

# THE DISAVOWAL OF CONTEXT:

## SENTENCING LEX WOTTON

by Thalia Anthony

### INTRODUCTION

Almost thirty years ago in the case of *R v Neal* (1982),<sup>1</sup> members of the High Court recognised that an Indigenous defendant's assault (swearing and spitting) on a reserve officer in Yarrabah, Queensland, needed to be understood in its paternalistic and racist context. Two of the four High Court judges acknowledged that racist tensions on reserves that provoke 'violent' crimes against non-Indigenous officers can be factors that reduce the offender's criminal sentence; because they reduce the culpability of the Indigenous offender.

A spate of ensuing cases cemented Indigenous mitigating factors. Most notable was *R v Fernando*,<sup>2</sup> which recognised colonial dispossession and neo-colonial socio-economic disadvantage as factors relevant to the offender's conduct. Justice Wood cautioned against imprisonment as a sentence for Indigenous offenders due to the deleterious effects of incarceration on Indigenous communities.

This article considers the shift away from judicial appreciation of context in sentencing Lex Patrick Wotton, a 37 year old Palm Islander man. Wotton was sentenced by the Townsville District Court on 11 November 2008 for his involvement in a protest against the police responsible for the death in police custody of Mulrunji Doomadgee<sup>3</sup> and the subsequent mishandling of its investigation. Wotton was convicted under s65 *Criminal Code* for partaking in a riot in which a building was destroyed. The maximum penalty for this offence is life imprisonment.<sup>4</sup>

The sentencing remarks made by Shanahan J focus heavily on issues of deterrence, protection of property and especially redemption for the police victims. His Honour relied on the reasoning of the Queensland Court of Appeal, which had heard a sentence appeal made by other protesters who had been convicted of lesser charges. In devising appropriate sentences, both courts disregarded Mulrunji's death in custody, and the mishandled police investigation that followed.

### MULRUNJI'S DEATH IN CUSTODY AND COMMUNITY BEREAVEMENT

On 19 November 2004, 36 year old Mulrunji was arrested for offensive language. With no significant criminal record, he was known for his happy-go-lucky character. Forty minutes after his arrest, Mulrunji was dead in the Palm Island police station. While in custody, he had suffered a black eye, four broken ribs, a ruptured liver – cloven in two – and a ruptured portal vein.

Gravely affected, the Palm Island community held public meetings expressing 'extreme concern' not only about Mulrunji's death, but also about the 'lack of any police action to bring anybody to heel concerning that death.'<sup>5</sup> After a history of adverse police-Indigenous relations, particularly in relation to Indigenous deaths in custody,<sup>6</sup> tensions were already simmering. This friction only escalated as the facts surrounding Mulrunji's death came to light.

The investigation into the death in custody was mishandled profoundly. Addressing a community meeting, Mayor Erica Kyle indicated that the pathology report from Mulrunji's autopsy, which had been sent to the Coroner, suggested that his death had been an accident, that is, that Mulrunji had slipped on a step.<sup>7</sup> Andrew Boe, counsel for Palm Island in the coronial inquiry into Mulrunji's death, criticised this as inappropriate given that the community had known the victim and was aware of a long history of police injustice on the island. He describes it as tantamount to saying

please don't speculate, it's all OK, it was just an accident.  
... Go back to your lives, wear this one, because it was just an accident.<sup>8</sup>

For the community, this was one more 'example of how another grave injustice in their community was not going to be examined'.<sup>9</sup>

It was not disclosed sufficiently to the community that the Crime and Misconduct Commission was conducting an investigation into Mulrunji's death in custody. Once they learned of the nature of the investigation, specifically the relationship between the investigators and the police officer under investigation, community members became alarmed.<sup>10</sup> The investigation was conducted by close friends of the responsible police officer, Senior Sergeant Hurley; during the period of investigation, Hurley wine and dined the investigating officers at his home and engaged in off-record discussions about the matter. Further, the investigating officers had already been attached to the Palm Island police station for two years.<sup>11</sup> The partiality in the investigation was an affront to several key recommendations of the Royal Commission into Aboriginal Deaths in Custody, specifically that assistants to a coronial inquiry ought to be independent (Recommendation 27), as should investigations into deaths in custody (Recommendation 33).

The response to these background circumstances culminated in a public protest outside the police station. On 26 November 2004, approximately 300 people (one-eighth of the Palm Island population)<sup>12</sup> assembled at the station demanding that the police leave. The group threw stones and mangoes at the police building and yelled abuse at the police. Some officers sustained minor injuries but no officer was seriously injured. The officers were armed and prepared to fire on the protesters to preserve their own lives;<sup>13</sup> a number pointed rifles at protesters. Ultimately, the officers retreated to the hospital and police barracks. Over the next three hours, the police station and court house were burnt down.<sup>14</sup>

For Wotton, this protest set the stage for four years of criminal proceedings, eventually resulting in a criminal sentence of six years' imprisonment. He would be condemned for his role in the protest while the officers behind the barracks would be valorised for their bravery.

### **SENTENCING: ENFORCING WOTTON'S CULPABILITY AND INDEMNIFYING THE PALM ISLAND POLICE**

Wotton was sentenced in the aftermath of extensive media coverage and adverse police union publicity, after judicial remarks on his culpability throughout his proceedings<sup>15</sup> and after the acquittal of Senior Sergeant Hurley for manslaughter. Justice Shanahan sentenced Wotton to six years' imprisonment, with a two-year non-parole period.<sup>16</sup> The sentencing remarks sidelined the

death in custody from the offence, focusing instead on deterrence of similar activity. The comments emphasised the seriousness of the offence, especially as police had been victimised, and sought to vindicate the police officers.

### **DISAVOWAL OF CONTEXT**

Justice Shanahan depicted the Palm Island community as divided between the 'law-abiding good' against the 'rioting bad'; stating 'I have had the advantage of meeting a number of the citizens of Palm Island, particularly the elders and the members of the Community Justice Group'. His Honour considered that many 'are working towards improving that community' and should be given 'recognition and support'.<sup>17</sup> His Honour contrasted this with the response by the 'rioters' to problems facing their community:<sup>18</sup>

I have faith the substantial balance of the Palm Island community, which did not participate in this riot, would not agree this was a legitimate way of expressing community concern.<sup>19</sup>

Certainly Shanahan J recognised community anger arising from the flawed investigation into Mulrunji's death. His Honour pointed out that appointing to the investigation a sergeant 'attached to the Palm Island Police Station' and 'a friend of the arresting officer' could 'hardly have given the perception of objectivity and independence'.<sup>20</sup> The judge also admonished the communication of Mulrunji's post-mortem results to the community as an 'accident'.<sup>21</sup> However, Shanahan J unequivocally ruled out this context as relevant to Wotton's sentence; that is, 'rioting' is so 'intrinsicly dangerous'<sup>22</sup> that no circumstances would warrant consideration. His Honour cited the Court of Criminal Appeal's position that:

the background to this matter is not particularly relevant for the purpose of the sentence. The reason for that, in my view, is the serious nature of the offence itself, rioting with destruction.<sup>23</sup>

The only relevant context for Shanahan J, again citing the Court of Criminal Appeal, was 'recent and not so recent *world history*' that 'illustrates the immense damage wrought by riots'.<sup>24</sup> His Honour further remarked that 'mob conduct' is not 'tolerated in a civilised community'.<sup>25</sup> Protest, therefore, is inherently at odds with a civilised community, which requires a reasoned response. With these uncivilised miscreants in mind, Shanahan J emphatically defended deterrence as central to the sentence; concerned to 'ensure that [the riot] does not occur again',<sup>26</sup> his Honour cited *McCormack*:

Their participation in the riot seems to have sprung ... from a view ... that the police had earlier acted harshly or beyond their powers. Even if the police had so acted the mob conduct at the police station was a reaction which could not be tolerated in a *civilised community*.<sup>27</sup>

### SERIOUSNESS OF OFFENCE

Wotton's sentence was based primarily on the seriousness of the offence. Shanahan J considered the number of offenders, the damage to public property and the nature of the police victims. His Honour referred to the fact that 300 people participated in the 'riot' but found that this figure 'may well be an exaggeration' because 'the video does not disclose that many active participants. There seemed to have been a number who were simply spectators'.<sup>28</sup> Second, his Honour assessed the economic loss caused by the 'riot', noting that 'millions of dollars damage was occasioned to the infrastructure of Palm Island and the damage to the community can easily be seen'.<sup>29</sup> Third, his Honour stressed that it was police who were the 'target of this riot';<sup>30</sup> that is, police were the object of the protests because they 'were simply performing their duties as police officers'.<sup>31</sup>

### VINDICATING THE POLICE

For both Shanahan J, and the Court of Criminal Appeal, it was the 'identity of the targets' – Palm Island police – that makes this offence 'distinctly grave'.<sup>32</sup> Justice Shanahan repeatedly noted the 'relatively minor' injuries sustained by police, referring to a bruised hip as the most serious example of harm suffered.<sup>33</sup> His Honour considered it 'surprising' that no officer was seriously wounded, but noted this as a 'simple fact'.<sup>34</sup> Instead, Shanahan J stressed the *emotional* toll on police, who were 'subject to vile abuse, threats of death and taunts for being police officers [and] many perceived that they were about to die'.<sup>35</sup> His Honour continued,

It appears that many have suffered emotionally, many have suffered financially and many feel that their careers in the police service have been irrevocably damaged. There has also been much suffering caused to their families, their partners and their children and other families. It should be noted in that regard that one of those officers was in fact Indigenous and he particularly feels put upon by what occurred.<sup>36</sup>

As evidence of their 'horror and terror',<sup>37</sup> Shanahan J noted that some officers 'had decided to shoot at the crowd if it came to that'. Two in particular identified Wotton 'as the person that they would shoot first'.<sup>38</sup> The judge considered this police response not only justified, but as evidence of Wotton's wrong-doing. This reaction was cast as a reasoned response to an uncivilised act.

By denying context, the Court could not properly recognise that the community anger was a reaction not only to the death of an Indigenous man in police custody, but was also the product of much deeper, long-running, tension in Indigenous-police relations. Indeed, by abstracting the protests from their historical circumstances, Shanahan J commented that:

To add the obvious, that one police officer is perceived – whether or not with justification – to have done a terribly bad thing, does not justify the wholesale, violent, condemnation of the contingent of which he forms part.<sup>39</sup>

### REINSTATING CULPABILITY: WOTTON AS LEADER

Justice Shanahan regarded Wotton as a 'major player' and 'leader' in the riot. There was evidence that Wotton had given a speech at the public meeting, indicating that 'things were going to burn'.<sup>40</sup> However, the judge offset this leadership role with Wotton's conflicting role in assisting the police to escape injury, noting

In my view the only thing in your favour in your involvement in this was that at stages you made some efforts to lessen the chances of the police officers being injured.<sup>41</sup>

Justice Shanahan concluded by referring to Wotton's good character and contribution to the Palm Island community. Wotton had been actively involved in the Palm Island Men's Group, in an alcohol and drug rehabilitation program, and also in a program aimed at assisting young people and addressing suicide problems in the community.<sup>42</sup> His Honour referred to some alcohol-related offences in his youth, but noted that Wotton 'overcame those problems and has endeavoured to assist others' in doing the same. In this way, Shanahan J appeared to characterise Wotton as one of the 'good' members of the community – those people idealised at the outset of the remarks – but only for the purposes of a mild reduction to the head sentence. The mitigating factor that Wotton had tried to 'minimise the chances of serious injury done to the police' was key in this regard. This conduct, combined with the adverse impact of bail conditions and imprisonment, and glowing references from community members and prominent people across Australia, led to a reduction in Wotton's sentence from seven to six years.<sup>43</sup> The earliest date for Wotton's release is 18 July 2010.

### CONCLUSION

Justice Shanahan's sentencing remarks sought to vindicate the police response to community anger, and to deter similar responses to police injustice. In so doing, the judge downgraded the significance of Mulrunji's death in custody, police responsibility for that death, and the

patently biased police investigation that ensued. Clearly, this provides no deterrence for similar conduct for Palm Island police. As Andrew Boe argues, it is 'terribly naïve' to conceive Wotton's offence within a framework of deterrence:

as a justice system, we didn't have the maturity to examine the context within which this death in custody occurred, and the context within which there were reactions to it. And I think it's unfortunately the reality for black and white relations in this country is such that we won't examine these things in the fashion that is necessary to create true reconciliation.<sup>44</sup>

By disavowing context in this way, Shanahan J reconstructed the Palm Island protests as a spontaneous and random uprising. The judge effectively absolved those officers involved in Mulrunji's death from any sense of remorse or culpability; his Honour did little to encourage a more sensitive police culture towards Palm Island residents. Instead, his Honour cast the police officers as innocent victims, and reinforced the notion that their actions are not properly open to public scrutiny or accountability.

*Dr Thalia Anthony is a Lecturer in the Faculty of Law, University of Sydney. Her research is focused on criminal procedure, public interest litigation and legal claims of Indigenous peoples. Thalia has published and edited a number of books and articles, including the Critical Criminology Companion (with Chris Cunneen, 2008 Hawkins Press), Connecting with Law (with Michelle Sanson and David Worswick 2009 OUP) and Indigenous Legal Issues (with Garth Nettheim et al 2009 Thomson, forthcoming). Her research relating to Indigenous stolen wages claims is the subject of a potential test case and Government inquiry.*

- 1 149 CLR 305.
- 2 (1992) 76 A Crim R 58.
- 3 Out of respect to the family, the deceased will hereafter be referred to by his assigned honorific title, *Mulrunji*.
- 4 Andrew Boe further noted that 'there's no prospect of that sort of penalty [of life imprisonment] being meted on anybody convicted of this sort of offence, even though that is the maximum', cited on Damien Carrick, 'The Sentencing of Lex Wotton', *The Law Report* (2008), < <http://www.abc.net.au/rn/lawreport/stories/2008/2416076.htm> > 26 February 2009.
- 5 Stewart Levitt, Wotton's lawyer, on *Law Report* Ibid.
- 6 Mulrunji was approximately the 240<sup>th</sup> Indigenous death in custody in the previous fifteen years (Australian Bureau of Statistics, cited by Levitt on *Law Report* 2008). The Palm Islanders encounter with the criminal justice system is markedly disproportionate. Judge Nase in *R v Wotton* [2007] QDC 181at [3] cited statistics that Torres Strait Islander peoples make up 3.5% of the population, but constitute nearly 25% of the adult state prison population and 55% of children in detention.
- 7 It was only after an independent review of the coronial

evidence and a prosecution outside the office of the Director of Public Prosecutions that the responsible officer, Senior Sergeant Hurley, was prosecuted.

- 8 Boe above n 4.
- 9 Ibid.
- 10 Citing Coronial Inquiry; *R v Wotton* [2007] QDC 181,[4].
- 11 *The Queen v Lex Patrick Wotton*, 07/11/2008, 2-3.
- 12 *R v Poynter, Norman & Parker; ex parte A-G (Qld)* [2006] QCA 51,[32] ('*Poynter & Ors*').
- 13 *R v Wotton* [2007] QDC 181, [6]-[7] (Nase DCJ).
- 14 Levitt, above n 5.
- 15 See also *Wotton v DPP* [2006] QDC 202 (14/07/2006); *Wotton v DPP* [2007] QDC 181 (16/03/2007).
- 16 110 days, which had already been served, were deducted from the two year period: *The Queen v Lex Patrick Wotton*, above n 11.
- 17 Ibid.
- 18 Ibid, 3.
- 19 Ibid, 6, citing *Poynter & Ors*, [39] (de Jersey CJ).
- 20 Ibid.
- 21 Ibid.
- 22 Ibid, 5.
- 23 Ibid, 4 citing *Poynter & Ors*, [31].
- 24 Ibid, 6, citing *Poynter & Ors*, [37] (de Jersey CJ) (emphasis added).
- 25 Ibid, 6, citing *Poynter & Ors*, [37] (de Jersey CJ).
- 26 Ibid, 5.
- 27 Ibid, 6 (emphasis added).
- 28 Ibid, 10.
- 29 Ibid.
- 30 Ibid, 4.
- 31 Ibid, 4.
- 32 Ibid, 5 citing *Poynter & Ors*.
- 33 Ibid, 9.
- 34 Ibid, 10.
- 35 Ibid, 11.
- 36 Ibid.
- 37 Ibid.
- 38 Ibid.
- 39 Ibid, citing *Poynter & Ors*, [35] (de Jersey CJ).
- 40 *The Queen v Lex Patrick Wotton*, above n 18, 6.
- 41 Ibid, 8.
- 42 Ibid, 14.
- 43 Ibid.
- 44 *Law Report*, above n4.