Background factors and sentencing

Juliet Curtin reports on *Bugmy v The Queen* [2013] HCA 37

Should sentencing courts be required to take into account the unique systemic or background factors which have been instrumental in bringing Aboriginal offenders before the courts and into custody? This was one of the questions before the High Court in *Bugmy v The Queen*,[1] an appeal brought by Mr Bugmy against the decision of the New South Wales Court of Criminal Appeal (CCA) to impose a more severe sentence than that which he had received from the District Court of New South Wales.

Background

The appellant was a 31 year old Aboriginal man from Wilcannia. He had been separated from his family aged 12, left school aged 13, and was unable to read or write. The greater part of the appellant's childhood was spent in foster care, boys' homes and juvenile justice facilities and he had been in custody for most of his adult life. As a child, the appellant had been exposed to extreme episodes of domestic violence, as well as drug and alcohol abuse. He had a history of mental health issues, and had made five previous suicide attempts whilst in custody. It was against these background factors that the appellant invited the High Court to adopt the approach taken by the Canadian Supreme Court, which requires Canadian sentencing courts to take into account the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender.[2]

The appellant had pleaded guilty to two counts of assaulting a correctional officer (contrary to s 60A(1) of the *Crimes Act 1900* (NSW) (Crimes Act)) and one count of causing grievous bodily harm with intent to cause harm of that kind (contrary to s 33(1)(v) of the Crimes Act). He had committed the offences, aged 29, whilst he was in remand at the Broken Hill Correctional Centre. The appellant had asked one of the correctional officers, Mr Gould, to see if his visiting hours could be extended as he was concerned his visitors might arrive after visiting hours were over and would be refused entry. Unsatisfied with Mr Gould's response to his enquiry, the appellant threatened Mr Gould and proceeded to throw pool balls at him, as well as two additional correctional officers. One of the pool balls struck Mr Gould in the left eye. Mr Gould suffered serious eye injury as a result, and ultimately suffered a complete and permanent loss of vision in his left eye as well as significant psychological damage.

The appellant was committed for sentence to the District Court at Dubbo. Acting District Court Judge Lerve sentenced the appellant to a non-parole period of four years and three months and a balance of term of two years, for all of the offences.[3]

The maximum penalty for an offence under s 60A(1) of the Crimes Act is imprisonment for five years; the maximum penalty for an offence under s 33(1)(b) of the Crimes Act is imprisonment for 25 years. His Honour discounted each sentence by 25 per cent to reflect the utilitarian value of the appellant's early guilty pleas. In mitigation, Lerve ADCJ also allowed 'some moderation to the weight to be given to general deterrence' because of medical evidence that the appellant suffered from a mental condition, although there was no link between that condition and the offences. Finally, his Honour found that *Fernando/Kennedy* issues were present,[4] namely, that the appellant's childhood had been one of violence, deprivation, alcohol and drug abuse, and accordingly, that these issues would need to be considered in determining his sentence. Pursuant to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), Lerve ADCJ took into account as aggravating factors Mr Gould's position as a correctional services officer, Mr Gould's consequential post-traumatic stress, the use of a pool ball as a weapon, and the appellant's criminal history.

The Court of Criminal Appeal

The director of public prosecutions appealed to the CCA on the ground that the sentences imposed by Lerve ADCJ were manifestly inadequate. The director subsequently filed three additional grounds of appeal arguing that Lerve ADCJ had failed to properly determine the objective seriousness of the offence, had failed to properly acknowledge that Mr Gould was performing his duties as a correctional services officer when he was assaulted, and that in giving weight to the appellant's subjective case, had impermissibly ameliorated the appropriate sentence. The CCA, constituted by Hoeben JA, Johnson and Schmidt JJ, allowed the appeal with respect to the sentence for the s 33(1)(b) offence, upholding the director's additional grounds of appeal, but making

no finding as to whether the sentence was manifestly inadequate.[5] The CCA held that Lerve ADCJ had erred in his assessment of the seriousness of the offence against Mr Gould, had failed to take into account the appellant's lack of remorse, had given insufficient weight to the appellant's criminal record, and had erred in taking into account the evidence of the appellant's mental illness. Accordingly, the CCA quashed the sentence imposed by Lerve ADCJ and imposed a non-parole period of five years, with a balance of term of two years and six months. Importantly, the CCA did not consider whether or not, in the exercise of its jurisdiction under s 5D of the *Criminal Appeal Act 1912* (NSW), it should invoke its 'residual discretion' to decline to interfere with the sentence, notwithstanding the demonstration of error or manifest inadequacy.

His Honour Justice Hoeben gave the principal judgment (Johnson and Schmidt JJ agreeing). In relation to the director's submission that the appellant's age and criminal record lessened the relevance of the *Fernando* principles, and that accordingly Lerve ADCJ erred in taking into account the social deprivation in the appellant's youth and background, Hoeben JA stated that 'with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish. This is particularly so when the passage of time has included substantial offending.'[6] With respect to the director's submission that Lerve ADCJ had erred by reducing the weight to be given to general deterrence by taking into account the appellant's mental illness, Hoeben JA found that Lerve ADCJ's error was in taking into account evidence of the appellant's mental condition because the diagnosis given in the medical evidence was too general in its terms to be a factor relevant to sentencing.[7]

The High Court

On appeal, the High Court[8] found that the CCA's power to substitute a sentence for that imposed by Lerve ADCJ was not enlivened by its view that it would have given greater weight to deterrence and less weight to the appellant's subjective case.[9] The CCA could only vary the sentence if first satisfied that Lerve ADCJ's discretion miscarried because the sentence imposed was below the range of sentences that could be justly imposed for the offence consistently with sentencing standards. Accordingly, the appeal was allowed, and the director's appeal was remitted to the CCA. As the appeal was to be remitted to the CCA for determination, the High Court refrained from considering the consequences of the CCA's failure to consider the exercise of its residual discretion.

Although the CCA's failure to determine whether the sentence imposed by Lerve ADCJ was manifestly inadequate was determinative of the appeal to the High Court, the High Court also addressed two other issues put before it, namely, the correctness of Hoeben JA's statements as to the relevance of the appellant's background and mental illness to his sentencing. Before the High Court, the appellant challenged Hoeben JA's statement that the extent to which social deprivation in an offender's youth and background can be taken into account diminishes over time, particularly when the offender has a record of substantial offending. The appellant also submitted that sentencing courts should take into account the unique systemic or background factors of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender, as well as the high rate of incarceration of Aboriginal Australians. In making these submissions, the appellant relied on two decisions of the Supreme Court of Canada: *R v Gladue*,[10] and *R v Ipeelee*.[11]

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The High Court observed that the Canadian Supreme Court decisions relied upon by the appellant needed to be understood in the context of the provisions of the Canadian *Criminal Code*, specifically, s 718.2(e), which requires a court that imposes a sentence to take into consideration the principle that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.'[12] The

appellant submitted that s 718.2(e) of the Canadian Criminal Code was similar to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prohibits a court from sentencing an offender to imprisonment unless satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

In declining to adopt the approach taken by the Canadian Supreme Court, the High Court observed that s 5(1) of the Crimes (Sentencing Procedure) Act does not require courts to give particular attention to the circumstances of Aboriginal offenders.[13] Further, the High Court considered that to require courts to take judicial notice of the systemic background of deprivation of Aboriginal offenders would be 'antithetical to individualised justice'.[14] Accordingly, the High Court held that:

> Aboriginal Australians as a group are subject to social and economic disadvantage across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.[15]

In relation to the weight to be given, in sentencing, to evidence of social deprivation, the High Court accepted that a background of profound social deprivation such as the appellant's remains relevant to the sentencing process, regardless of the offender's criminal history. However, the High Court observed that evidence of an offender's deprived background will not have the same mitigatory relevance for all the purposes of punishment.[16]

In his separate reasons for judgment, Gageler J stated that whether there will be a diminution in the extent to which it is appropriate for a sentencing judge to take into account the effects of social deprivation in an offender's youth and background must be determined on a case by case basis. His Honour stated that the weight to be given to the effects of social deprivation in an offender's background is a matter for individual assessment. [17]

Endnotes

1. (2013) 302 ALR 192; (2013) 87 ALJR 1022; [2013] HCA 37.
2. In *R v Gladue* [1999] 1 SCR 688 at [69], the Canadian Supreme Court held that: 'the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts.' And in *R v Ipeelee* [2012] 1 SCR 433 at [60], the Canadian Supreme Court held that: 'courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters…provide the necessary context for understanding and evaluating the case-specific information presented by counsel.'
3. *R v William David Bugmy* (NSWSC, 16 February 2012, unreported).
4. Lerve ADCJ was here referring to the sentencing principles relevant to the sentencing of Aboriginals which were set out by Wood J in *R v Fernando* (1992) 76 A Crim R 52 at 62-63, and the decision of the New South Wales Court of Criminal Appeal in *Kennedy v R* [2010] NSWCCA 260 at [50]–[58].
5. *R v Bugmy* [2012] NSWCCA 223.
6. Id., at [50].
7. Id., at [47].
8. French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, Gageler J delivering a separate judgment.
9. At [24], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, at [55], per Gageler J.
10. [1999] 1 SCR 688.
11. [2012] 1 SCR 433.
12. *Bugmy v R*, at [29].
13. Id., at [36].
14. Id., at [41].
15. Id.
16. Id., at [44].
17. Id., at [56].