallace, called at the deceased's house to borrow some noodles. Morton answered the door and let them inside. On enquiry as to the deceased's whereabouts, Morton indicated that he was in his bedroom. The young men went to the bedroom door, which was locked from the inside. It was opened by Alvin Wallace. They could see the deceased's body inside. They went to the community hall and located ACPO Alice. After telling him what they had found, ACPO Alice went to the police station and advised Sergeant White and Sergeant Abbott. They all subsequently returned to the house. The scene was secured. Morton was arrested. Later, police from Alice Springs arrived and began to collect evidence at the scene. In the early hours of 19 July, Morton was taken to Alice Springs. Shortly thereafter, he had a fit and was hospitalised.

[21] An autopsy was conducted by Professor Green at Alice Springs on 20 July 2007. Professor Green's principal findings were that the deceased suffered five stab wounds consistent with having been caused by a Victorinox knife, which the police had located in the house amongst a blue box of knives place in a cardboard box in the lounge room over which a blanket had been placed. Professor Green's evidence was that the deceased's death could have resulted from any one of four of the wounds.

[22] The Crown case at trial was that Morton had overheard the deceased and Peter Ward having a conversation on the morning of 17 July about the possibility of arranging a visit to Titjikala with the prospect of Morton staying there with an Aunt, Anne Wallace. She later had a conversation with the deceased to the effect that she would not take him. The police found a backpack in the main room of the house packed with clothes, various sets of keys, a tablet dispenser used to provide Morton with his medication and a second bag containing Morton's Nintendo game. The Crown asked the jury to draw the inference that Morton expected to be taken to Titjikala and waited all day for the deceased to come home from work to take him there. Instead, the deceased came home in a very drunken condition. Morton did not drink alcohol and did not like his carers to become drunk. When the deceased came home, Morton became angry when he found out that the deceased was not going to take him to Titjikala and was drunk. At this stage, the deceased was sitting on a chair in the main room. Morton picked up the Victorinox knife and stabbed the deceased near the chair. The deceased fled towards the stove and then towards the door to his bedroom. He went inside and locked the door. He died shortly thereafter.

[23] There was competing evidence at the trial by expert psychologists and psychiatrists on whether or not the defence of mental impairment was made out. The Crown was also put to proof on the identity of the killer; and if Morton was responsible for the deceased's death, whether his actions were

voluntary. The defences of provocation and diminished responsibility were also left to the jury. The verdict of the jury is consistent with findings that:

1. Morton caused the deceased's death by stabbing him with the knife;

2. Morton's actions were voluntary;

3. Morton intended to kill the deceased or to cause him serious harm;

4. The defence of mental impairment was not made out;

5. There was no provocation by the deceased; but

6. Morton had established the defence of diminished responsibility because, at the time,

7. His mental capacity was substantially impaired;

8. The impairment arose wholly or partly from an underlying condition; and given the extent of his impairment, Morton should not be convicted of murder.

Evidence concerning Morton's level of disability

[24] I have received two reports from occupational therapists. The first report, signed by Ms Jill Foster, is undated but was apparently written at some time during 2009. Ms Foster reported that Morton had shown interest in learning to write. He could recognise his own name and made strenuous efforts to copy it. He was very interested in picture books and could name a number

of different animals and objects. He was able to colour in pictures, using a suitable range of colours of his own choice, but when he became fatigued he would over-colour, using only one colour and slip outside the lines. His response to country music prompted improved posture, increased attention, focus, eye contact and level of arousal. Cognitive tasks such as sorting, matching and differentiating appeared to be of no interest. Her report indicated that with encouragement he should be able to make some improvements in those activities.

[25] The report of the second occupational therapist, Susan Brooks, dated 20 July 2009, provided a sensory processing assessment. The assessment indicates that his functional abilities fluctuate throughout the day and he is also lethargic after having a seizure. He is able to complete daily living tasks with prompting and some demonstration, such as washing and dressing. Prompts need to be very simple instructions.

[26] Mr Martin O'Grady, a psychologist, gave evidence at the trial. He conducted a very simple test, appropriate for able-minded children of four to five years and not requiring the use of language. His opinion was that Morton's disability was not profound, but fell in the moderate range, rather analogous to that of a seven year old. He described Morton's speech as monosyllabic and he would repeat words in an apparent attempt to process information. He was more articulate when in a high emotional state.

[27] I have received a report by a speech pathologist, Ms Louise Taylor. The report is undated, but the assessment was made in July 2009. Her overall assessment was that Morton displayed minimal understanding of spoken language. He constantly required prompts, visual cues and modelling to complete new or unfamiliar tasks. The overall picture presented was that he displayed limited expressive language skills at a very basic level and tended to use alternate forms of expression such as behaviour, body language and facial expressions to be assertive in his interactions. Morton was also beginning to integrate information from his senses and starting to solve simple problems through trial and error. Further improvement through training was thought possible.

[28] Morton was also assessed by a clinic psychologist and clinical child and adolescent neuropsychologist, Dr Larry Cashion in September 2008. Dr Cashion is a leading expert in the field of autism. In his opinion, Morton satisfied the diagnostic criteria for an autistic disorder, complicated by the presence of neuropathology from untreated epilepsy, cognitive impairment and a learning disorder and dysfunctional parenting and care giving whilst in childhood. As such, Morton had not developed the range of social and behavioural options that could have been expected with appropriate intervention. Despite this, there is still an opportunity for him to learn basic self-help skills and socialisation through intensive programming in an appropriate care environment. He has a serious disability which requires significant intervention in the short and long term. During the trial,

Dr Cashion's evidence was that Morton's intellectual disability was in the severe to moderate range. Dr Cashion also expressed grave concerns for Morton's future welfare if he were to be held in an adult prison.

[29] Morton was assessed by a forensic psychologist, Mr Richard Balfour, whose report is dated 4 June 2008. He concluded that Morton has an intellectual disability in the moderate to severe range with autistic tendencies and very poor verbal skills. A lot of his verbal communication consists of echolalia – repeating words spoken to him by others – a feature noted and commented upon by all of the professionals. Mr Balfour noted that his violent behaviour appeared to be both reactive, due to his low tolerance of frustration and poor ability to delay self-gratification; and instrumental, to achieve a goal. He considered that there was sufficient clinical evidence to substantiate a diagnosis of intermittent explosive disorder (a diagnosis Dr Cashion apparently did not agree with).

[30] At the trial, evidence was given by Dr Lester Walton, a consultant psychiatrist, to the effect that Morton was disabled to a moderate to severe level and functioning at the level of a child of seven or eight years of age, due to his brain injury. I have since the trial received a report dated 30 March 2010 in which he states that he concurs with the comments of Mr Firkins, the manager of the Disability Support Team, that Morton is "dramatically affected by his disabilities which encompassed all aspects of his functioning". He states that at no stage has he observed anything

indicative of a psychosis. He did not anticipate any dramatic change in Morton's mental state. Dr Walton commented favourably on the conditions at the Alice Springs Correctional Centre:

> "I would have to say that I was impressed with the seeming understanding, considered management within the strictures of an adult prison environment and seemingly genuine attitude of care which surrounds Mr Morton currently. The indications are that he is responding favourably to the current management."

[31] Evidence was given at the trial by Dr Kevin Smith, a psychiatrist. Dr Smith also prepared a very detailed report dated 2 April 2009. It is sufficient for my purposes to refer only to one paragraph of his report which sums up his opinion:

> "Diagnostically, Mr Morton suffers from Temporal Lobe Epilepsy, with grand mal and partial complex seizures. He has an Intellectual Impairment classes as 'mild', and he has an Organic Personality Disorder characterised by grossly impaired social and communications kills, a limited capacity for empathy with others, some autistic features, and explosive behaviours including aggression when he feels provoked or his demands are not being met. His past tendencies to be fascinated with cruelty are more likely a manifestation of boredom and a lack of empathy, along with being a manifestation of physical strength eye-hand coordination, rather than indicative of an Antisocial Personality

Disorder. An interesting neuropsychiatric aspect of his case are the descriptions of behaviours associate (sic) with increased seizure activity in which he becomes unable to interpret and process his environment appropriately, and can enter a dangerous state of rage for which he has no recall."

[32] Subsequent to the trial, I ordered a further psychiatric assessment with the assistance of an interpreter. This was undertaken by Associate Professor Leon Petchkovsky in January 2010 with the assistance of an East Arrernte interpreter and several other persons familiar with Morton's condition. Professor Petchkovsky's diagnosis is that he suffers from a reactive attachment disorder (RAD) which arises from a failure to form normal attachments to primary caregivers in early childhood. He observes:

"There are two forms of it, the 'disinhibited form', which can present itself as indiscriminate sociability, such as excessive familiarity with relative strangers; and the 'inhibited form', featuring failure to initiate or respond to most social interactions in a developmentally appropriate way. Malcolm displays both patterns. Many other conditions, including 'pervasive developmental disorders', autistic spectrum disorders and various forms of intellectual disability, can also affect attachment behaviour, or be **comorbid** or BOTH, as in this case. Malcolm also has epilepsy (both grand mal and R temporal partial

seizures) and these conditions are well known to impact on behaviour and social interactions in a range of problematic ways.

Recommendations

Malcolm has several severe life-long conditions, including:

1. RAD
2. Intellectual disability
3. Epilepsy
4. Diabetes."

[33] Dr Walton commented on this report as a "novel diagnosis" but concurs with the comment that many other conditions can affect attachment behaviour, as in this case:

> "That is, Mr Morton has proved difficult to diagnose parsimoniously and hence has attracted a variety of diagnostic labels but the point to note is that they are not mutually exclusive. Suffice to say that the combination of problems identified which affect Mr Morton amount in total to marked disability."

[34] Professor Petchkovsky also noted and endorsed the "competent caring and highly professional rehabilitationist work that my colleagues in the local

Forensics, Corrective and Disabilities Services have done with this very difficult young man…"

[35] As can be seem from this brief discussion of the expert reports, there is considerable disagreement between the experts. I am not in a position to resolve these differences except that, as the jury found that Morton was guilty of manslaughter by reason of diminished responsibility, the opinions of those experts, notably Mr Balfour, Dr Cashion and Dr Walton, that he was, at the time of the deceased's death, mentally impaired as that expression is defined by s 43C of the *Criminal Code*, to the extent that he was not criminally responsible for his actions is not open to me. Nevertheless, there is considerable agreement between the experts that support findings that Morton suffers from epilepsy, has brain damage, is intellectually and socially disabled, and has diabetes, the combination of which results in a marked disability. Without question, this significantly reduces his moral culpability for his offending.

Fixing the term

[36] Section 43ZG(1) of the *Criminal Code* requires the Court, when it makes a supervision order, to fix a term in accordance with subsections (2), (3) or (4) "that is appropriate for the offence concerned and specify the term in the order".

[37] Section 43ZG(2) provides:

> Subject to subsections (3) and (4), the term fixed under subsection (1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.

[38] As I have already noted, it is common ground that I should fix a custodial supervision order, no other kind of supervision order being appropriate.

[39] Section 43ZG(2) gives rise to two questions of construction. The first question is what is meant by "the offence charged"? Strictly speaking, the only charge contained in the indictment was a charge of murder. Yet, the jury returned a verdict of not guilty of murder and a qualified verdict of guilty of manslaughter, which was not specifically charged, but was an available alternative verdict. I note that s 43X(3) specifically refers to a finding by the jury at a special hearing "that the accused person committed the offence charged or any offence available as an alternative to the offence charged". Does this mean that the draftsman has made a clear distinction between the offence charged and a qualified finding of guilt on an alternative verdict, so that I am bound to fix the term as if he had been found guilty of murder? If this is right, worse is to follow because in s 43ZG(4), if a supervised person had been **charged** with the commission of

multiple offences, the term must be fixed "by reference to the offence carrying the longest maximum period of imprisonment". Does this mean that if a supervised person had been found not guilty of the offence carrying the longest maximum penalty, but qualified verdicts of guilty had been returned by the jury for lesser offences, the Court must nevertheless fix the term by reference to the maximum penalty for the offence he was found not guilty of?

[40] No counsel addressed this question. All assumed, correctly in my opinion, that the relevant "offence charged" must be read in the context of Part IIA of the Code as a whole. In this case, that means that "the offence charged" is to be taken to be the offence of manslaughter and not murder. In the context of Part IIA, the Act provides for a special hearing where the accused is unfit to be tried. The purpose of the special hearing is set out in s 43V and it "is to determine, on the evidence available, if the person who is not fit to stand trial –

> (a) is not guilty of the offence he or she is charged with;
>
> (b) is not guilty of the offence he or she is charged with because of his or her mental impairment; or
>
> (c) committed the offence he or she is charged with or an offence available as an alternative to the offence charged.

[41] If the person is found not guilty because of mental impairment (the present statutory equivalent to insanity), s 43X(2) provides that that "is taken to be a finding of not guilty because of mental impairment" and the Court must then either declare the accused liable to a supervision or release the accused unconditionally. In that situation, it makes sense that the accused's term would be fixed by reference to the charge or charges he or she faced, even though found not guilty. (I assume for these purposes that if the accused faced more than one charge, a verdict of not guilty because of mental impairment would be returned on each charge.)

[42] If the accused is found not guilty of an offence, the Court must discharge him.[2] If the accused is found guilty of the offence charged or an available alternative, the Court must then declare that the person is liable to a supervision order or discharge the person unconditionally.[3]

[43] In the present case, the verdict in relation to the charge of murder was not guilty. A supervision order could not be made as a consequence of that finding in respect of that charge. The supervision order is required as a consequence of the finding of guilty of manslaughter. I consider that that is "the offence charged" for the purposes of s 43ZG(2), because Morton stood in danger of a finding of guilty of manslaughter vide s 316(1) of the Code and that is the charge in respect of which the qualified finding of guilt was

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2 See s 43X(1).
3 See s 43X(3).

made. Further, s 43ZG(1) refers to "fixing a term… that is appropriate for the offence concerned…" In this case, the "offence concerned" could not be anything else except the offence of manslaughter.

[44] The second question of construction is whether, when fixing the term, the Court should assume that the accused was a normal person "having no cognitive deficits". Dr Rogers SC submitted that this was the correct approach because, first, a person with cognitive deficits can never be found guilty (I presume by this that Dr Rogers meant to refer to a person who, by reason of "cognitive deficits" was unfit to stand trial). The second reason advanced was that there would otherwise be an element of "double dipping", because the verdict already took into account his mental impairment by acceptance of the defence of diminished responsibility.

[45] Mr Grace QC submitted that the Court should apply normal sentencing principles and Morton's cognitive deficits must be taken into account according to the evidence.

[46] In my opinion, there is nothing in s 43ZG which requires me to approach my task in the manner urged by Dr Rogers; and Mr Grace's submission is correct. I note that this was the approach which I adopted in *The Queen v Faulton*.[4]

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[4] [2004] NTSC 12 at [13].

[47] Because Morton was aged 16 at the time of the offence, for the purpose of fixing a term, it was submitted that I am required to elect to proceed either under the *Youth Justice Act* or the *Sentencing Act*.[5] In the circumstances of this case, I am satisfied that the appropriate sentencing regime for a serious offence is the *Sentencing Act* and I will proceed to deal with this matter accordingly. It was not suggested by Mr Grace QC otherwise, although he did maintain a submission that Morton was entitled to be sentenced with the sentencing principles appropriate to juveniles in mind. To the extent that those principles are relevant, I accept Mr Grace's submission.

[48] The objective facts are that this was a serious manslaughter. The deceased was Morton's own carer. He had done nothing to provoke the knife attack upon himself, except come home late whilst drunk. He suffered five stab wounds with a knife, four of which were fatal wounds. The attack was sustained, albeit probably not for longer than a few minutes. The evidence of Professor Green was that he died about 20 minutes after the attack. The killing was voluntary and Morton, at the very least, intended to cause him serious harm.

[49] I accept that there is a distinction between voluntary and involuntary manslaughter and that the former is often, although not inevitably, more serious than the latter, because the former requires an intent to kill or cause

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[5] *Youth Justice Act*, s 82(1); *R v Gurrwiwi* (2008) 154 NTR 1.

serious harm.[6] In the present case, Morton has no prior convictions. He has not pleaded guilty or expressed his remorse, although the circumstances prevented such a course. There is no fixed sentencing tariff for manslaughter.

[50] The established authorities show that where a crime is committed by a person with cognitive defects which were present and operating at the time of the crime, the offender is not or may not be a suitable vehicle for general deterrence, in the sense that a sentence fully reflecting general deterrence should be sensibly moderated.[7] Similarly, the moral culpability of the offender may be reduced and this would affect the punishment that is just in all the circumstances, and denunciation is less likely to be relevant.[8] In *R v Verdins*, the Court of Appeal of Victoria provided further guidance in such cases; whether or not specific deterrence should be moderated or eliminated as a sentencing consideration depends on the nature and severity of the symptoms of the condition as exhibited by the offender and the effect of the condition on the offender's mental capacity at the time of the offence. On the other hand, the existence of the condition at the time of sentencing or its foreseeable recurrence may mean that a given sentence may weigh more heavily on the offender than it would a person of normal health. Where there is a serious risk of imprisonment having a significant adverse effect on

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6 *R v Morton* (2001) 11 NTLR 97 at 98-99 [3]; *The Queen v Lavender* (2005) 222 CLR 67 at 70 [2].
7 *Waye v The Queen* [2000] NTCCA 5; *R v Verdins* (2007) 16 VR 269.
8 *R v Tsiaris* [1996] 1 VR 398; *R v Verdins* (2007) 16 VR 269 at 277 [32].

the prisoner's mental health, this will be a factor tending to mitigate punishment.[9] Further, *Verdins*[10] made it abundantly clear that these principles are not confined to cases of serious psychiatric illness and any one or more could apply to a mental impairment, mental disorder or abnormality whether or not the condition in question could be described as a serious mental illness.

[51] In cases of diminished responsibility, the High Court has held that the principle of proportionality applies to all cases, i.e. a sentence should not be increased beyond that which is proportionate to the crime merely to protect the community from the risk of recidivism.[11] However, that does not mean to say that the Court can disregard or give inadequate weight to the need to protect the community.[12] The risk of recidivism may in fact be so strong that the mental disorder might not be treated as a mitigating factor, but as a reinforcement of the need for the longest possible sentence.[13]

[52] The question remains, to what extent would Morton remain a danger to the community if and when he were to be released from custody. The report dated 16 February 2010 from Mr Firkins, the Acting Manager of the Disability Support Tram, refers to the triggers for "challenging behaviour" which include:

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9 *R v Verdins* (2007) 16 VR 269 at 277 [32].
10 *R v Verdins* (2007) 16 VR 269 at 272 [6].
11 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472.
12 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473-474.
13 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 474-477.

- Seizure activity
- Unexpected changes in routine or uncertainty
- Heightened arousal for extended periods of time
- Unpleasant or overwhelming interaction with others
- Being teased/bullied
- Frustration – not getting his wants/needs
- Delayed gratification
- Communication difficulties.

[53] Mr Firkins observes in his report:

> "Despite the differing specifics of Mr Morton's diagnoses, the functional understanding, prognosis and management strategies are relatively unanimous. That is, Mr Morton requires a well structured environment with consistent routines and well trained staff suited to safely and effectively manage Mr Morton."

[54] He concludes that Morton will require an intensive service environment for the foreseeable future. The goal of the long-term management plan is to increase his ability to socialise, to accept frustration, to reduce aggressive

incidents and to reduce self-harming incidents. Since his transfer to the ASCC, Morton has made some progress. Mr Firkins reports:

> "There have been two reported cases of self-injurious behaviour; and three aggressive behavioural episodes since Mr Morton moved to ASCC. This is a marked reduction from previous environments. Mr Morton's incident rate of seizure activity has been significantly reduced and his diabetes in under control whilst being managed at ASCC."

[55] As to the risk to the community, Mr Firkins' opinion, as stated in his report, is:

> "Mr Morton is not able, and is not likely to be able, to manage himself or be managed in the community without an intensive therapeutic Management Plan, including rapid access to custodial officers and restraint as required, to ensure community (or client) safety.
>
> Without this environment, Mr Morton has demonstrated that he poses an acute risk to others and the community. Mr Morton lacks impulse control and has been known to become aggressive rapidly; apparently having limited understanding about the harm delivered to more vulnerable members of the community. Mr Morton has been known to be a threat and cause harm whether armed or unarmed."

[56] This report is to be contrasted with the report from the ASCC dated 23 March 2010. In particular, the ASCC report states that there have been no adverse issues relating to socialising with other prisoners, he now responds to directions to complete tasks and is participating in general population routines, there has been a vast improvement in the way he interacts with custodial officers, there have been no incidents of self-harming behaviour and the frequency with which he has demonstrated antisocial behaviour, and the severity of it, is decreasing. The prison staff no longer use restraint mechanisms and Morton is "demonstrating an evident improvement in the way he is managing his anger and, further, that he is not demonstrating the verbal or physical signs of aggression as were once quite prevalent". Overall, the report concludes that Morton "has started to present as somewhat less of a management problem and is demonstrating increases in his overall skill level".

[57] I note that Morton has recently re-enrolled into the Acacia Hill School, where a specialised educational program has been developed for him. The ASCC report indicates that the school program occupies 30 minutes per fortnight and there have been no adverse reports to date.

[58] On the other hand, the report from the Aged and Disability Program prepared by Mr Davey, dated 11 January 2010, concludes:

- Morton has excellent hand/eye coordination and the strength to go with it. He is adept at using a shanghai and shooting basketball hoops.

- He is adept at computer games including Nintendo “Game Boy”, Playstation and Xbox.

- It is not expected that he will be understand the concept of the exchange of goods and services for money or give change.

- He cannot drive a car or ride a pushbike and it is thought that he would struggle significantly with public transport.

- He is unable to manage his own finances. (He is currently subject to a joint guardianship order with the Office of Adult Guardianship and a community guardian.)

[59] Associate Professor Leon Petchkovsky, in his report dated 13 January 2010, concludes:

> “There are limits to how much improvement we can look forward to, but he has done extremely well so far at ASCC, improving across every category and we should be able to look forward to him eventually being able to manage appropriate supported accommodation in the community over the [next] 4 to 5 years, providing the improvement we see become[s] consolidated.”

[60] Overall, the evidence at this stage is such that Morton represents a significant danger to the community if he were to be released, but he has made significant progress in the relatively short time that he has been in the ASCC. I think, given that his lack of education and social development is a significant factor in his past offending, it is too early to conclude that Morton will never be able to be safely released into the community,

although that remains a distinct possibility and even a probability. But, in my opinion, that conclusion cannot be reached at this stage beyond reasonable doubt.

[61] The objective circumstances of this manslaughter were not such as to place it in the most serious category warranting a life term. Although the attack was sustained, it was provoked in the non-technical sense by the deceased's behaviour in coming home drunk in circumstances where he must have known that this would upset Morton, particularly as he knew that he had been unable to arrange respite care for him at Titjikala. Morton also has no prior convictions. The opinions of the expert psychiatrists and psychologists are not uniform as to the precise diagnosis of his mental condition. This may have been caused or contributed to by Morton's communication problems, particularly as, with the exception of Associate Professor Petchkovsky, none of the numerous experts had the advantage of a competent interpreter when interviewing him or assessing him. There is in any event a real difficulty in assessing his mental competence accurately when he is unable to communicate adequately, for whatever reason, and where, because of the lack of proper parenting, he could not be expected to have developed any real social skills and treated strangers, particularly authority figures, with distrust. The effects of his mental impairment and lack of social skills, establish that any sentence imposed does not warrant the full weight of the law for the purposes of general deterrence and denunciation and it must not be overlooked that he was only aged 16 at the

time. Special deterrence is not likely to be of great weight at least in the medium term. These factors require any sentence to be sensibly moderated, bearing in mind also that his moral culpability for the offending is also reduced. On the other hand, he presently represents a danger to the community (and to himself) if released and this is very likely to remain the case, at least for the foreseeable future. There is no risk that prison will weigh heavily upon him; on the contrary, it appears to have had a very positive effect so far. In all the circumstances, I consider that an appropriate head sentence would have been imprisonment for 12 years, which I would have backdated to the date he first went into custody, *viz* to 17 July 2007.

[62] Section 43ZG does not specifically refer to backdating the sentence I would have imposed. In the absence of such a provision, in my opinion, this is a factor which the Court should take into account when fixing the term. This was the approach I adopted in *The Queen v Faulton*. Both counsel submitted that this was the correct approach. In those circumstances as Morton has already spent two years and 10 months in custody, I fix a term, for the purposes of s 43ZG(1) of the *Criminal Code* of nine years and two months.

[63] The effect of fixing this term is that a mandatory review will not be required for at least another eight years and 11 months from today,[14] but there will be annual reports to the Court as required by s 43ZK, which may, if the Court

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[14] See s 43ZG(3).

considers it appropriate, trigger a review to determine whether Morton should be released from the supervision order.[15]

Orders

[64] I make the following orders:

1. Malcolm Morton (Morton) is subject to a custodial supervision order and is committed to custody at the Alice Springs Correctional Centre (ASCC).

2. The Director of Correctional Services, within the meaning of the *Prisons (Correctional Services) Act* (the Director), in consultation with the Chief Executive Officer of the Department of Health and Families (the CEO), shall be responsible for Morton's safe care and custody.

3. In respect of any illness or injury whilst in prison, Morton shall be cared for and treated, if necessary without his consent, by the Corrections Medical Service and/or by such other person or persons as the Director, in consultation with the CEO, shall require.

4. The Director, in consultation with the CEO, may make written determinations with respect to the internal management at ASCC concerning Morton's care and custody consistent with his status as a supervised person under Part IIA of the *Criminal Code*.

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[15] See s 43ZH(1). The legislation also permits applications to the Court to vary or discharge the order to be made by either the DPP or Morton at any time upon 14 days' notice: see s 43ZD.

5. In respect of his mental impairment, Morton shall be managed by staff of the Aged and Disability Service Program and other persons authorised by the CEO ("the Disability Management Team").

6. The management of Morton's mental impairment shall be consistent with the Recommended Goal Summary and Management Plan dated 11 January 2010 (the Management Plan), including the proposal that the Disability Management Team will have face to face contact with Morton on an average of three times per week.

7. The Director and the Superintendent of ASCC are authorised to permit Morton to participate in the Management Plan, including ensuring that the Disability Management Team has access to Morton at the ASCC, as required, during ordinary business hours, Monday to Friday.

8. In accordance with s 43ZG(1) of the *Criminal Code*, a term of nine years and two months is fixed commencing from the date of this order.

9. A mandatory review of this order pursuant to s 43ZG(3) of the *Criminal Code* shall take place no later than eight years and 11 months from the date of this order.

10. The Appropriate Person as defined by s 43A of the *Criminal Code* shall prepare and submit a report to the Court on the treatment and management of Morton's mental impairment, condition or disability by not later than one year from the date of this order and thereafter at

intervals of not more than 12 months until this order is revoked or expires (and Morton is released unconditionally).

11. Liberty to the parties to apply on short notice.
