

# Early Exposure to Alcohol and Other Drug Abuse

## Case Summaries

[\*Bugmy v the Queen\* \(2013\) 249 CLR 571 \[2013\] HCA 37](#) (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ)

*Cause grievous bodily harm with intent - – disadvantaged childhood as indigenous offender included early exposure to alcohol abuse and violence – general sentencing principles*

- Aboriginal offender whose background included growing up in a household where alcohol abuse and violence commonplace – limited formal education – commenced alcohol and drug abuse at 13 years - saw father stab his mother 15 times – all offender’s siblings had criminal records and offender commenced own record at 12 years – spent many years in custody – mental health issues possibly from alcohol: **at [12]-[13]**

[40] Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. 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.

...

[43] The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

[44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase

***R v Fernando*(1992) 76 A Crim R 58 (Wood J)**

*Malicious wounding - disadvantaged childhood as indigenous offender – general sentencing principles – relevance of exposure to alcohol abuse in community*

- Offender sentenced for maliciously wounding his de facto partner with a knife – disadvantaged background included early introduction to alcohol and long-standing abuse of it within communities where such conduct is not only the norm but positively encouraged by peer group pressure

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects. (pp.62-63)

### **Primmer [2020] NSWCCA 50 (Hamill J, Leeming JA and Harrison J agreeing)**

*Specially aggravated break and enter - Crown appeal – childhood trauma caused PTSD – Bugmy and Millwood applied at first instance – Crown appeal dismissed in exercise of residual discretion*

- Difficult childhood – both parents heroin addicts - exposure to drug abuse including driving with father to source drugs – parental incarceration – exposure to family violence – transient accommodation with father – early drug abuse and self-harm – diagnosis of PTSD: **at [25]-[27]**
- Accepted psychologist opinion as to impact of PTSD on offending – risky, reckless and self-destructive behaviour – inability to self-regulate – aggression, substance use and deficits in impulse control – developmental trauma: **at [28]**
- Applied Bugmy and Millwood [2012] NSWCCA 2 at [69]- justified sentence well below range: **at [37]**

### **Hoskins v R [2020] NSWCCA 18 (RA Hulme J; Basten JA and N.Adams J agreeing)**

*Failure to stop after accident – childhood trauma and Bugmy considerations relevant to explanation for non-violent offence*

- Offender struck and killed pedestrian with car - no culpability for accident but failed to stop
- Childhood history of exposure to drug and alcohol abuse, physical abuse, domestic violence and multiple care givers - possible PTSD: **at [49]-[59]**
- Accepted on appeal psychologist's suggestion that failure to stop linked to impaired judgment and poor decision making in context of emotional distress and panicked state: **at [71]-[74]**

- Concluded disadvantaged and dysfunctional background operated to provide some explanation for offence – while self-interest and self-preservation still key factors moral culpability reduced in view of childhood trauma: **at [78]**

**R v Irwin [2019] NSWCCA 133** (Walton J, Simpson AJA and Adamson J agreeing with additional comments)

*Multiple offences involving firearms, police pursuit and drugs – causal link between abusive childhood, drug addiction and offending - found error in refusal to apply Bugmy principles - sentence manifestly inadequate despite error*

- Description of childhood included exposure to parents' substance abuse and violence at hands of father – sexually assaulted by male friend of family – commenced cannabis use at 7-8 years, alcohol use at 11 years and amphetamines at 15 years: **at [32]-[39]**
- Found Sentencing Judge erred in declining to apply Bugmy principles – accepted causal link between background, drug addiction and offending: **at [110]-[123]**

[39] Dr Furst concluded his pathway into addiction and drug related offences was connected to his exposure to parental alcoholism, domestic violence and physical abuse victimisation

- Despite error, and although background represented 'reasonably significant subjective feature relevant to the sentencing of the respondent' concluded sentences manifestly inadequate and allowed Crown appeal: **at [136]**.

**Conte v R [2018] NSWCCA 209** (Payne JA and Button J, Schmidt J dissenting)

*Driving offences – parents' substance abuse resulted in neglect - central role of drugs to offending - sentence manifestly excessive – did not reflect background of offender which contributed to drug addiction*

- Evidence established both parents drug addicts and unable to properly look after offender or provide proper role models – raised by sister who was only four years older – toxic environment of substance abuse and violence – poor school experience - developed longstanding dependence upon drugs as a result of background: **at [16]-[21]**
- On appeal referred to relationship between background, substance addiction and offences:

[21] In short, the applicant, a young man just two years past the age at which the criminal justice system regards one as an adult, had, by the time of the offences, developed a longstanding dependence upon prohibited drugs, no doubt largely as a consequence of his upbringing, and the psychological damage it inflicted upon him. And it was the effect of those drugs that played a central role in the offences: his gross intoxication was the aggravating feature of each of the two major counts; he claimed not to have slept for days, no doubt as a result of the ingestion of amphetamines; and that lack of sleep, combined with the direct effects of the drugs, surely played a role in his grossly dangerous mode of driving and its catastrophic consequences.

- Found sentence manifestly excessive: **at [24]**

**[Ohanian v R \[2017\] NSWCCA 268](#)** (Hamill J, Gleeson JA and Rothman J agreeing)

*Supply prohibited drug - history of dysfunctional childhood including early exposure to physical abuse and illicit drug culture – error to find impact of dysfunctional background diminished because offender had ‘ample opportunity to address his difficulties’*

- Expert evidence established 29 year old offender had been exposed to physical and emotional abuse by his father as a very young child then introduced to illicit drug culture, and accompanying criminal activity and violence, by his step-father - dysfunctional childhood caused mental health issues: **at [14]-[15]**.
- Sentencing judge erred in finding these factors were of diminished value because offender was ‘a mature man who has had ample opportunity to address his difficulties’ – contrary to ***Bugmy***: **at [21]-[22]**
- On re-sentence found offender’s dysfunctional childhood and early exposure to drug culture provided ‘a compelling explanation for his addiction and ongoing involvement in criminal offences’ as well as causing his ‘significant and chronic mental health problems’ making custody likely to be more onerous: **at [35]**

**[Buxton v R \[2017\] NSWCCA 169](#)** (Bathurst CJ and Walton J, Price J dissenting)

*Armed robbery offence – parent’s substance abuse and introduction to alcohol at age 5 years caused significant emotional neglect – relevant to assessing moral culpability*

- Psychiatric report showed both parents substance abusers – mother used large quantities of drugs and alcohol during pregnancy – father introduced applicant to cannabis at age 5 years – daily user of cannabis by 10 years, amphetamines by 11 years and heroin by 13 years – displayed ADHD and ‘psychotic symptoms’ in teenage years although psychologist states ‘difficult to make a definitive diagnosis of applicant’s mental condition due to prodigious substance dependence’ – father’s substance abuse problems caused significant emotional neglect - criminal offending commenced at 15 years: **at [10]-[27]**
- Found sentence manifestly excessive – sentencing judge overstated subjective seriousness of offences and had insufficient regard to applicants’ background: **at [117]**

[99] We have set out the applicant’s subjective circumstances above (at [10]-[27]). Although as we indicated in dealing with Ground 1, the sentencing judge took those circumstances into account, we would respectfully disagree with his comment that not much should be made of them. It seems to us that the introduction to drugs at the age of 5 and what his Honour found to be significant emotional neglect caused by his father’s substance abuse problems along with the fact that the applicant had no relationship with his mother, were matters of significance. Further, the psychiatric and presentence reports summarised above (at [10]-[24]), which were not challenged at the hearing, demonstrate the applicant’s substance abuse had an effect both on his mental state and his overall level of functioning. These matters are significant in assessing the moral culpability of the offender: *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 at [39], [43]-[45], although as was pointed out in that case, the inability to control his impulses may increase the importance of protection of the community: *Bugmy* supra at [45]; *Engert* (1995) 84 A Crim R 67 at 68.

**Turner v R [2016] NSWCCA 208** (RS Hulme AJ, Leeming JA and McCallum J)

*Assault occasioning actual bodily harm and unrelated offences of aggravated sexual intercourse without consent against former partner – failure to take into account childhood of domestic violence, neglect and substance abuse – relevance to reduced self-control – general detrimental impacts*

- Appeal against sentence imposed for an assault in 2009 and unrelated serious sexual offences against estranged partner in 2011 – found insufficient weight given at first instance to evidence of mental health and upbringing
- Found on appeal inadequate weight had been given to unchallenged evidence from psychiatrist report and offender himself of significant childhood exposure to physical, psychological and sexual abuse – introduced to alcohol by uncles at 10y and using cannabis at 13y
- Background included physical, psychological and sexual abuse – early substance abuse – lived on street from late teens – developed serious mental health issues, substance dependence and personality disorder: **at [18], [50]**
- On appeal Court accepted opinion of psychiatrist that:
 

[37] (the offender) also has a history of poor attachment to his parents and marked behavioural disturbance in his youth. It is likely that the early onset of his alcohol abuse and the severe childhood sexual abuse, trauma and neglect he was exposed to adversely affected his personality formation and made him more prone to angry outbursts, difficulty sustaining relationships and impulsivity.
- In relation to first assault accepted upbringing and mental condition significantly contributed to applicant's lack of control in response to provocation of victim: **at [40]**
- In relation to sexual offences concluded inadequate reference to, and consideration of, applicant's background: **at [88]-[91]**

[114] When to the Applicant's mental disability is added the impact of his upbringing, the Applicant's offending is not to be judged by normal standards

**R v Jennar [2014] NSWCCA 331** (RA Hulme J, Leeming JA and McCallum J agreeing)

*Armed robbery offence - background included parental heroin abuse and incarceration – inevitability of life path - reduction in moral culpability*

- Both parents heroin addicts – father in and out of gaol – mother also imprisoned – largely left to own devices from a very early age due to parents' drug addiction – 'deprived of parental guidance and suffered emotional neglect': **at [37]-[38]**
- Psychologist described the respondent as 'having lived the "life script" he had been given, namely drug addiction and criminal activities to fund it.': **at [39]** and having a "life path ... largely predetermined, raised in a household where both parents were heroin-dependent": **at [49]**
- Sentencing Judge accepted 'respondent's moral culpability was less than the culpability of an offender whose formative years had not been marred by having been raised in a household in which both parents were heroin dependent and, for significant periods, incarcerated as a result': **at [50]**

- Crown Appeal dismissed

**[R v Booth \[2014\] NSWCCA 156](#)** (Hamill J, Hoeben CJ at CL and Beech-Jones J agreeing)

*Aggravated break and enter offences and robbery – paternal grandparents part of ‘stolen generation’ – likely impact on upbringing of offender’s father and offender – deprived background combined with low intellectual functioning justified leniency in individual sentences*

- Extensive description of background described as ‘marginalisation of rural and outback aboriginal communities’ and ‘a national disgrace’: **at [4]** – offender’s childhood likely impacted by grandparents being part of ‘stolen generation’: **at [15 – para 9]** – early years spent on mission surrounded by widespread alcohol abuse – victim and witness to family violence – left unsupervised – became State Ward at 10 years and endured multiple foster homes in different towns – separated from sisters – sexual abuse – poor education meant illiterate – early substance abuse as a result of an environment that ‘normalised substance abuse’ – early contact with criminal justice system – deaf in one ear: **at [15]**
- Childhood experiences combined with low intellectual functioning meant poor coping skills and continued substance abuse: **at [15 – para 23-25]** – also easily led by negative peers: **at [15 – para 28]**
- On Crown appeal concluded subjective circumstances justified application of *Bugmy* principles and leniency of individual sentences – sentences ‘tempered with considerable compassion and ... structured in such a way as to foster his rehabilitation’: **at [18]** – total sentence, however, manifestly inadequate and degree of accumulation increased.

**[R v Sharpley \[2014\] NSWDC 253](#)** (Yehia SC DCJ)

*Aggravated break, enter and steal offence - sentencing of offender from disadvantaged rural Aboriginal community – evidence of socio-economic conditions of community – relevance to understanding moral culpability of offender – background of deprivation reduced moral culpability*

- Young male from rural Aboriginal community – parents separated when offender young due to domestic violence – continued exposure to father’s alcohol abuse and violence – learning difficulty and barely literate – little employment: **at [26]-[31]**
- Evidence of social-economic conditions of community provided by Aboriginal Legal Service field officer– referred also to findings of the Walgett Gamilaroi Working Community in 2005 – issues include: widespread violence and alcohol abuse – severe deprivation – racism and stereotyping – inequalities and lack of opportunity – lack of resources and living conditions – welfare mentality – difficulty accessing services – low levels of literacy and numeracy – low student retention and high truancy rates – high levels of criminal and anti-social activity - unemployment: **at [22]-[23]**
- Evidence of extreme deprivation, substance abuse and violence within community relevant and essential to understanding and assessing moral culpability of offender:

[25] The level of substance abuse and violence coupled with the lack of opportunity gives rise to a sense of hopelessness and disempowerment amongst some members of the local

community that cannot be ignored when assessing the moral culpability in the individual's case. This offender's history of deprivation and exposure to alcohol abuse, violence and the lack of opportunity to thrive in such an environment is intrinsically connected to his current predicament. ...

[40] The uncontested evidence before me is that the community from which the offender comes and in which he has been raised has experienced an appalling degree of deprivation over a long period of time. This offender is a product of that community and it is therefore necessary for me to assess his moral culpability, bearing in mind the particular socio-economic factors that exist in his community that have inevitably had an impact upon him. Failure to do so would be a failure to fulfil the principle of individualised justice. ...

...

[49] Prolonged and widespread social disadvantage has produced a community so demoralised and alienated that many within it, like this offender, have succumbed to alcohol abuse, criminal misconduct and a sense of hopelessness. That background of disadvantage and of deprivation may impact upon the individual so deeply and so broadly that it serves to shed light on matters such as, for example, the offender's recidivism.

...

[52] This offender has grown up with alcohol abuse being a normal part of his home life and also a devastating and entrenched problem in his peer group and his community. He committed these offences whilst affected by alcohol. The offender's self-induced intoxication is not normally to be taken into account as a mitigating factor. However, the evidence before me demonstrates that he has experienced a deprived upbringing, including exposure to significant alcohol abuse and domestic violence resulting in a dysfunctional family environment and a significant degree of disadvantage. I am satisfied that his background of deprivation operates to reduce his moral culpability and thereby mitigate the sentence.

### **Relationship between Bugmy Principles and s 21A(5AA) Crimes (Sentencing Procedure) Act**

At common law intoxication and substance addition could be relevant as a mitigating factor where the origin or extent of the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, including where it commenced at a very young age. See:

[\*R v Henry\* \(1999\) 46 NSWLR 346; \(1999\) 106 A Crim R 149; \[1999\] NSWCCA 111 at \[273\]](#) (Wood CJ at CL)

[\*SS v R, JC v R\* \[2009\] NSWCCA 114 at \[101\]-\[104\]](#) (Price J, Tobias JA and James J agreeing).

Any reliance upon self-induced intoxication at the time of the offence as a mitigating factor is now prohibited by **s 21A(5AA) Crimes (Sentencing Procedure) Act** which commenced on 31 January 2014:

(5AA) Special rule for self-induced intoxication

In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

(5B) Subsections (5A) and (5AA) have effect despite any Act or rule of law to the contrary.

In the following cases a distinction is made between using the offender's intoxication to mitigate the circumstances of the offence, and taking into account generally an offender's early exposure to substance abuse and subsequent intoxication and addiction according to the *Bugmy* principles.

**[Kelly v R \[2016\] NSWCCA 246](#)** (Rothman J, Hoeben CL at CL and RA Hulme J agreeing)

*Multiple offences of violence including wounding with intent to cause grievous bodily harm - rejected Crown submission that s.21A(5AA) had abolished Bugmy and Fernando considerations*

[50] The effect of *Fernando* and of *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced". In that way, the intoxication fits the description to which McClellan CJ at CL referred in *Bourke*.

...

[54] Most importantly, the learned sentencing judge took into account his finding that the applicant had used drugs of various kinds since he was 13 years of age and has been on and off a methadone programme for his heroin/morphine addiction since 2003. At the age of 13 years, the applicant was not at an age of "rational choice" that would give rise to the full responsibility for the moral culpability and the predictable consequences of a choice to become addicted: see *Bourke*, supra at [28], citing *Henry* [1999] NSWCCA 111; (1999) 46 NSWLR 346 at [185].

**[R v Coats \[2020\] NSWSC 1236](#)** (Campbell J)

*Inflict GBH with intent – intoxicated at time of offence –s.21A(5AA) abrogates common law in relation to intoxication where drug use commenced at early age – still relevant under Bugmy principles*

[31] I am of the view that s 21A(5AA) must be taken to apply for all purposes so that the exception to the common law rule that intoxication was not a mitigating circumstances in respect of persons who acquired their addiction in their youth has been abrogated. At the same time, I am of the view that Mr Wilson's alternative argument ought to be accepted and to the extent to which *Bugmy* considerations ameliorate and reduce what might otherwise be the moral culpability associated with this offending, it is relevant to bear in mind that Mr Coats's substance abuse disorder commenced between the ages of 13 and 15. However, accepting that by his mid-thirties he was no doubt in the grip of it, it was not until then that he started using ice.

[32] None of this means that intoxication is a justification for Mr Coats's offending. But the matters I have referred to in relation to his upbringing, his disadvantage and the dysfunctionality of his youth do reduce to some extent his moral culpability for this offending including the consideration that it was committed while he was under the effect of intoxicating illicit drugs which addiction he acquired as an aspect of his childhood deprivation.

**[R v Russell \(No.3\) \[2018\] NSWSC 1673](#)** (Rothman J)

*Murder - consideration of relationship between s.21A(5AA) and Bugmy principles –raises question of what constitutes 'voluntary' / self-induced' intoxication*

[36] Here, where the offender first consumed alcohol, in relatively large quantities, at the age of five, well prior to the age of criminal responsibility or an age of rational decision-making, and was, probably by the time of criminal responsibility and certainly by the time of majority, an alcoholic or an addict in the consumption of alcohol, the notion of "voluntary" consumption of alcohol takes on a wholly different complexion.

[37] More importantly, when dealing with the *Bugmy* factors, one is not making allowance or mitigating for “intoxication”. The factors relate to a deprived environment of which alcohol forms part. It is the moral culpability associated with that environment for which allowance is made; not intoxication, and the state of inebriation of the offender at the precise time of the commission is not the most relevant aspect of that issue.

[38] It is probably unnecessary to resolve finally the foregoing issue, about which, no doubt, there may be different views. The reason it is unnecessary to determine the issue finally is that, as the Crown points out in its most helpful Supplementary Submissions, whether or not one can take into account intoxication as a mitigating factor, when it is a reflection of the environment in which the offender was raised “it does not impact upon the relevance of the offender’s deprived background” as a factor in sentencing. ...

[39] In the current circumstances, it would be impossible, given the expert evidence, to deal with culpability and the degree of deliberation in the offender’s conduct, without considering the effect of alcohol on the offender.

...

[78] Nevertheless, the state of intoxication of the offender is a matter that tells significantly on the culpability of the offender and his background brings into play the principles embodied in the issues that relate to an environment of abuse and social exclusion which have affected Mr Russell’s executive decision-making and render him far less a person who stands as a good example for the purposes of general deterrence.

### **[R v May \(No.2\) \[2016\] NSWSC 1070](#)** (Wilson J)

*Murder - extreme drug induced intoxication at time of offending not mitigating factor – evidence of offender’s early exposure to violence and substance abuse resulting in drug addiction relevant generally to moral culpability*

[102] Mr May’s drug addicted past, born of the despair and hopelessness of the communities in which he was raised, remains a feature of his overall subjective case. However, in conformity with s 21A(5AA) I have not had regard to the offender’s state of self-induced intoxication as a mitigating feature in assessing sentence.

[103] An offender’s history of early exposure to violence and drug use, and consequent drug addiction, can be relevant to the question of an offender’s moral culpability and capacity to regulate his emotions and conduct: *Bugmy*, at [43] – [44]. I have had regard to the offender’s drug addiction in that way, and as relevant to his future prospects.

### **[R v Johnson \[2015\] NSWSC 31](#)** (Hamill J)

*Murder - distinction between using evidence of childhood exposure to alcohol and violence in assessment of seriousness of offence and in assessment of moral culpability*

[79] In accordance with s 21A(5AA), I make it clear that I have not taken into account as a mitigating feature the self-induced intoxication of the offender at the time of the offence. However, in conformity with the High Court’s judgments in *Bugmy* and *Munda*, I have taken into account the fact that the offender’s early exposure to both domestic violence and drug and alcohol abuse reduce his moral culpability and capacity to control his emotions.

### **[R v Hines \(No.3\) \[2014\] NSWSC 1273](#)** (Hamill J)

*Murder – intoxication not mitigating factor – history of exposure to alcohol and violence justified general reduction in moral culpability*

[65] In making those remarks I record that I am conscious of, and have applied, the provision in s 21A(5AA) of the *Crimes (Sentencing Procedure) Act*. I have not taken into account Mr Hines’ self-induced intoxication as a mitigating feature. However, his history of deprivation and exposure to

alcohol and violence are so intrinsically connected to his current predicament that his moral culpability is diminished. These matters are relevant to a proper assessment of an appropriate and just sentence in accordance with what has fallen from the High Court in both *Bugmy* and *Munda v Western Australia*.