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Indigenising Sentencing? Bugmy v the Queen

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Before the High Court

Indigenising Sentencing?
Bugmy v The Queen

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Abstract

The grant of special leave in *Bugmy v The Queen*[1] has provided an occasion for the High Court to rule on the significance of Indigenous background in sentencing in relation to other sentencing considerations. In particular, the Court must reconcile the sentencing considerations of deterrence, community protection, offence seriousness and criminal history with the principles of individualised justice and the recognition of factors specific to the Indigenous defendant. These sentencing objectives may appear to be in conflict, but they can be reconciled if the Court accepts that the aim of community protection and deterrence is furthered through accounting for Indigenous context and providing sentences that address Indigenous disadvantage. The emphasis placed by the New South Wales Court of Criminal Appeal and other state and territory higher courts on the seriousness of the offence has diminished the significance of the disadvantaged circumstances of Indigenous offenders in sentencing, and has contributed to increased levels of Indigenous imprisonment. *Bugmy v The Queen* will be important in providing clearer direction on the common law's interpretation of sentencing principles for Indigenous offenders. These have undergone substantial revision over the past 20 years. This case provides an opportunity for the High Court to consider the role of criminal sentencing in the dramatic over-representation of Indigenous Australians in prisons, and how sentencing can be structured to promote deterrence outside of prisons.

I Introduction

In 1992, *R v Fernando*[2] set down the considerations for sentencing Indigenous offenders from disadvantaged communities and how their background may be relevant in mitigation. While the New South Wales Supreme Court in *Fernando*[3] averred to the need for sentencing to reflect the seriousness of violent crimes, it matched this with considerations of subjective circumstances of the offender. The *Fernando* principles, as discussed below, have been influential in sentencing Indigenous offenders across Australia. However, it is not until now that the High Court of Australia has ruled on their significance in sentencing Indigenous

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1 Transcript of Proceedings, *Bugmy v The Queen* [2013] HCATrans 111 (10 May 2013).
2 (1992) 76 A Crim R 58 ('*Fernando*').
3 Ibid 62–3.

offenders vis-à-vis other sentencing principles, particularly the seriousness of the offence and the need for deterrence.

In the case of *Bugmy v The Queen*,[4] which was granted special leave to appeal to the High Court in May 2013, there are four grounds of appeal. First, whether the New South Wales Court of Criminal Appeal erred by failing to consider manifest inadequacy and/or to consider whether the residual discretion should be invoked (that is, even if the Court of Criminal Appeal found that the sentence was manifestly inadequate, whether, in exercise of the residual discretion, the Crown appeal should have been dismissed). Second, whether the Court of Criminal Appeal erred in stating that with the passage of time, the extent to which social deprivation in an offender's youth and background (including those factors set out in *Fernando*)[5] must diminish. A related issue is whether the High Court should adopt the approach of the Canadian Supreme Court in *R v Gladue*[6] and *R v Ipeelee*,[7] requiring sentencing courts to take into account the unique systemic and background factors which have played a role in bringing Indigenous offenders before the court. Third, whether a sentencing judge can take into account mental illness even when such illness did not directly contribute to the commission of the offence. If so, how is mental illness relevant to the determination of the sentence. This relates to the issue of the role of subjective circumstances, including Indigenous background, in sentencing. Fourth, defence counsel will submit that general deterrence is a discrete consideration relevant to the purpose of sentencing rather than to an assessment of the objective seriousness pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A. Accordingly, matters of culpability and the subjective circumstances of the offender should be relevant to considerations of deterrence.

This note will first examine the common law principles and statutory provisions that provide sentencing courts with discretion to take into account a range of subjective and objective factors relevant to the offence and offender. These factors may be relevant as aggravating or mitigating circumstances. The note will then trace the development and application of the *Fernando* principles as grounds for mitigation in sentencing Indigenous offenders. This feeds into a discussion of the procedural history and issues in *Bugmy v The Queen* and how the New South Wales Court of Criminal Appeal's decision represents a reinterpretation by Australian courts of the *Fernando* principles. This reinterpretation involves privileging considerations of the objective seriousness of the offence, community protection and the need for deterrence over the subjective circumstances of the offender. Such an approach precludes a consideration of how sentences can be better structured to address circumstances that underpin criminality — for example, through remedial institutions and services — and fails

4 Transcript of Proceedings, *Bugmy v The Queen* [2013] HCATrans 111 (10 May 2013).
5 (1992) 76 A Crim R 58, 62–3.
6 [1999] 1 SCR 688.
7 (2012) SCC 13 [37]. In *R v Ipeelee*, the Canadian Supreme Court determined that the seriousness of the offence should not affect appropriate sanctions being handed down to reflect the offender's Aboriginal heritage and connection to community.

to address the detrimental and widescale impact and the inter-generational effect that imprisonment has on Indigenous people and their communities.[8]

The New South Wales Court of Criminal Appeal's approach to diminishing the relevance of Indigenous background, by rendering it less significant when an offender engages in serious crime over a lengthy period, is paradoxical given that contact with the criminal justice system, and especially imprisonment, aggravates the defendant's social disadvantage.[9] Criminologists suggest that hardship increases with criminalisation because it alienates the offender from the community.[10] McCoy argues that prisons exclude the underclass from the moral community, and sentences for disadvantaged offenders should be reintegrative to assure their stake in the moral community and reduce their offending.[11]

In relation to Indigenous offenders, Nicholson asserts that imprisonment compounds their disadvantage by perpetuating their cycle of poverty, subordination and marginalisation.[12] Indigenous disadvantage in the prison is particularly harsh because it is in a foreign environment, often a long distance from their communities, and because it reinforces historically tense relations between Indigenous people and white law enforcers. In the case before the High Court, the appellant Bugmy was from a remote community where he had experienced conflict with police, had been in and out of detention centres and prisons since a young age, and had requested rehabilitation for his alcohol abuse on numerous occasions, although such requests did not result in adequate intervention.[13] Should the High Court decide that the subjective circumstances of the offence carry little weight, it will mean longer prison terms for someone such as Bugmy; on the other hand, should the Court decide that more attention should be given to Indigenous circumstances, it will promote sentencing outcomes that address these circumstances through more appropriate non-penal orders.

Rather than circumstances of Indigenous disadvantage becoming less relevant as the defendant's criminal history is extended, it becomes more incumbent on courts to consider the effect of imprisonment on Indigenous defendants and whether alternative sentences may be better suited to breaking their cycle of crime. This would fulfil the sentencing objectives of deterrence and community protection while accounting for the offender's culpability.

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8 Figures from the Australian Institute of Health and Welfare show the national rate of Indigenous juvenile incarceration is 31 times the non-indigenous rate, and prison sentences are particularly high in remote towns. The impact that imprisonment has is inter-generational as prisoners are more likely to have children who are eventually imprisoned. Natasha Robinson, 'Black sentences soar as juvenile jails become a "storing house"', *The Australian* (Sydney), 5 January 2013, 1; Natasha Robinson, 'Call for review of juvenile sentencing', *The Australian* (Sydney), 7 January 2013, 4.

9 *R v Bugmy* [2012] NSWCCA 223 [23].

10 Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford University Press, 1995) 125; Barbara Hudson 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1999) 8 *Social and Legal Studies* 583, 589–90.

11 Candace McCoy, 'Review Essay: Sentencing (and) the Underclass' (1997) 31 *Law & Society Review* 589, 611–12.

12 John Nicholson, 'Sentencing Aboriginal Offenders — A Judge's Perspective' (Paper presented at Criminal Law Conference, Uluru, 31 August – 1 September 2012).

13 *R v Bugmy* [2012] NSWCCA 223 [23].

II Relevance of Indigenous Background in Sentencing

Australian sentencing courts have accounted for the circumstances of disadvantaged Indigenous offenders to reflect their reduced culpability[14] and the deleterious impact of prison on Indigenous people.[15] These circumstances have mitigated Indigenous offenders' sentences where they are deemed relevant to the offender or the offence. In sentencing legislation across Australia there is substantial scope for sentencing courts to exercise their discretion to consider factors relevant to the individual defendant.[16] These factors, which may operate to mitigate or aggravate sentences, are considered in relation to normative sentencing principles stipulated in the legislation, including punishment, deterrence, rehabilitation of the offender, offender accountability, denunciation of the offender's conduct, community protection, and recognition of the seriousness of the offence and harm to the victim.[17] Sentencing statutes also particularise some of the matters that courts are to have regard to when passing a sentence, such as the maximum penalty for the offence, the nature of and harm caused by the offence, the identity and age of the victim, the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, and remorse.[18] With few exceptions,[19] Indigenous background is not specifically listed as a relevant factor.

At common law, the notion of 'individualised justice' requires that all relevant factors are taken into account, including the defendant's background, in sentencing.[20] Accordingly, the judiciary exercises its discretion to account for all 'circumstances of the offence and the offender'.[21] In the sole High Court of

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14 See, eg, *Fernando* (1992) 76 A Crim R 58; *R v Hickey* (Unreported, NSW Court of Criminal Appeal, Finlay, Abadee and Simpson JJ, 27 September 1994); *R v Stone* (1995) 84 A Crim R 218.

15 See, eg, *Fernando* (1992) 76 A Crim R 58; *Police (SA) v Abdulla* (1999) 74 SASR 337; *R v Smith* [2003] SASC 263.

16 *Crimes Act 1914* (Cth) s 16A(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Sentencing Act 1995* (NT) ss 5(2)(s), 6, 6A; *Penalties and Sentences Act 1992* (Qld) s 9(2)(r); *Criminal Law (Sentencing Act) 1988* (SA) s 10(1)(o); *Sentencing Act 1991* (Vic) s 5(2)(g).

17 See *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Crimes (Sentencing) Act 2005* (ACT) s 7; *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

18 *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 6A; *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes (Sentencing) Act 2005* (ACT) s 33; *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 9; *Sentencing Act 1995* (WA) ss 7, 8.

19 The ACT legislation provides that the court must consider whether the cultural background of the offender is relevant (*Crimes (Sentencing) Act 2005* (ACT) s 33(m)). Courts in Queensland, when sentencing an Indigenous person, must have regard to submissions made by a representative of the community justice group in the offender's community, including 'any cultural considerations' (*Penalties and Sentences Act 1992* (Qld) s 9(2)(p)). In the Northern Territory, a sentencing court may receive information about an aspect of Indigenous customary law, or the views of members of an Indigenous community, but only where certain procedural requirements have been fulfilled (*Sentencing Act 1995* (NT) s104A). However in the Northern Territory and Commonwealth jurisdictions, cultural practices and customary laws cannot be taken into account to mitigate or aggravate an offence (*Crimes Act 1914* (Cth) ss 16A(2A), 16AA(1)).

20 *Wong v The Queen* (2001) 207 CLR 584, 611.

21 *R v Whyte* (2002) 55 NSWLR 252, 276.

Australia judgment to address the significance of Indigenous issues in sentencing, Brennan J stated:

> 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 offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[22]

Discretion is applied on a case by case basis to determine whether Indigenous factors are relevant to reducing a sentence.[23] An Indigenous offender has no special right to receive leniency by virtue of Indigenous status alone.[24] Sentencing courts rely on Indigenous factors only when the offender is a member of an Indigenous community *and* his/her offence or punishment reflects that membership.[25] Therefore, it is necessary for sentencing submissions to point not only to the Indigenous background of the offender but how this has affected his/her life and contributed to offending. Mildren J of the Northern Territory Supreme Court stresses that the Court only considers Indigenous matters that are relevant to 'ordinary' sentencing principles.[26] He describes the Court's reasoning and process in the following way:

> Customary law or cultural practices sometimes provide relevant background material of a secondary fact to prove a primary fact which has traditionally been regarded as a mitigatory fact. For example, in cases involving 'pay-back' [Indigenous law punishment], the relevant primary fact is that the accused has already been punished or in the future will be punished by others for his or her offence. The principle being invoked in such cases is that, to ignore this, it would expose the offender to an element of double punishment. In such cases the court applies exactly the same sentencing principles when sentencing an Aboriginal person as anyone else.[27]

In this respect, the interpretation and application of Indigenous circumstances in sentencing operate within the common law's general sentencing principles. The Indigenous offender's disadvantaged background provides a relevant context for mitigating the offence, including reducing the offender's moral culpability. It may also explain how principles of deterrence can be promoted through non-prison sentences.

III The *Fernando* Principles

The New South Wales *Fernando*[28] principles set the tone for considerations when sentencing Indigenous offenders. In recognising the relevance of Indigenous

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22 *Neal v The Queen* (1982) 149 CLR 305, 326 ('*Neal*').
23 *R v Woodley, Boonga & Charles* (1994) 76 A Crim R 302.
24 *Neal* (1982) 149 CLR 305, 326.
25 *Fernando* (1992) 76 A Crim R 58, 63; *R v Minor* (1992) 105 FLR 180, 190.
26 Dean Mildren, 'Customary Law: Is It Relevant?' (2008) 1(2) *Northern Territory Law Journal* 69, 75.
27 Ibid 73–4.
28 (1992) 76 A Crim R 58.

background, poverty and alcoholism to mitigation, the New South Wales Supreme Court in *Fernando* drew on a body of sentencing remarks across Australia.[29] Crystallising this case law, the Court enunciated the following oft-cited principles:

1. Facts relevant to the offenders' membership of a group should be accounted for, but 'the same sentencing principles are to be applied in every case'.
2. Aboriginality does not necessarily 'mitigate punishment' but may 'throw light on the particular offence and the circumstances of the offender'.
3. Alcohol abuse and violence 'go hand in hand within Aboriginal communities', feeding into 'grave social difficulties' of unemployment, low education, stress, and so on.
4. Mitigation should be provided where alcohol abuse reflects the offender's 'socio-economic circumstances and environment'.
5. Courts should provide punishment to protect Indigenous victims and reflect the seriousness of 'violence by drunken persons', particularly domestic violence.
6. A long prison term is particularly alienating and 'unduly harsh' for Indigenous people who come from a 'deprived background' or have 'little experience of European ways'.
7. The relationship between violence and alcohol abuse in Indigenous communities requires 'more subtle remedies' than imprisonment.
8. The public interest in 'rehabilitation of the offender and the avoidance of recidivism on his part' should be given full weight.[30]

Also influencing the New South Wales Supreme Court in *Fernando* were the findings of the Royal Commission into Aboriginal Deaths in Custody,[31] which had just been handed down when the case was heard. The Royal Commission's *Final Report* fuelled concerns about the over-imprisonment of Indigenous people and made a case for a distinct jurisprudence for sentencing Indigenous offenders, including that prison is a sanction of last resort. This report was referred to in

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[29] Ibid 62. The New South Wales Supreme Court referred to the following cases: the Queensland Court of Criminal Appeal case of *R v Friday* (1985) 14 A Crim R 471, 472, where it was held that the defendant was 'a victim of the circumstances in which her life had placed her'; *Yougie v The Queen* (1987) 33 A Crim R 301, 304, where the same court held that 'it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals' that have 'placed heavy stresses on them leading to alcohol abuse and consequential violence'. The Western Australian Court of Criminal Appeal, in *Rogers v The Queen* (1989) 44 A Crim R 301, 305, which recognised the 'notorious fact' that the 'use of alcohol by Aboriginal persons in relatively recent times has caused grave social problems, including problems of violence', which should 'provide circumstances of mitigation', and the same court's remarks in *R v Juli* (1990) 50 A Crim R 31, 36, which maintained that the 'abuse of alcohol reflects the socio-economic circumstances and the environment in which [the Indigenous offender] has grown up and should be taken into account as a mitigating factor'.

[30] *Fernando* (1992) 76 A Crim R 58, 62–3.

[31] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

Fernando[32] as evidence of the unique conditions for Indigenous people in the criminal justice system, although the New South Wales Supreme Court did not aver its significance.

While Wood J's remarks in *Fernando* were not in themselves novel, they synthesised the Indigenous factors to be taken into account and formulated them within a paradigm that balanced competing sentencing considerations, such as the seriousness of the crime and the harm to the victim. Consequently, the eight *Fernando* principles for sentencing Indigenous offenders from disadvantaged communities have been influential across Australia.[33] They are informed by the same judicial considerations that deem Indigenous laws, Indigenous punishment systems and political grievances relevant to mitigation.[34] The facts of *Fernando's* case were that Fernando stabbed his friend and onetime de facto partner, causing serious wounds to her neck and leg. Fernando's background was marked by low levels of education and forcible removal from his family by the Welfare Department. He was sent to an isolated property and thereafter lived in Walgett, a racially divided community in north-western New South Wales where Indigenous people, including Fernando, were beleaguered with socio-economic hardship.[35] He had a criminal history that was linked to his excessive alcohol consumption and had consumed large amounts of alcohol just before the stabbing.

Wood J had to contend with the significance of the defendant's Indigenous circumstances. Should his economic disadvantage and ensuing alcoholism mitigate the criminal sentence? Do these factors weigh particularly heavily on Indigenous offenders? What bearing would a lighter sentence have on social justice for Indigenous people? Is sentencing a means of compensation or restoration? The New South Wales Supreme Court's answers to these questions set the context for the *Fernando* principles that have provided signposts for sentencing Indigenous offenders. These include mitigation to reflect the Indigenous offender's lower moral culpability, an acknowledgment that imprisonment is particularly harsh on Indigenous offenders, and the need for non-custodial options to address the relationship between violence and alcohol abuse.

IV Judicial Rationales for Reducing Indigenous Prison Sentences

Following *Fernando*, the New South Wales Court of Criminal Appeal and appeal courts in other states adopted and expounded its principles and observations. In *R v*

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32 (1992) 76 A Crim R 58, 62.

33 Sheryn Omeri, 'Considering Aboriginality' (2006) 44(7) *Law Society Journal* 74, 76.

34 See *Neal* (1982) 149 CLR 305; *R v Benny Lee* [1974] NTSC 221; *R v Minor* (1992) 105 FLR 180; *R v Miyatatawuy* (1996) 87 A Crim R 574; and more generally: Thalia Anthony, 'Sentencing Indigenous Offenders', Indigenous Justice Clearinghouse Brief 7 (2010); Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).

35 Cilka Zagar (ed), *Growing up Walgett: Young Members of the Walgett Aboriginal Community Speak Out* (Aboriginal Studies Press, 1990) xi; Kate Ross and John Taylor, 'The Relative Social and Economic Status of Indigenous People in Bourke, Brewarrina and Walgett' (Working Paper No. 8/2000, Centre for Aboriginal Economic Policy Research, 2000) vii–viii.

Hickey,[36] the Court referred to the 'tragic truth' of the 'litany of disadvantage' that frequently accompanies Indigeneity and should be taken into account in sentencing where relevant. In *R v Stone*,[37] the Court allowed an appeal against the trial judge's finding that the strength of the *Fernando* principles had been eroded because the defendant had committed similar serious offences in the past. It held that the significance of subjective factors pertaining to the Indigenous defendant should not be diminished by the objective aggravating circumstances such as the seriousness of the offence.[38] In 1999, the South Australian Supreme Court held that the *Fernando* principles have broad application to Indigenous offending in remote and urban communities and cannot be offset by 'tariff' (minimum) sentences.[39] Also commenting that the *Fernando* principles were 'not restricted to traditional aboriginals', the South Australian Court of Criminal Appeal found that heritage, rather than geography, contributes to the offender's circumstances.[40]

However, Indigenous specificity has not only been recognised in relation to the nature of the defendant's disadvantaged Indigenous community and upbringing, but also in relation to Indigenous over-representation in the prison system. This affects the framing of the sentencing determination by shifting the focus from 'the problem' of the Indigenous community and circumstances, to 'the problem' of punishment and imprisonment for Indigenous people. It points the finger at the dominant institutions which create the patterns of subversion and symbolise 'white on black' violence.[41] In addition to the New South Wales Supreme Court's remarks in *Fernando* that referred to the 'unduly harsh' impact of prison for Indigenous people,[42] the South Australian Supreme Court highlighted the 'debilitating affect' that imprisonment has on Indigenous people, and referred to the *Indigenous and Tribal Peoples Convention*[43] as endorsing penalties 'other than confinement in prison'.[44] In *R v Smith*[45] the South Australian Court of Criminal Appeal noted that the 'cultural milieu' of the prison is foreign to remote and urban Indigenous offenders. These remarks signal the need for sentencing to be sensitive to issues of Indigeneity not only because of the disadvantaged background of the Indigenous defendant but also because of the potential for prison to have an acute adverse effect on the Indigenous defendant and his/her community.

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36 (Unreported, NSW Court of Criminal Appeal, Finlay, Abadee and Simpson JJ, 27 September 1994) 4.
37 (1995) 84 A Crim R 218.
38 *R v Stone* (1995) 84 A Crim R 218, 224.
39 *Police (SA) v Abdulla* (1999) 74 SASR 337, 343–4.
40 *R v Smith* [2003] SASC 263 [60]–[61].
41 Harry Blagg, 'Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 129, 139.
42 *Fernando* (1992) 76 A Crim R 58, 62–3.
43 Opened for signature 27 June 1989, ILO C169 (entered into force 5 September 1991).
44 *Police (SA) v Abdulla* (1999) 74 SASR 337, 344.
45 *R v Smith* [2003] SASC 263 [61].

V The First Instance Decision and Appeal

In May 2013, the High Court granted special leave to appeal the decision of the New South Wales Court of Criminal Appeal in *R v Bugmy*.[46] A central ground for the appeal was that the Court of Criminal Appeal erred in holding that the weight attributed to the *Fernando* principles lessen by virtue of the offender's lengthy criminal history, the objective seriousness of his offences and the need for deterrence. In 2011, the defendant had pleaded guilty to two counts of assaulting a Corrective Services Officer contrary to the *Crimes Act 1900* (NSW) s 60A (1), which attracts a maximum penalty of five years' imprisonment, and one count of causing grievous bodily harm with intent contrary to s 33(1)(b) which attracts up to 25 years' imprisonment. The latter offence involved a prison officer being struck in the eye with a pool table ball, resulting in the loss of sight in that eye and post-traumatic stress.

At the time of the offence, Bugmy, a 29-year-old Indigenous man from Wilcannia in north-western New South Wales, was on remand for assaulting police, resisting police, escaping from police custody, intimidating police and causing malicious damage by fire. His childhood involved exposure to violence and alcohol abuse, and he commenced using cannabis and alcohol at the age of 12. Bugmy was educated to Year 7, resulting in poor literacy and numeracy skills. He has a history of head injuries and suffered from auditory hallucinations and psychotic symptoms of a schizophrenic type. Since the age of 13 Bugmy has committed numerous offences of break, enter and steal, assault, resist police and damage to property, and has served long terms of imprisonment for these offences. He has never attended a detoxification or rehabilitation facility. Bugmy had asked for assistance with treatment of his alcohol abuse on numerous occasions but without success. He had negative attitudes towards authority figures, particularly the police, attitudes that were described by an expert witness as attributable to family 'cultural issues'.[47] Expert evidence adduced in court pointed to the need for Bugmy to undergo extended counselling for his drug and alcohol abuse problems and regular psychiatric review in view of his reported 'voices'.[48] These voices may point to an undiagnosed mental illness.

In sentencing Bugmy, District Court Judge Lerve ordered, for all of the assault charges, imprisonment with a non-parole period of 4 years and 3 months. Pursuant to the *Crimes Act 1900* (NSW) s 21A, Lerve ADCJ took into account the aggravating factors that the victims were Correctional Services Officers, that a victim suffered significant psychological injury, that the defendant used the pool ball as a weapon, and the defendant's criminal record. The judge also accepted, in mitigation, that the offence was unplanned and committed on the spur of the moment in a fit of anger, concluding that the offence was 'slightly less serious than the mid-range of objective seriousness for offences of this kind'.[49] In recognising the defendant's disadvantaged background, the judge took into account the

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46 [2012] NSWCCA 223.
47 Ibid [23].
48 Ibid.
49 Ibid [13], [30].

Fernando principle that sentencing decisions should recognise the defendant's social disadvantage that precedes the commission of a crime.[50] He also accounted for Bugmy's mental illness and the need for rehabilitation to address his alcohol and substance abuse. Bugmy's sentence was moderated on account of 'psycho-social evidence' as it limited the value of general deterrence in this case.[51] The judge stressed that the defendant's 'very great need for intensive residential fulltime rehabilitation' pointed to a lesser prison sentence despite his substantial criminal history.[52] This operated 'very much in favour of a finding of special circumstances'.[53]

The Director of Public Prosecutions appealed against the District Court's sentence on three grounds — that the sentencing judge failed to determine properly the objective seriousness of the offence (which would have taken into account the status of the victim as a correctional officer); placed too much weight on the defendant's subjective circumstances to ameliorate the sentence, and that the total sentence imposed was manifestly inadequate. On the first two grounds alone, the New South Wales Court of Criminal Appeal allowed the appeal and increased the sentence for the grievous bodily harm offence to a five-year non-parole period. The Court did not consider the issue of whether the original sentence was manifestly inadequate.

The Court of Appeal's judgment, delivered by Hoeben JA, found that the objective seriousness of the offence, including the category of the victim, were important matters of aggravation and required that the sentence incorporate a message of personal and general deterrence.[54] The Court was of the view that the sentencing judge did not deliver this message adequately.[55] In relation to the weight of the subjective factors impermissibly ameliorating the sentence, the Court accepted Crown submissions that Lerve ADCJ failed to account for the defendant's lack of contrition and remorse and gave insufficient weight to the defendant's criminal record.[56] The Court also held that the sentencing judge erred by taking into account the defendant's mental illness to reduce the weight to be given to general deterrence.[57] Finally, the Court held that the Indigenous background and difficult circumstances Bugmy faced as a young person, such as the exposure to alcohol abuse, were not significant given the defendant's offending history.[58] The Court followed its own decision in *R v Newman*,[59] discussed below, where it held that 'it is not every case of deprivation and disadvantage suffered by an offender of aboriginal race or ancestry that calls for the special approach adopted in *Fernando*'.[60] This was applied in Bugmy's case because of his early and ongoing contact with the criminal justice system that required a message of specific

50 Ibid [26]–[27].
51 Ibid [27].
52 Ibid.
53 Ibid.
54 Ibid [35]–[38].
55 Ibid [38].
56 Ibid [40]–[42].
57 Ibid [45].
58 Ibid [49]–[50].
59 (2004) 145 A Crim R 361, 376.
60 *R v Bugmy* [2012] NSWCCA 223 [49].

(personal) and general deterrence.[61] The Court concluded 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'.[62]

Notwithstanding its recognition that Indigenous background can be taken into account, the Court set up an inverse correlation between the significance of Indigenous background and the significance of the offender's criminal history.[63] Thus in Bugmy's case, the extent to which this matter could be taken into account was limited.[64] The Court upheld that the primary objective of sentencing for criminal offences is community protection from crimes through personal and general deterrence.[65] It ruled that the consideration of the *Fernando* principles in reducing the weight to be given to general deterrence should only be modest.[66] Based on Bugmy's criminal history, the objective seriousness of the offence and the need for deterrence, the Court increased his sentence.

During the application for special leave to the High Court, Bugmy's counsel submitted that the New South Wales Court of Criminal Appeal's privileging of the seriousness of the offence to minimise the relevance of the social deprivation in the offender's youth and Indigenous background was erroneous in principle. This error was compounded by comments that a defendant's substantial offending history diminished the significance of Indigenous factors — a finding that could not be supported in law.[67] Bugmy's counsel stated that these grounds of appeal are 'a matter of significant and indeed profound importance for the administration of criminal justice and for the sentencing, in particular, of indigenous offenders not only in New South Wales but nationally'.[68] Other grounds of appeal include the relevance of mental impairment to reducing the effect of general deterrence and the failure of the Court of Appeal to consider the matter of the manifest inadequacy and whether its residual discretion should have been exercised to dismiss the Crown's appeal. The High Court's granting of leave in Bugmy's case has opened a window for it to reflect on the role of sentencing Indigenous offenders in a society with an ever-expanding Indigenous prison population.

VI Revisions of *Fernando* in the Past Decade: the Rise of Seriousness and Deterrence

The emphasis on the seriousness of the offence of the New South Wales Court of Criminal Appeal in *R v Bugmy* is not new. Over the past decade the Court, in hearing appeals on the sentences for Indigenous offenders, has increasingly placed value on the seriousness of the offence and deterrence above the culpability of the offender and the need for more subtle remedies than imprisonment.[69] This trend is

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61 Ibid [38].
62 Ibid [50].
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid [52].
67 Transcript of Proceedings, *Bugmy v The Queen* [2013] HCATrans 111 (10 May 2013).
68 Ibid.
69 See *R v Newman* (2004) 145 A Crim R 361; *R v Ceissman* (2001) 119 A Crim R 535 ('*Ceissman*').

also present in other Australian jurisdictions.[70] This is despite the fact that the definition of offence seriousness is not clearly stated in principle or legislation.[71] In *Neal*,[72] Brennan J of the High Court held that moral culpability and the emotional disposition of the offender can be relevant to determining the seriousness of the offence or 'gravity' of the conduct.[73] Nonetheless, courts often equate seriousness exclusively with the harm to the victim, who is regarded as an 'authentic expression' of harm.[74] They refer to the concept as 'objective seriousness' to imply a rational calculation of the scale of harm.[75] Reference to the victim can invoke a punitive response without recourse to mitigating circumstances, including the moral culpability of the offender. In Bugmy's case, the Court of Criminal Appeal regarded the harm to the victim, an on-duty corrections officer, as an aggravating factor that overshadowed Bugmy's special circumstances.

Since the late 1990s there has been an increasing tendency for courts to confine the significance of Indigenous background on the basis of the primacy of the objective seriousness of the offence and the need for deterrence and community protection. Higher courts have also been inclined to disregard the defendant's Indigenous background where the defendant has come from an urban, as opposed to remote, Indigenous community. *Ceissman*[76] was one of the first New South Wales Court of Criminal Appeal cases that downplayed the significance of Indigenous circumstances because the offender resided in an urban environment and was 'part-aboriginal'. Ceissman, who was convicted of trafficking cocaine, 'grew up in extreme poverty', received little education, had parents who were drug addicts with criminal histories, witnessed serious physical violence between them, and was orphaned when he was 11 years old.[77] His circumstances did not enliven the *Fernando* principles because Ceissman was not 'from a remote community for whom imprisonment would be unduly harsh'.[78] The Court in *Ceissman* privileged the guideline sentence that is predicated on the seriousness of the crime of drug importation over subjective Indigenous considerations.[79]

Following *Ceissman*, in *R v Morgan*,[80] the New South Wales Court of Criminal Appeal applied its reasoning to an offender who committed robbery, break and enter and assault. The defendant was brought up in a town in central

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70 See *Wurramara* (1999) 105 A Crim R 512 (NT); *The State of Western Australia v Munda* [2012] WASCA 164.

71 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 99.

72 *Neal* (1982) 149 CLR 305, 325.

73 See also *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477; Andrew von Hirsch, 'Scaling Punishments: a reply to Julia Davis' in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society: International Perspectives* (Ashgate, 2004) 361; Susan Easton and Christine Piper, *Sentencing and Punishment: the Quest for Justice* (Oxford University Press, 2005) 60.

74 John Pratt, 'Penal Populism and the Contemporary Role of Punishment' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 265, 271–2.

75 *R v Bara* [2006] NTCCA 17 [24]; *R v Morgan* (2003) 57 NSWLR 533, 542.

76 (2001) 119 A Crim R 535, 540.

77 Ibid 543.

78 Ibid 540.

79 Ibid 541. For applications of *Ceissman*, see *Andrews v The Queen* [2007] NSWCCA 68; *Carr v The Queen* [2009] NSWSC 995.

80 (2003) 57 NSWLR 533.

Victoria and had an 'intimidating, violent and alcohol dependent' father. The offender was found by the Court *not* to be 'particularly disadvantaged', despite having to flee his home regularly to avoid his abusive father and spending 'a good part of his early life in boys' homes or correctional centres'.[81] Because the 'offences were not alcohol-related and the appellant did not come from a *remote* community, nor was he unfamiliar with the justice system', the *Fernando* principles were not applied.[82] This is despite the fact that the defendant lived near Shepparton — a town 200 kilometres out of Melbourne. The Court held that the defendant's Indigenous background, as far as they related to the *Fernando* principles, 'added little to the … sentencing exercise beyond those matters which would otherwise have been taken into account, for any offender'.[83] Rather, the Court attributed significant weight to the serious nature of the offending.

This narrow conception of the *Fernando* principles came to bear on the Court of Criminal Appeal's sentencing remarks in *R v Newman, R v Simpson*.[84] The Court distinguished the Indigenous defendants, who were from Griffith in central New South Wales, from defendants in 'a remote community', who would be more likely to enliven the *Fernando* principles.[85] One defendant, Newman, was forcibly removed from his family at a young age to an isolated mission property. He had an early introduction to alcohol in communities where drinking was 'not only the norm but positively encouraged by peer group pressure', and his criminal record was 'exclusively, if not entirely' alcohol related.[86] The Court questioned whether Aboriginality was an issue at all, observing that the offenders' 'lamentable' background of disadvantage and alcohol and drug abuse 'is not in any way unique nor is it restricted to any particular community group'.[87] It regarded alcohol and drug abuse as arising from a common type of 'deprivation or abuse early in life' that does not give rise to special consideration, 'notwithstanding [the offender's] Aboriginality'.[88] The seriousness of the offence — aggravated entering dwelling with intent to commit a serious offence — also made it legitimate to 'give little weight to the applicant's subjective circumstances'.[89]

The privileging of the seriousness of the offence above considerations of Indigenous background has also been evident in remarks by the Northern Territory and Western Australian Courts of Criminal Appeal since the late 1990s — each confining the relevance of the *Fernando* principles. In the Northern Territory, the Indigenous background of the offender has not come under scrutiny, but there has been a strong emphasis on the sentencing principles of deterrence and the seriousness of the offence, as well as upholding the wider community's interest in

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81 Ibid 535.
82 Ibid 539 (emphasis added).
83 Ibid.
84 (2004) 145 A Crim R 361.
85 Ibid 376, 378.
86 Ibid 385–6.
87 Ibid 378–9.
88 Ibid 379.
89 Ibid. This reasoning that privileged the seriousness of the offence above the subjective considerations in the *Fernando* principles was applied in *Gillon v The Queen* [2009] NSWCCA 277, [30] (Hislop J); *R v Blow* [2010] NSWCCA 294, [55] (McClellan CJ); *Russell v The Queen* [2010] NSWCCA 248, [50]–[51] (Price J).

lengthy imprisonment. In the seminal Northern Territory Court of Criminal Appeal decision of *R v Wurramarra*,[90] the Court stressed the seriousness of the offence above all other sentencing considerations. The Court noted that the 'dysfunctional' status of the defendant's community on Groote Eylandt, with its prevalence of alcohol abuse and violence, was 'by no means' justification for 'a lower sentence'.[91] In fact, it was taken to signal the need for a strong deterrence message, notwithstanding the Court's recognition that imprisonment has limited impact on the 'dysfunction or deprivation' that lie at the root of violence.[92] According to the former Principal Solicitor of the North Australian Aboriginal Justice Agency, Glen Dooley, *Wurramarra* has contributed to the rapid increase — a doubling between 1999 and 2009 — in the Northern Territory's prison population.[93] In *Bryce Jabaltjari Spencer v The Queen*, the Court of Criminal Appeal stated that *Wurramarra* displaced the *Fernando* principles and therefore the defendant's membership of a 'deprived or dysfunctional' community 'does not mean that lower sentences should prevail' where there is a serious offence.[94] The Court has also stated that due to the seriousness of the crime, 'the interests of the wider community demand the prisoner be punished by the loss of his liberty'.[95] In other cases the Court has applied a common law 'standard sentencing' approach for serious offenders, based on a scale of seriousness and notwithstanding their Indigenous background and its effect on moral culpability.[96]

In the recent decision of *Western Australia v Munda*,[97] the Western Australian Court of Criminal Appeal upheld the relevance of the *Fernando* principles but stated that Indigeneity was to be afforded little weight because of the seriousness of the offence involving drunken violence as well as the need for personal and general deterrence. The sentencing remarks in *Munda*, like other recent applications of the *Fernando* principles, reveal a judicial retreat from considering the relevance of Indigenous background and the grave impact that imprisonment has on Indigenous people. These revisions of *Fernando* have raised concerns that substantive equality and individualised justice are being undermined. These concerns have come from legal commentators[98] and the Aboriginal legal service that brought the appeal in *Bugmy v The Queen*.

When assessments of seriousness are based exclusively on harm, issues of culpability are neglected along with the fact that 'strong social disadvantages may

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90 (1999) 105 A Crim R 512 ('*Wurramarra*').

91 Ibid 522.

92 Ibid 521.

93 ABC Radio National, 'Old Law, New Ways', *Background Briefing*, 21 November 2010 (Chris Bullock); Australian Bureau of Statistics, *Prisoners in Australia*, no 4517.07 (2009) 26.

94 *Bryce Jabaltjari Spencer v The Queen* [2005] NTCCA 3 [23].

95 *R v Webb* [2003] NTSC (Unreported, Northern Territory Supreme Court, Bailey J, 21 February 2003) 8.

96 *Inkamala v The Queen* [2005] NTCCA 6; *R v Rindjarra* [2008] NTCCA 9 [52].

97 (2012) 43 WAR 137, 161–3 ('*Munda*').

98 For example, Martin Flynn, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 16; Richard Edney, 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8.

be at the root of much offending'.[99] According to Hudson, it also reduces the crime to its *actus reus* by removing the mental element.[100] This justifies terms of imprisonment without consideration of the broader circumstances of the offending. Equally, notions of deterrence assume that 'more prison equals less crime', and neglect factors impinging on the defendant's choice, or the choices of others in the general population when committing crimes.[101] These notions underestimate the significance of factors which include in Bugmy's case a background of disadvantage, alcohol and substance abuse and mental impairment, as well as tense relations with law enforcement authorities. The current application of 'deterrence' in sentencing also overestimates the role of imprisonment in reducing crime, and in doing so overlooks other strategies that may be more effective in crime prevention. With respect to Bugmy, evidence adduced in the District Court suggested that his offending may have been better addressed through non-penal institutions rather than imprisonment — evidence that was diminished on appeal due to a narrow understanding of offence seriousness, community protection and deterrence.[102]

VII Towards an Understanding of Community Protection Outside of the Prison

As stated, the *Fernando* principles were formulated by the New South Wales Supreme Court after the Royal Commission into Aboriginal Deaths in Custody handed down its seminal national report detailing the vast over-representation of Indigenous Australians in custody. According to the 2013 National Deaths in Custody Program Monitoring Report, in the 20 years since the Royal Commission, the number of Indigenous prisoners has almost doubled.[103] Indigenous Australians account for 26 per cent of the prison population and have been described as the most punished population in the world.[104] This indicates that longer prison sentences for Indigenous offenders are not having the requisite effect of deterrence and community protection. Abstract models of behaviour that assume autonomy and individual choice have sacrificed serious consideration of moral culpability and community circumstances while not delivering safer communities.

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99 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) 86; R A Duff, 'Dangerousness and Citizenship' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon, 1998) 149; Andrew Ashworth, 'Sentencing' in Mike Maguire, Rodney Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology* (Oxford University Press, 3rd ed, 2002) 1106.

100 Hudson, above n 10, 584.

101 Nicola Lacey *State Punishment: Political Principles and Community Values* (Routledge, 1988) 59–61; Barbara Hudson, 'Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' (2006) 10 *Theoretical Criminology* 29.

102 *R v Bugmy* [2012] NSWCCA 223 [23].

103 Matthew Lyneham and Andy Chan, *National Deaths in Custody Program Monitoring Report: Deaths in Custody in Australia to 30 June 2011*, Report 20 (Australian Institute of Criminology, 2013) v.

104 Ibid vi; Fiona Skyring, *Justice: A History of the Aboriginal Legal Service of Western Australia* (UWA Publishing, 2011); Harry Blagg, 'Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier' in Allison Morris and Gabrielle Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart, 2001) 227.

Increasing Indigenous imprisonment necessitates that the High Court consider whether the seriousness of the offence should overshadow mitigating circumstances relating to the offender's background. Indeed, if courts are to hand down sentences that will restore and rehabilitate Indigenous offenders, greater emphasis needs to be placed on exploring community circumstances and how the offender may be better reintegrated and Indigenous communities strengthened. Bugmy is an example of an offender who was calling on the system to provide rehabilitation services, but only found institutional sanctuary in the prison. By failing to give substantial weight to Indigenous circumstances, the courts will continue to fall back on an imprisonment response when deterrence and community protection could be better served through non-custodial sentencing options and more appropriate community-based remedial services.