Four Recent Decisions on Sentencing Aboriginal People

In October 2013 the High Court handed down an unanimous decision on a sentencing appeal from the New South Wales Court of Criminal Appeal. Bugmy v R was decided on the very narrow ground that the NSWCCA had wrongly allowed a prosecution appeal as to the inadequacy of Mr Bugmy’s sentence, without actually deciding that his sentence was manifestly inadequate. For that reason his appeal was allowed. The High Court also held that the CCA had erred in holding that the degree to which his deprived background as an Aboriginal person could be taken into account in sentencing, diminished with time and repeat offending. In allowing the appeal the High Court said much on the topic of sentencing Aboriginal people and reaffirmed existing precedents. The 1982 High Court decision of Neal v R ¹ and the NSW decision of Fernando² were reaffirmed and consideration was given to various Canadian decisions on sentencing Aboriginal people. They raised the question of the degree to which grossly disproportionate incarceration rates can or cannot be considered in sentencing discretions.

**Bugmy v R (2013)302ALR192**

The facts in Bugmy are distressing. Mr Bugmy was born and raised in Wilcannia NSW in a household where alcohol abuse and violence were commonplace. He had little formal education and was illiterate. He started drinking and taking drugs at 13 years, at 15 years he was reported to have witnessed his father stabbing his mother 15 times. His juvenile offending commenced at 12 years and he was 29 years old at the time of the offences giving rise to the appeal. Much of his adult life had been spent in prison. The offences giving rise to the appeal was the result of an altercation in the Broken Hill Correctional Centre. Mr Bugmy had thrown some pool balls at a prison officer, one of which had hit his left eye causing the officer to lose the sight of that eye – it was a serious offence.³

In Bugmy the High Court expressly approved the dicta of Brennan J (as he then was) in Neal v R ⁴

> “the same sentencing principles are to be applied of course in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offenders membership of an ethnic or other group.”

These dicta are important because they reaffirm the principle of equality before the law, but equality which takes into account cultural difference. His Honour Justice Stephen Rothman⁵ of the NSW Supreme Court has commented that this approach affirms the Aristotelian

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¹ (1982) 149CLR at 326
² (1992)76A CrimR 58
³ Bugmy at para 12 of the Judgement
⁴ (1982) 149CLR at 326
⁵ "The impact of Bugmy&Munda on Sentencing Aboriginal and Other Offenders”, Paper delivered by Hon Justice Stephen Rothman to the Ngara Yura Twilight Seminar 25th Feb 2014, page 7.
concept of formal equality and the principle that like cases should be treated alike, but relevant difference should be treated rationally differently. In that regard His Honour had referred to his own Judgement in the matter of Jimmy v R\(^6\)

These dicta from Neal had been expanded upon by Wood J of the NSW Supreme Court in Fernando \(^7\) where his Honour had set forth a number of principles as a gloss or commentary upon the Neal formula. Wood J had given particular attention to the question whether alcohol abuse at the time of the offence in the context of intergenerational trauma should be taken into account as factors of mitigation in Aboriginal sentencing cases. Wood J had remarked in that the distressing effects of Aboriginal alcohol abuse required more sophisticated interventions that the blunt instrument of the criminal law.

There was also a line of authority in South Australia which supports these propositions. In Houghagen v Charra (1989) 50 SASR 419 and Leech v Peters (1988) 40 A Crim R 350, it was acknowledged that special considerations applied to the sentencing of Aboriginal people in South Australia who come from remote communities where alcohol abuse has been endemic. All of this was reaffirmed in Bugmy; in the plurality judgement of the Court at paragraph 40 and 43

“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”

“Among other things, a background of that kind may compromise the persons capacity to mature and to learn from experience. It is a feature of the person’s makeup and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending”

The appellant in Bugmy had raised two Canadian Supreme Court decisions Gladue (1999)1 SCR 688 and Ippeelee (2012) 1 S C R 433.

These cases had raised the spectre of grossly inflated incarceration rates and the ways that should be dealt with in the light of legislative principles that imprisonment should be the sanction of last resort.

The High Court response to the decision was emphatically to reassert the principle of individualised justice.

“Nor is there a way to take into account the higher rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. With this a consideration, the sentencing of Aboriginal people would cease to involve individualised justice”\(^8\)

\(^6\) [2010]NSWCCA60
\(^7\) (1992) 76 A Crim R at 62
\(^8\) Bugmy at para 36
In addition, the High Court justices raised the question whether State legislatures could enact legislation requiring that particular attention be given to the circumstances of Aboriginal offenders.⁹ It was this issue that was agitated in R v Grose (2014) SASC FC 42 where the Full Court of the Supreme Court considered the question whether s9C of the Criminal Law Sentencing Act infringed the principles of racial equality before the law enshrined in the Racial Discrimination Act.

R v Grose (2014) SASC FC 42

The appeal in Grose had arisen because the sentencing judge had declined to order a s9C sentencing conference, and in the course of argument of that appeal the court had raised the question before the parties whether or not s9C in itself was racially discriminatory for the purposes of s10 of the Racial Discrimination Act. Section 9C of the Sentencing Act was an enacted in 2005 and it gives legislative sanction to “Nunga Courts” and allows family and community members to participate in the sentencing process for Aboriginal people. It allows the courts to be better informed of those factors relevant to sentencing which arise by reason of the defendant’s Aboriginal social and cultural identity. As was indicated in Bugmy, generally these factors relate to acute social and economic disadvantage compared with the rest of the population. Indeed in Grose, Gray J spent some time examining Aboriginal cultural disadvantage in historical terms. He looked at the recommendations of the Royal Commission into Aboriginal Deaths in Custody, and the fact that despite that Royal Commission the rate of Aboriginal incarceration in Australia has doubled since the Royal Commission’s final report in 1991. Reference was also made to the Bringing Them Home report of the Human Rights Commission of 1997 and the Commissioner’s concerns about the effects of intergenerational trauma upon Aboriginal families and societies.

In Grose, apart from the defendant and the DPP, the State Attorney General and the Aboriginal Legal Rights Movement were granted leave to appear as interveners. Various submissions were made by the parties as to whether s9C of the Sentencing Act infringes s10 of the Racial Discrimination Act.

S10 of the Racial Discrimination Act relevantly provides

(1) if, by reason of or of a provision of a law of the state, persons of a particular race, do not enjoy a right that is enjoyed by persons of another race, or enjoy a right to a more limited extent than persons of another race, then, notwithstanding anything in that law, persons of the first mentioned race shall by force of this section enjoy that right to the same extent as persons of that other race.

(2) A reference in subsection 1 to a right includes a reference to a right of a kind referred to in article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

The leading judgement, that of Gray J concluded these issues as follows

⁹ Bugmy at para 36, though the plurality judgment stated that this issue did not arise in the appeal
“s9C of the Sentencing Act confers the right to have a sentencing court adopt a different process in the conduct of the inquiry necessary to determining sentence, including by modifying the persons from whom evidence or material may be received and at whose instigation that may occur. Section 9C falls within the scope of article 5(a) of the CERD convention as it is a procedural provision relating to treatment by a criminal court. S9C confers a “right” which is protected under s10 of the Racial Discrimination Act. It does not matter that s9C conference is held only at the court’s discretion. While s9C is discretionary in one sense, in reality it creates a right that a sentencing conference be held in an appropriate case. Consistent with the beneficial purpose of the Racial Discrimination Act, it is appropriate to regard that as a right for the purposes of s10.”

Having concluded that s9C of the Sentencing Act gives Aboriginal people different procedural rights in respect of the sentencing process than non-Aboriginal persons, and had thus engaged s10 of the Racial Discrimination Act, the Full Court nevertheless held that its validity was saved by the operation of s8 of the Racial Discrimination Act which provides for exceptions to prohibition of racial discrimination. That relates to the question of special measures.

What constitutes a special measure was considered by the High Court in Maloney v R (2013) 298 ALR 308. In Maloney, French CJ had observed

“the sole purpose of a “special measure” in those circumstances, must be to secure the adequate advancement of those racial or ethnic groups or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.”

Applying these criteria, Gray J concluded in Grose, that

“the terms of s9C as well as its legislative history, demonstrate a finding by the legislature of the existence of an ethnic group and their need for special treatment in order to ensure their equal participation in the criminal justice system.”

His Honour continued at paragraph 99

“s9C is not restrictive in its operation, but rather, it is facilitative. In particular, a s9C conference will not be held unless an Aboriginal defendant consents to the process. Further, s9C does not preclude a non-Aboriginal defendant from seeking that the court adopt a similar procedure. In these circumstances it cannot be concluded that s9C is not reasonably necessary to the object of better engaging Aboriginal people in the criminal justice system.”

The Full Court concluded therefore that s9C of the Criminal Law Sentencing Act is not in breach of the Racial Discrimination Act, since it is saved as a special measure. In relation to the facts of the case the Full Court also concluded that the learned Sentencing Judge had been

10 Grose v R [2014]SASCFC para74
11 298 ALR 308 para 18 & 21
12 Grose v R [2014]SASCFC para95
wrong in declining to hold a s9C conference in the case of the defendant Mr Grose, and the Full Court remitted the matter to the District Court with the sentencing to be carried out again by a different judge.

**Rv Pennington [2015]SASCFC98**

*Rv Pennington* was a sentencing appeal taken to the Court of Criminal Appeal from a sentence imposed by a judge of the District Court of South Australia. Mr Pennington had been found guilty by jury verdict of the offence of recklessly causing serious harm upon his domestic partner, the offence having taken place at Yalata community. The sentencing judge imposed a sentence of eight years with a five-year non-parole period. By the majority judgements of Sulan and GrayJJ this was reduced on appeal to a five-year head sentence with a three-year non-parole period. Mr Pennington had a serious criminal history of violence and he had grown up in circumstances of intergenerational alcohol abuse and violence at Coonana and Cundeelee communities in the WA goldfields region. It was significant that people from those communities had later set up the very remote and alcohol free community of Tjuntjuntjara, where his father now lives. The court accepted that the effects of intergenerational alcohol abuse upon the defendant had not been properly considered by the sentencing judge, in accordance with the principles laid down in *Bugmy*. Lack of proper consideration of four factors relevant to sentence were identified as errors made by the sentencing judge, in the context of the *Bugmy* decision.

- The defendant’s history of alcohol abuse as a specific mitigating factor
- whether the defendant would have found imprisonment particularly burdensome
- what was the attitude of the defendant’s home community to his offending
- what were the prospects of rehabilitation on country or within his home community for the defendant.

In addition the Court of Criminal Appeal took particular account of dicta of GrayJ in *Grose*, to the following effect.

In *Grose*, this Court observed that:

While in *Bugmy* the Court’s focus was upon factors of social and economic disadvantage and their relevance to sentence, those aspects are not exhaustive of matters to which a court sentencing an Aboriginal person may need to be alive. Underlying the decisions of *Fernando, Bugmy* and *Munda* is the fundamental principle of individualised justice and the relevance of personal factors to the sentencing exercise. In addition to factors of social and economic disadvantage that may be present, the court may need to consider cultural factors or the unique history and treatment of a particular ethnic group. Such factors may be relevant to the court’s assessment of the gravity of the offending and the defendant’s blameworthiness. This may impact the choice of penalty and purposes of punishment.

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13 [2015]SASCFC98 at para 16
14 [2015]SASCFC98 at para 17 & 20
15 [2015]SASCFC98 at para 35, 36
16 [2015]SASCFC98 at para 25 referring to Grose (2014)119SASR92,103
As a consequence of the courts accepting the particular disadvantage arising from particular circumstances of particular Aboriginal communities, the Court of Criminal Appeal referred favourably to previous decisions of the South Australian Supreme Court, which touched upon Yalata community.

26. Counsel appearing for the defendant on appeal drew attention to South Australian authorities addressing sentencing in relation to the Yalata community. Particular reference was made to Houghagen v Charr, Leech v Koko and Ingomar v Police. It was submitted that these authorities disclose that even before Bugmy and Fernando, the South Australian Supreme Court has been aware of the particular history of disadvantage applying to the cases of western desert people from the Yalata community.

27. It was further submitted that the problems associated with the Yalata community were known and well-established to the South Australian Courts. Further, that the unique history of the Aboriginal people removed from the western desert to Yalata, Cundeelee and Coonana, was a matter to be taken into account as the unique history and treatment of a particular ethnic group. It was said that the factors identified in Grose, and this unique history, were relevant to the Court’s assessment of the gravity of the defendant’s offending and his blameworthiness.

28. Attention was drawn to Fuller Cust, where Eames J observed:

> To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not re-offend and, in turn, to ensure the long-term safety of the public.

Counsel for the defendant acknowledged that there needed to be a balancing of community protection and the protection of Aboriginal victims, against the mitigating effects of a deprived background of acute disadvantage, and of intergenerational alcohol abuse and violence.

It may be inferred that the Court of Criminal Appeal concluded from this discussion that balancing Mr Pennington’s acute disadvantage, against community protection and the protection of Aboriginal victims referred to in Bugmy and Munda did not take place properly and that as a consequence the judge gave too much weight to that to general and personal deterrence.

The court did not however underplay the difficulties that would arise in rehabilitating Mr Pennington upon his release from imprisonment.

We consider that the defendant when released from custody is in need of substantial assistance and supervision. His abuse of alcohol should be addressed. His rehabilitation into the relevant community needs to be handled with care. In all probability, he may need medical assistance as part of his rehabilitation. The need for

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17 [2015]SASCFC98 at paras26to29
18 [2015]SASCFC98 at para30 and 46 to51
the criminal justice system to accommodate the special needs of criminal offenders has been addressed in the Royal Commission into Aboriginal Deaths in Custody. A number of those recommendations are relevant to the assistance that should be made available to the defendant while in custody and upon his release. These recommendations have been accepted in this jurisdiction as well as others. It is to be hoped that those recommendations can be followed in the case of this defendant. Ultimately these are matters for the Department for Correctional Services and the Parole Board, however, if the type of assistance spoken of in the Royal Commission report is not provided then the prospects of the defendant not reoffending will be significantly reduced.¹⁹

**Peters v Police [2014]SASC192**

Finally brief mention should be made of the Magistrates Court appeal in *Peters v Police*²⁰ This was an appeal against sentence for offences involved with Mr Peters sniffing petrol at Yalata community. In the course of the appeal he was found unfit to plead to such offences because of cognitive deficits that have arisen as a result of his sniffing petrol. Gray J concluded his judgement by making strong recommendations to police that he be diverted from the criminal justice system by the use of the *Public Intoxication Act* 1984.

Gray J concluded his judgement as follows;

- Problems associated with excessive intoxication at Yalata were the subject of an article published by the Australian National University Northern Australian Research Unit in 1984¹¹. A response by the Government was the passing in 1984 of amendments to the *Aboriginal Lands Trust Act* 1966 (SA). Section 16a of that Act applied the *Public Intoxication Act* 1984 (SA) to Aboriginal Lands Trust lands, upon proclamation of particular Lands Trust lands. The Yalata Reserve was duly proclaimed for this purpose. However, the lack of any appropriate holdings cells at Yalata meant that it was not initially feasible to implement the legislation.

- The *Public Intoxication Act* allows for police to detain a person that is in a public place and, because of their intoxication, is unable to take proper care for himself. Section 7(3) of the Act provides that a person that has been detained in this manner must be taken as soon as reasonably practicable to their residence, a police station or a sobering up centre for admission as a patient.

- In 2002, the then State Coroner conducted inquests into the deaths of petrol sniffers on the Anangu Pitjantjatjara Yankunytjatjara Lands. He recommended that petrol be declared a drug to which the *Public Intoxication Act* applies and that the Act be amended to apply on the Anangu Pitjantjatjara Yankunytjatjara Lands. In 2004, in accordance with the recommendations of the inquest, petrol was gazetted as being a drug to which the Act applied.

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¹⁹ [2015]SASCFC98 at para52
²⁰ [2014]SASC192
Counsel appearing for the defendant on the appeal indicated from the bar table that petrol sniffing was relatively less prevalent in Yalata as compared to, for example, the Anangu Pitjantjatjara Yankunytjatjara Lands. Instead, problems associated with alcohol consumption had been a greater issue in Yalata. The Court was further informed that the defendant’s offending was drawn to the attention of authorities by members of the local community, who were concerned about the defendant’s tendency to negatively influence younger members of the community. In these circumstances, it can be readily understood that police are placed in an invidious position when they are called to deal with the defendant’s offending.

Counsel for the police informed the Court that she had had conversations with four police officers from Ceduna Police Station and the Eyre and Western Local Service Area who have had frequent dealings with the defendant and other members of the Aboriginal community in these areas. The Court was informed that the sobering up unit at Ceduna has been substantially upgraded as a result of the 2011 “Sleeping Rough” Inquest. The unit was declared as a place approved by the Minister for the purpose of section 7(3)(b) of the Public Intoxication Act by Gazette on 1 November 2012. However, counsel for the police submitted that, if the defendant were detected with petrol in Yalata, it would be impractical to convey him to Ceduna, given the distance between Yalata and Ceduna.

The Court was informed that the Yalata Police Station is a new complex and that all cells meet the requirements needed for detention under the Public Intoxication Act. The Court was also informed that the defendant has been approved as a high priority for entry into the new detox rehabilitation centre at Port Augusta.

Ultimately, the approach to be taken in dealing with persons involved in petrol sniffing at Yalata will be a matter within the discretion of the relevant police officer. However, it may be suggested that one option to consider is detention in accordance with the Public Intoxication Act. That approach would have the advantage of enabling the person under the influence of drugs or alcohol to be detained without requiring them to be charged with an offence.

Aboriginal over representation in the criminal justice system, and the means to address that over representation by fully taking into account Aboriginal cultural and identity in the context of disadvantage has been vigorously pursued by the South Australian Supreme Court. It has done so within the constraints of individualised justice and proper consideration of the Racial Discrimination Act.

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