

Out-of-Home Care

Case Summaries

Higgins [2020] NSWCCA 169 (Wilson J, Johnson and Wright JJ agreeing)

Appeal against sentence for possess prohibited weapon, escape and affray – example of childhood which included removal to foster care and multiple placements – Bugmy principles applied at first instance

- Removed from care of parents by extended family when aged 3-4 years – at 9 years placed into foster care due to behaviour - multiple placements probably connected to behavioural difficulties – separation from family and feeling of being unwanted – impact on education – early substance abuse – low intelligence – supported himself through welfare and crime: **at [35]-[46]**
- Bugmy principles given due consideration and applied to reduce moral culpability: **at [57], [61], [84]**

Hardees [2020] NSWDC 191 (O'Brien AM DCJ)

Multiple offences of violence and a supply prohibited drug – link between incarceration of mother, trauma during foster care and subsequent mental health – Bugmy principles applied

- Mother jailed when offender 4 years old resulting in placement in foster care until 15 years – separated from siblings - physical and sexual abuse – multiple placements – compromised education – limited employment: **at [44]**
- Diagnosed with schizophrenia at 15 years – in opinion of psychologist offender predisposed to developing schizophrenia due to genetic vulnerabilities and early environmental stressors including domestic violence and sexual abuse – exacerbated by substance abuse, isolation and incarceration: **at [48]**
- Mental health and socially impoverished, disadvantaged and deprived background impacted assessment of moral culpability: **at [49]**

O'Connor v R [2017] NSWCCA 311 (Fullerton J, Leeming JA and Adamson J agreeing))

Robbery while armed with a dangerous weapon – example of childhood that included neglect and lack of supervision resulting in out of home care- Bugmy principles applied – balanced with personal deterrence and community protection

- Background of impoverishment, neglect and physical abuse – inadequate housing with father – removed into state care – early substance abuse – frequent encounters with criminal

justice system – reinstated to mother’s care but her chronic alcoholism and lack of parental supervision resulted in juvenile detention, youth refuge and foster care: at [33]-[34]

- Bugmy principles applied generally at first instance – balanced with personal deterrence and community protection: at [35]

WAP v R [2017] NSWCCA 212 (Johnson J, Beech-Jones and Fagan JJ agreeing)

Old sexual offences – offender sexually abused in foster care – relevant to moral culpability

- Deprived childhood exposed to violence and alcohol abuse by parents – due to uncontrollable behaviour placed in foster care and boys’ homes - sexual abuse while in care reported but ignored – early drug abuse and criminal offending: at [45]
- Bugmy principles applied generally at first instance to reduce moral culpability: at [47]

R v Zanker (No.2) [2017] NSWSC 1254 (Fagan J)

Accessory before the fact to murder – unstable childhood including frequent moves under foster care – impact on education, social development and behaviour – reduced moral culpability

- Sentencing judge accepted offender’s ‘early years were extremely unsettled, chaotic, disruptive and adverse’ – born to 16 year old mother who abused drugs and alcohol during pregnancy - lived with mother until 8 years old moving around the State – physically assaulted by step-father – Ward of State for 6 years moving around towns and foster carers – lived 3 years with Aunt then refuges: at [51]-[54]

[55] These circumstances denied the offender any chance of learning or developing socially or mentally at school. Unsurprisingly this resulted in behavioural problems... (mental health issues and drug abuse)

- Background taken into account as mitigating factor on sentence:

[57] I take into account as relevant to the severity of the sentence I should impose his very disadvantaged background from birth. This appears to have led him into a criminal milieu and limited his exposure to moral guidance and example. I regard his moral culpability as to some extent reduced by this consideration. It also supports my view that he has reasonable prospects of rehabilitation.

R v Birch [2016] NSWSC 816 (Rothman J)

Murder of female partner in spontaneous assault – history of foster care, institutions and homelessness as a teenager

- Offender’s difficult childhood detailed in psychologist report – abuse and violence – environment of alcohol abuse – deprivation from infancy – care provided by mother, grandmother, foster carers and institutions – homeless as a teenager – lived as victim in refuges – impact on education and subsequent employment – abuse of drugs and alcohol to block out early trauma – fits Bugmy / Fernando criteria: at [21]-[24]

- Dysfunctional childhood fundamental to assessing combination of objective and subjective features – person with dysfunctional childhood does not bear equal moral responsibility: at [30]-[32]
- Quoted Millwood [2012] NSWCCA 2 at [69]

Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions ... That his background is a relevant consideration affording some (although limited) mitigation is entirely consistent with the approach taken by Wood J (as he then was) in R v Fernando (1992) 76 A Crim R 58, a decision which has repeatedly been followed in this Court.

Johan v R [2015] NSWCCA 58 (Schmidt J, Hoeben CJ at CL agreeing, Simpson J dissenting)

Serious violence and firearms offences – childhood of extreme abuse and neglect resulting in early removal and out of home care – difficult sentencing exercise – balancing mitigating factors with seriousness of offences

- Description of background of young Aboriginal offender revealed extreme neglect resulting in removal from mother's care at 2 years - exposure to itinerant lifestyle, adult sexual activity, substance abuse, violence and erratic parenting – numerous foster placements - abuse – lived on streets, with friends and with mother since 14 years – associated with criminals since 7 years – disrupted education - received award under Victim's Compensation and Rehabilitation Act for physical abuse inflicted by mother and partner - early substance abuse: at [69]-[83]; [88]
- Consequences of early mistreatment included behavioural problems, increased aggression, delinquency and criminality through teenage years – PTSD: at [84]-[85]
- Difficult sentencing exercise - childhood and youth relevant to mitigation of moral culpability, deterrence and retribution – balanced with gravity of offences and other sentencing principles: at [107]-[108] (see also Simpson J at [14]-[15])

R v YS [2014] NSWCCA 226 (Fullerton J, Gleeson JA and McCallum J agreeing)

Multiple offences including aggravated sexual assault – risk factors of re-offending related to childhood deprivation – included unsuccessful and unsuitable foster care placements and placements with family members and exposure to poor role models – balancing reduction in moral culpability with community protection

- Young offender with aboriginal heritage – exposed to substance abuse and family violence - removed from parents at early age due to abuse and neglect – unstable childhood with multiple placements in foster care, with different family members, juvenile detention centre and children's refuge – returned to live with mother for short period until her incarceration - moved to live with father – interrupted schooling - two brothers serving periods of imprisonment for armed robbery, reportedly related to their alcoholism – offender reported many of those who support him have history of engaging in antisocial and/or criminal activities at [34]-[40]

- Background of violence and substance abuse, neglect, poor role models and disrupted education identified as risk factors to future offending – required balancing of community protection with reduction in moral culpability: **at [52], [103]-[107]**
- 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 Loveridge; R v AB [2013] NSWSC 1591 (Hamill J)

Violent murder – effect of background of extreme deprivation including physical abuse, neglect and multiple foster care placements– mitigation of seriousness of offence balanced with protection of community

- Loveridge’s background included gross neglect from an early age – forced to shop and care for siblings at age 6 years until placed in foster care – evidence of serious mental health problems and problematical behaviour by age 7 years – by age 16 years anger management problems, poor impulse control and anti-social behavioural issues including criminal activities - living in unauthorised and inappropriate placements or on the street – poly-substance abuse: **at [36]-[40]**
- Relationship of background to moral culpability taken into account

[43] Taking all this material together, it is, I think, appropriate to deal with Loveridge on the basis that, as a result of circumstances beyond his control, his insight into the true moral character of his actions and his ability to exercise judgment about them was significantly less than that of a young person of his age who had grown up in a healthy and supportive

familial situation. To these problems must be added the immaturity which is the natural concomitant of his age. Though on one level he was well capable of glib, indeed cunning denials and creative lies, yet they were exposed with relative ease. Nevertheless, I have no doubt that Loveridge well, if incompletely, appreciated the moral and criminal culpability of his actions although I rather think that his callousness was significantly contributed to, if not entirely caused by, the warped moral world that shaped his upbringing.

- AB removed from parents at 12 months of age due to neglect, physical abuse, exposure to heroin abuse and domestic violence – multiple placements with extended family and foster carers – standard of care ‘uneven’ – resisted appropriate boundaries – continued exposure to violence at instance of mother - transient accommodation – family and extended family all have criminal records – limited schooling – early substance abuse – pre-sentence report suggests developed belief ‘violence is a normal part of life’ – poor insight: **at [44]-[50]**
- While deprived backgrounds to be given full weight on sentence must be balanced with protection of community in view of demonstrated inability to control violent impulse – dangerous individuals: **at [55]-[56]**