CASENOTE:
BUGMY V R (2013) 302 ALR 192

by Lucy Jackson

INTRODUCTION

In *Bugmy v R* (*'Bugmy'*),[1] the High Court was presented with the opportunity to decide the relevance of an offender's background of profound social deprivation to the application of sentencing principles.

There were two judgments in the High Court. The majority (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) allowed the appeal, holding that an offender's background of deprivation is a relevant factor when determining an appropriate sentence for that offender. In doing so, the Court applied a race-neutral approach, stating that the deprived background of an Aboriginal offender may mitigate the sentence appropriate for an offence, just as the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. Specifically, the majority held that section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not direct a sentencing judge to give attention to the circumstances of an Aboriginal offender in a way that is different from the attention she or he would give to the circumstances of an offender who is not Aboriginal, as this would impair individualised justice in sentencing.

Importantly, the majority also held that the effects of a background of significant deprivation do not diminish over time, and are to be given full weight as factors for consideration in sentencing. In a separate judgment, Gageler J dissented on this point, holding that the weight to be given to the effect of a history of social deprivation is a factor to be determined in each individual case, and not a categorical principle.

BACKGROUND

Mr Bugmy is an Aboriginal man from the far-west New South Wales town of Wilcannia. He has little education and is unable to read or write. He grew up in a family with a history of violence and alcohol abuse, and started abusing drugs and alcohol himself at the age of 13. He witnessed his father stabbing his mother multiple times. Both he and his partner are alcoholics.

After first offending at 12 years old, Mr Bugmy was regularly detained in juvenile detention until he was transferred to an adult prison at age 18. He has spent most of his adult life behind bars, which has included repeated suicide attempts. He also has a history of head injury and auditory hallucinations. His history of violent offences included the charges of assault police and causing malicious damage by fire, for which he was on remand at Broken Hill Correctional Centre ('the Centre') from November 2010.[2]

On 8 January 2011, Mr Bugmy became upset when it became apparent that his visitors would not arrive at the Centre before the end of visiting hours. Consequently, Senior Correctional Officer Gould agreed to see whether visiting hours could be extended in this instance. Apparently unsatisfied with this outcome, Mr Bugmy followed Mr Gould into the wing office, saying 'I'll split you open, you ****'. Mr Bugmy then left the wing office and telephoned his partner, repeating to her that he would 'split Gould open'. When Assistant Superintendent Pitt and another officer, Mr Donnelly, arrived to speak to Mr Bugmy in the exercise yard, he also threatened them, before he ran to the pool table, picked up pool balls and began throwing them at Mr Pitt and Mr Donnelly.

Upon Mr Gould entering the yard, Mr Bugmy repeated his earlier threat, striking Mr Gould with the pool balls. As Mr Gould attempted to secure himself inside the wing office, Mr Bugmy threw another ball, which struck Mr Gould in the left eye, causing him to immediately lose the sight in that eye. Mr Bugmy climbed onto the gymnasium roof and continued throwing pool balls at the officers. When he eventually came down from the roof, he expressed satisfaction at Mr Gould's injury and stated that he 'had not finished with Gould'.

Following these incidents, in May 2011 Mr Bugmy pleaded guilty to two offences of assaulting a correctional officer in the execution of his duty,[3] and one offence of causing grievous bodily harm to a person with intent to cause harm of that kind.[4]

On 16 February 2012, Lerve ADCJ in the District Court of New South Wales sentenced Mr Bugmy to a non-parole period of four years and three months, with a balance of term of two years for the three offences.[5]

JUDGE LERVE'S COMMENTS ON SENTENCING

In deciding Mr Bugmy's sentence, Lerve ADCJ noted that the utilitarian value of the early guilty pleas should be reflected by a 25 per cent reduction in sentence. In relation to the causing grievous bodily harm offence, his Honour considered as aggravating factors that Mr Gould (a) was a corrections officer and (b) consequently suffered significant psychological harm. The use of the pool ball as a weapon and Mr Bugmy's history of violent offences were further aggravating factors. He noted that the offence was slightly less serious than the mid-range of an offence of this type, and also that Mr Bugmy was 'an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment',[6] so '[c]learly enough the *Fernando*[7]/*Kennedy*[8] type issues are present'[9] and should be taken into account.

FERNANDO CONSIDERATIONS

The '*Fernando* type-issues' referred to by the sentencing judge concern sentencing principles set out in the 1992 *Fernando* decision. Mr Fernando was from an Aboriginal community where alcohol abuse and violence were commonplace.[10] In his remarks on sentencing Mr Fernando, Wood J formulated a series of propositions adapted from the High Court's decision in *Neal v R*,[11] several appellate sentencing decisions,[12] Justice Toohey's paper 'The Sentencing of Aboriginal Offenders',[13] and the Report of the Royal Commission into Aboriginal Deaths in Custody.[14] The effect of the '*Fernando* considerations' is that in sentencing, judges must recognise an offender's background of social disadvantage—whatever his or her ethnicity may be.[15]

APPEAL TO THE NEW SOUTH WALES COURT OF CRIMINAL APPEAL ('NSWCCA')[16]

The Director of Public Prosecutions ('the Director') appealed Judge Lerve's decision to the NSWCCA initially on the basis that the sentence was manifestly inadequate. Later additional grounds of appeal were filed by the director: that his Honour had inadequately assessed the seriousness of the offence, and that too much weight had been given to Mr Bugmy's subjective circumstances.

The NSWCCA (Hoeben JA, Johnson and Schmidt JJ) upheld the additional grounds of appeal, and stated that as such it was unnecessary to decide whether the sentence was manifestly inadequate.[17] The court re-sentenced Mr Bugmy for the grievous bodily harm offence to a non-parole period of five years, and a balance of two and a half years. Their Honours did not consider whether to use the residual discretion conferred by section 5D of the *Criminal Appeal Act 1912* (NSW) to dismiss the director's appeal notwithstanding the finding of error.

In his reasons, Hoeben JA (Johnson and Schmidt JJ agreeing) stated that he assessed the objective seriousness of the offence as higher than what the primary judge had found,[18] and that inadequate attention had been given to Mr Bugmy's prior convictions.[19] The Director submitted that the effects of a background of social deprivation diminish with the passage of time, particularly when viewed in light of repeat offending,[20] which Hoeben JA accepted. His Honour also agreed with the Director's submission that Lerve ADCJ had fallen into error in reducing the weight to be given to general deterrence due to Mr Bugmy's history of mental illness.[21]

THE DECISION

There were three issues to be determined by the High Court: (1) the correctness of the NSWCCA in resentencing despite not finding that the original sentence was manifestly inadequate; (2) the relevance of an offender's deprived background to sentencing factors; and (3) the relevance of an offender's history of mental illness to sentencing factors.

FAILURE TO CONSIDER MANIFEST INADEQUACY

The High Court held that the power of the NSWCCA to substitute a sentence in place of that imposed by the primary judge could not be engaged merely because it would have given greater weight to the case for deterrence, and lesser weight to Mr Bugmy's subjective case.[22] As sentencing is a discretionary judgment, the power to re-sentence an offender is only enlivened if the court is satisfied that the primary judge's discretion miscarried such that the sentence imposed was manifestly inadequate.

THE RELEVANCE OF SOCIAL DEPRIVATION

The NSWCCA had held that whilst a background of social deprivation is a relevant consideration to be taken into account in sentencing, the weight to be given to this consideration must diminish over time—particularly when that passage of time has included substantial offending.[23]

The majority of the High Court agreed that an offender's background of social deprivation is a relevant consideration when determining an appropriate sentence for a particular offence, but instead held that the effects of that background do not diminish over time or with the commission of other offences. As such, the High Court held that an offender's subjective case should be given its full weight as a factor in sentencing. Furthermore, their Honours held that the analysis a sentencing judge must apply to an offender's subjective case will be the same whatever the race of the offender, in order to achieve individualised justice.

In coming to these conclusions, the majority considered the persuasive authority of two decisions of the Supreme Court of Canada: *R v Gladue,*[24] and *R v Ipeelee.*[25] In *Gladue,* the Supreme Court held that sentencing judges must take into account the systemic factors unique to Aboriginal offenders,[26] but that sentencing must always be assessed on an individual basis[27] so that, for example, the sentence for a violent offence committed by an Aboriginal person would likely be close to the sentence imposed on a non-Aboriginal person for the same offence.[28] *Ipeelee* addressed the misconception that the *Gladue* principles did not apply at all to violent offences,[29] explaining that systemic factors must be considered in every case involving an Aboriginal offender, as this provides the context for the imposition of an appropriate sentence.[30] The Canadian cases sit against the background of section 718.2(e) of the Canadian Criminal Code, which warrants a sentencing judge to pay 'particular attention to the circumstances of Aboriginal offenders.'[31] However, the words of section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which Mr Bugmy's counsel submitted as the equivalent provision, do not contain the same direction to analyse the subjective circumstances of an Aboriginal offender. The High Court held that to consider the circumstances of Indigenous offenders differently to those of non-Indigenous offenders would cease to involve individualised justice.[32]

The High Court rejected the submission that courts should take judicial notice of the background of systemic deprivation of Aboriginal offenders as a category,[33] as to do so would negate the principle of individualised justice. In a case in which such social deprivation is relied upon as a reason for sentence mitigation, it will be necessary to establish that background on the evidence.[34]

In the NSWCCA, the Director had submitted that the effects of Mr Bugmy's subjective case could not be given their full weight when viewed against his ongoing history of violent offences. However, in the High Court, the Director acknowledged that the effects of significant deprivation do not diminish with the passage of time and repeat offending, and should subsequently be taken into account to determine the appropriate sentence in every case.[35] The majority of the High Court accepted this submission, explaining that 'a background of that kind may compromise the person's capacity to mature and learn from experience.'[36]

However, an offender's background may not always give rise to sentence mitigation.[37] The example that the majority gave is that if an offender has grown up in a violent environment, which explains their recourse to violence when frustrated, giving 'full weight' to the effects of that upbringing may reduce that offender's moral culpability, but also may increase the need to protect the community from that offender.[38]

Justice Gageler, in dissent, held that the principle that the effects of social deprivation do not diminish over time could not be universally applied.[39] Rather, his Honour held that the weight to be given is a consideration that must be determined on an individualised, case-by-case basis.[40]

THE RELEVANCE OF MENTAL ILLNESS

The majority held that the NSWCCA had not erred in accepting the Director's submission that the force of the medical evidence of Mr Bugmy's mental illness was insufficient to reduce the weight given to the need for deterrence as a sentencing principle.[41]

CONCLUSION

Properly understood, *Bugmy* does not address the role of Aboriginality *per se* in sentencing decisions. However, the effect of the decision is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in the determination of an appropriate sentence on an individual basis. What is particularly important about this decision is the recognition that the effects of a background of profound social deprivation do not diminish over time or with repeat offending. If sentencing courts are to give full weight to the effects of social deprivation, this may affect the numbers of Aboriginal people entering the prison population and the over-representation of Aboriginal people in the prison system.

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1 (2013) 302 ALR 192.
2 *R v Bugmy* [2012] NSWCCA 223 at [5].
3 Section 60A(1) *Crimes Act 1900* (NSW).
4 Section 33(1)(b) *Crimes Act 1900* (NSW).
5 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [2].
6 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [17].
7 *R v Fernando* (1992) 76 A Crim R 58 (*'Fernando'*).
8 *Kennedy v R* [2010] NSWCCA 260 (*'Kennedy'*).
9 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [17].
10 *Fernando* 62-3.
11 (1982) 149 CLR 305; 42 ALR 609; [1982] HCA 55 (*'Neal'*).
12 *Fernando* 62. These were: *R v Davey* (1980) 2 A Crim R 254; *R v Friday* (1984) 14 A Crim R 471; *Yougie v R* (1987) 33 A Crim R 301; *Rogers v R* (1989) 44 A Crim R 301; and *Juli v R* (1990) 50 A Crim R 31.
13 *Fernando* 62.
14 *Fernando* 62.
15 *Kennedy* at [53].
16 *R v Bugmy* [2012] NSWCCA 223.
17 Ibid at [53].
18 *R v Bugmy* [2012] NSWCCA 223 at [30]-[39].
19 *R v Bugmy* [2012] NSWCCA 223 at [41]-[42].
20 *R v Bugmy* [2012] NSWCCA 223 at [50].
21 *R v Bugmy* [2012] NSWCCA 223 at [43]-[44].

22 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [24]; Gageler J at [55].
23 *R v Bugmy* [2012] NSWCCA 223 at [50]-[52].
24 [1999] 1 SCR 688 (*'Gladue'*).
25 [2012] 1 SCR 433 (*'Ipeelee'*).
26 *Gladue* [66].
27 *Gladue* [80].
28 *Gladue* [79].
29 *Ipeelee* [84].
30 *Ipeelee* [83].
31 RSC 1985, c C-46.
32 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [36].
33 Ibid at [41].
34 Ibid.
35 Ibid.
36 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [43].
37 Ibid at [44].
38 Ibid.
39 *Bugmy* per Gageler J at [56].
40 Ibid.
41 *Bugmy* per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [47].

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