Cultural Dispossession

Case Summaries

***Hoskins* [2021] NSWCCA 169** (Brereton JA, Basten JA and Beech-Jones J agreeing)

Violence offences – no need to find profound deprivation – causative link not required – impact of change from stable to unstable family environment and exposure to criminal milieu and alcohol use during formative adolescent period – continued dislocation exhibited in Indigenous communities resulting from foreign invasion, disruption of culture and minority racial status.

- Indigenous offender raised by aunt in stable environment until returned to biological mother's care at 13y – unaware aunt was not real mother and no understanding why not raised by biological parents – struggled with feelings of abandonment – life became destabilised and chaotic in permissive environment under mother – biological family relationships characterised by violence, exposure to alcohol and criminal conduct normalised
- Not necessary to characterise an offender's childhood as one of "profound deprivation" before *Bugmy* principles apply: **at [57]**
- Causative link not required citing *Dungay* [2020] NSWCCA 209: **at [57]-[58]**
- *Bugmy* principles apply here especially in view of exposure to criminal milieu during formative adolescence period – exacerbated by momentous discovery in relation to his biological parents and subsequent identity issues and introduction to use of alcohol – sentencing judge erred in finding no evidence supporting application of *Bugmy* considerations : **at [61]-[64]**

Per Basten JA, agreeing

> [1] I agree with Brereton JA that the sentencing judge, in an otherwise thorough and careful judgment, failed to apply the principles articulated by the High Court in *Bugmy v The Queen*. Although those principles can apply generally to offenders brought up in circumstances of social disadvantage, they have particular application and are commonly invoked in relation to members of Indigenous communities. That is because, as has been documented by numerous inquiries and research studies, those communities continue to exhibit the dislocation resulting from foreign invasion, disruption of culture and minority racial status.[2] However, they are also the principal victims of alcohol driven violence of the kind exhibited by the applicant, Douglas Hoskins. To downplay the principle of protection of the community, identified as a purpose of sentencing in s 3A(c) of the Crimes (Sentencing Procedure) Act 1999 (NSW), is to diminish both the appearance and perhaps the fact of equal protection of those Indigenous communities. On the other hand, it must be recognised that incarceration has not proved an effective deterrent of anti-social behaviour in these circumstances; its deterrent effect being compromised by lack of insight which is itself a common feature of the circumstances which lessen moral culpability.
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> [2] These conflicting considerations place a sentencing judge in a difficult position; their acknowledgement provides little practical assistance in determining an appropriate sentence. The solution to the social problems does not lie in the criminal courts, whose best course may be to err on the side of leniency.
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> > [2] See, eg, *Kentwell v R (No 2)* [2015] NSWCCA 96 at [89]-[92] (Rothman J; McCallum J agreeing) referring to *R v Lewis* [2014] NSWSC 1127 at [37]-[38] (Rothman J); *Royal Commission into Aboriginal Deaths in Custody, National Report* Volume 1 (AGPS, 1991) at Chs 1.4-1.5

***Walker, Dargan* [2019] VSCA 137** (Whelan, Kyrou and Kaye JJA)

Armed robbery – racism and violence at hands of father – background and confusion as to Koori heritage relevant to assessment of culpability – steps taken to reconnect with heritage regarded as noteworthy on re-sentence

- Mother of offender (Dargen) a Yorta Yorta woman removed from parents and adopted by non-Aboriginal family – father of Irish descent, overtly racist and did not respect Aboriginality of wife or children – father also subjected family to severe physical and emotional violence: **at [30]**
- Accepted offender's background, including confusion concerning Koori identity, relevant to assessment of culpability for offence:

> [74] While the judge was not satisfied that Dargan's bipolar disorder was causally connected with his offending in this case, nevertheless his Honour correctly accepted that the principles, stated by the High Court in *Bugmy*, were relevant to the evaluation of Dargan's subjective culpability for the offending in the case. As mentioned, Dargan's traumatic and turbulent upbringing, and his confusion concerning his Koori identity arising from the overt racism of his father, were directly relevant to a proper assessment of his subjective culpability for the offending in the present case. In essence, the offending was not committed by a person who had had the advantage of a stable and secure upbringing guided by proper parenting. Dargan's attitudes to society, and his anti-social conduct, were necessarily the product of the manner in which he had been raised in his formative years. While those considerations do not excuse his offending, nevertheless, as the judge correctly acknowledged, they were relevant to a fair evaluation of Dargan's moral culpability. Necessarily, Dargan's culpability was at a lower level than if he had had the advantage of a proper and stable upbringing, without being subjected to the dysfunction and violence that he had suffered during his formative years.

- On re-sentence regarded as noteworthy that the offender had 'taken sensible steps to reconnect with his Yorta heritage, and to engage with it, as a pathway to reformation and rehabilitation into the community': **at [95]**

***Grose* [2014] SASCFC 42 (2014) 240 A Crim R 409** (Gray J, Sulan and Nicholson JJ agreeing)

Criminal trespass and dishonesty offences – validity and purpose of Aboriginal Sentencing Conferences - importance of identifying and exploring impact of offender's background – findings and recommendations of Royal Commission and other studies

- Sentencing judge declined to order Aboriginal sentencing conference under s.9C (SA) *Criminal Law (Sentencing) Act* 1988 – on appeal Court found refusal an error in exercise of sentencing discretion and sentence manifestly excessive – matter remitted for sentencing conference
- In considering validity and purpose of sentencing conference Gray J referred to importance of using conference to identify and understand risk factors associated with criminal offending – referred to findings of Royal Commission into Aboriginal Deaths in Custody and other studies which showed such factors more prevalent in Aboriginal populations – importance of Courts being alert to possible relevance of factors including childhood separation from families, social marginalisation, intergenerational cycle of abuse and violence, lack of

education and unemployment, poor health and alcohol abuse in relation to Aboriginal offenders and cultural dispossession: **at [41]-[51]**

> [49] There remains a high level of incarceration of Aboriginal people. In the 20 years following the Royal Commission report, the proportion of Aboriginal prisoners has almost doubled. As at 30 June 2013, there were 8,430 prisoners who identified as Aboriginal and Torres Strait Islander, representing just over one quarter, 27%, of the total prisoner population of 30,775[47]. It has been noted by the Indigenous Justice Clearinghouse that:[48]
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> > … Indigenous offenders are particularly over-represented in acts intended to cause injury, public order offences, offences against justice and unlawful entry … Indigenous offenders are younger than non-Indigenous offenders, have their first contact with the justice system at a younger age, and are more likely to be repeat offenders. High risk alcohol consumption is a significant risk factor, as is socioeconomic disadvantage. Risk factors around dispossession, colonisation and child removal are more difficult to measure, but are thought to have contributed to social disorganisation and an intergenerational cycle of violence …
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> [50] The overrepresentation of Aboriginal people in prison demonstrates an ongoing need for the criminal justice system to be alert to the factors that create a risk of offending. In 1997, the Human Rights and Equal Opportunity Commission[49] in its National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report found that "[a]n entrenched pattern of disadvantage and dispossession continues to wreak havoc and destruction in Indigenous families and communities."[50] It noted the ongoing relevance of the removal of Aboriginal people from their family:[51]
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> > Social justice measures taken by governments should have special regard to the inter-generational effects of past removals. Parenting skills and confidence, the capacity to convey Indigenous culture to children, parental mental health and the capacity to deal with institutions such as schools, police, health departments and welfare departments have all been damaged by earlier policies of removal.
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> > Unless these conditions are altered and living conditions improved, social and familial disruption will continue. Child welfare and juvenile justice law, policy and practice must recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.
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> [51] More contemporary evidence also demonstrates that the risk factors which the Royal Commission identified as contributing to interaction with the legal system, such as poor health, limited education and unemployment, continue to be statistically more prevalent in Aboriginal communities.[52] It has been suggested that the risk factors for offending by Aboriginal people are largely similar to those for the wider population, but that the higher incidence of such factors may explain higher rates of offending.
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> Further, there exist risk factors specific to Aboriginal people, including forced removal, which have an intergenerational effect.[53] It has been suggested that:[54]
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> > … Policies of child removal and institutionalisation have severely damaged the parenting capacity of many Indigenous people. Many parents are further incapacitated by their poor health, substance abuse and by imprisonment. Poor parenting is a very significant risk factor for offending …
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> > Of great concern is the identification of an intergenerational cycle of abuse and violence. Indigenous children frequently witness or experience violence, which is normalised and increases the risk that they themselves will use violence …
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> [49] Now known as the Australian Human Rights Commission.
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> [50] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Brining Them Home Report* (April 1997) 559.
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> [51] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report* (April 1997) 557.

> [52] See for example the findings of the Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (25 August 2011) Australian Government Productivity Commission http://www.pc.gov.au/__data/assets/pdf_file/0018/111609 /key-indicators-2011-report.pdf
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> [53] Dr Troy Allard, *Understanding and preventing Indigenous offending: Brief 9* (December 2010) Indigenous Justice Clearinghouse http://www.indigenousjustice.gov.au/briefs/brief009.pdf
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***Fuller-Cust* [2002] VSCA 168; (2002) 6 VR 496** (Batt JA, O'Brien AJA, Eames JA in dissent on final sentence)

Serious sexual offences with history of similar offences – impact of childhood removal from parents and out of home care on Aboriginal offender considered by Eames JA in dissent

- Aboriginal offender and his sister removed from parents and made wards of state at early age – natural parents refused access - placed into foster care with non-aboriginal family – strained relationship with foster mother – sexually abused – failed attempt to reunite with natural mother – placed in institutional care: at **[94]-[104]**
- Appeal against lengthy sentence allowed in view of error made in relation to rule of accumulation
- On re-sentence Batt JA and O'Bryan AJA both acknowledged offender's dysfunctional and disadvantaged childhood but found it carried little mitigating weight in view of nature and gravity of offences and offender's criminal history: **at [60]; [154]-[155]**
- Dissenting as to the appropriate length of re-sentence Eames JA discussed at length the relevance of the offender's Aboriginality, experience of childhood separation from his parents and subsequent foster care with his offending : **at [74]-[92]**

> [92] When regard is had to the welfare and other expert reports which were tendered before the learned sentencing judge it emerges very clearly that far from his Aboriginality being an irrelevance to the circumstances in which the offending conduct occurred, it is pivotal. Indeed, the history of the applicant has remarkable similarities to many of the cases reported upon by the Royal Commission into Aboriginal Deaths in Custody. The impact of a person being separated from family, endeavouring to regain contacts with that family, being rebuffed in those efforts, and thereupon suffering anxiety about being denied the opportunity to fully embrace his or her Aboriginality, was often addressed in individual reports and in the findings of the final report of the Royal Commission. The Commissioners recognised the impact of a person, in those circumstances, being socialised not into the family and kin network which would otherwise be the experience of an Aboriginal person living in urban circumstances but being socialised, instead, by the need to survive in institutional communities, including juvenile detention facilities and homes.[36] That is not to say that in all cases of such separation the impact on the child in later years must have been adverse: that possibility, however, needs to be recognised.[37]
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> > [36] See for example the report by J.H. Wootton Q.C., (formerly Wootton, J. of the Supreme Court of New South Wales): "Report of the Inquiry into the Death of Malcolm Charles Smith", 11 April 1989, at p.4ff.
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> > [37] In *Cubillo*, supra, at 115, O'Loughlin, J., when discussing the breadth of usage of the term "Stolen Generation", said that the mere fact that a child of part-Aboriginal ancestry was placed in an institution would not justify identification of that person as a member of the "Stolen Generation", it being necessary to go further and in each case to examine why the child was institutionalised, and whether it was necessary for that to have occurred in the interests of the child. His Honour's comments were made in the context of a claim of breach

> of duty of care by the State. The adverse impact of separation of Aboriginal children, for whatever reason, has been long recognised, the first academic writing on the topic being at least as early as 1951, by Professor R.M.Berndt (see P.Read, "Bibliographical Review of the Literature of the Stolen Generations", Vol 3, No.73, *Aboriginal Law Bulletin* (1995), at 22).

- Eames JA further considered findings of the Royal Commission into Aboriginal Deaths in Custody in relation to the offender's history of out of home care: **at [137]-[140]**

> [137] The Royal Commission into Aboriginal Deaths in Custody, in the National Report of the Commissioners, identified the over-representation of Aboriginal people in prisons and the underlying factors which led to such deaths in custody. The Commissioners identified one factor being the impact on Aboriginal people who had been separated from their natural families at an early age and placed under the control of welfare institutions and/or being adopted out. Of the 99 deaths in custody investigated by the Royal Commission, 43 of those who died experienced childhood separation from their natural families, through intervention by State authorities or by missions or other institutions[41]
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> [138] The Royal Commissioners acknowledged that many non-Aboriginal people who participated in the removal of children from their parents in such circumstances did so for the best of motives, and that in some cases opportunities were offered to the children concerned which might otherwise not have been obtained. The Commissioners noted, however, that for most the consequences were negative. The Commissioners observed:
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> > "The consequence of this history is the partial destruction of Aboriginal culture and a large part of the Aboriginal population, and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non-Aboriginal people. The other consequence is the considerable degree of breakdown of many Aboriginal communities and a consequence of that and of many other factors, the losing of their way by many Aboriginal people and with it the resort to excessive drinking, and with that violence and other evidence of the breakdown of society. As this report shows, this legacy of history goes far to explain the over-representation of Aboriginal people in custody, and thereby the death of some of them."[42]
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> The Commissioners noted that for Aboriginal people, this history "is burned into their consciousness".[43]
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> [139] The significance of the work of the Royal Commission and the potential relevance of its findings to cases involving Aboriginal offenders who had experienced separation from their natural families has been well recognised,[44] and the potential for there to be a connection between that experience and later offending behaviour should not be underestimated.[45]
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> [140] The report of the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families*, which was delivered by the President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, in April 1997, investigated the separation of Aboriginal children from their families "by compulsion, duress or undue influence". The report therefore distinguished what it called "forcible removal" from removals "which were truly voluntary, at least on the part of parents who relinquished their children, or where the child was orphaned and there was no alternative indigenous carer to step in."[46] The report, however, made clear that the term of reference was treated as including not merely children who were "removed" from their parents but also those who experienced "separation from their families".[47] The authors of the report noted[48] the results of the National Aboriginal and Torres Strait Islander Survey of 1994, conducted by the Australian Bureau of Statistics,[49] which reported that Aboriginal people surveyed who had been taken away from their natural families as children were twice as likely to have been arrested on more than one occasion than were Aboriginal people who did not have that background.
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> > [41] *Royal Commission into Aboriginal Deaths and Custody, National Report*, Vol. 1 par. 1.2.17, p.5, April 1991.
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> > [42] Paragraph 1.4.19.
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> > [43] Paragraph 1.4.2.

[44] The report of the Royal Commission was described by criminologist Professor Richard Harding as being "a unique inquiry, unparalleled in any other part of the world" which he said "served to raise public consciousness as to distinctive areas of Aboriginal disadvantage and paved the way for such ground-breaking work as the enquiry into the removal of Aboriginal children from their natural parents", See "Prisons are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody", R.W. Harding, *Aust & N.Z. Journal of Criminology*, Vol 32, No 2 (1999) 108, at 119.

[45] In the National Aboriginal and Torres Strait Islander Survey, conducted by the Australian Bureau of Statistics in response to a recommendation of the Royal Commission, more than 10% of Aboriginal persons aged 25 years and over reported being taken away from their natural family by a mission, the government or "welfare": see National Aboriginal and Torres Strait Islander Survey, 1994, Australian Bureau of Statistics, at page 2.

[46] "Bringing Them Home", Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Wilson, et al, Human Rights and Equal Opportunity Commission (1997), p.5.

[47] Ibid, p. 11.

[48] Bringing Them Home Report at p.15.

[49] National Aboriginal and Torres Strait Islander Survey 1994, at p.58, Detailed Findings, Australian Bureau of Statistics, 1995a, ABS Catalogue No. 4190.0, Canberra. (Where only a single arrest had occurred there was no significant reported difference by reference to childhood separation experience).

***Churchill* [2000] WASCA 230** (Kennedy AJA, Anderson and Wheeler JJ agreeing)

Manslaughter – Crown appeal – indigenous offender with chaotic and violent background – impact of shared dislocation of Aboriginal community from pastoral station

- Offender sentenced to short custodial sentence for killing of male partner – abusive and violent relationship
- Psychologist report described deprived childhood - exposed to family violence and alcohol abuse – grew up amongst chaotic and violent people – absence of parental responsibility – committed drinker since aged 16 years – a life 'typical of the extreme of the heavy drinking sub-culture, which is characterised by sordid and violent relationships': **at [12]-[17]**
- Forced departure of family from pastoral station home occurred when offender too young to recall, but meant she 'shared in the dislocation of her people, and she has grown up in the midst of the turmoil which resulted from it and from which they have never recovered': **at [13]**
- Crown appeal dismissed – applied principles in sentencing Aboriginal offenders as set out in by Brennan J in *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at 326 and Wood J in *R v Fernando* (1992) 76 A Crim R 58

***Harradine* (1992) 61 A Crim R 201 SACCA** (White J and Mullighan JJ, Prior J dissenting)

Assault and rape of former female partner – cultural dislocation - difficulties experienced by an Aboriginal person raised on reserve adjusting to city life – substance addictions – mitigating factor on sentence

- Aboriginal male moved from Aboriginal reserve community to urban environment at 16 years of age – introduced to substance abuse by victim - after suicide of victim's brother experienced trauma, deteriorating relationship with victim and increased substance use – history of assaults against victim
- Appeal allowed to reduce sentence for assault only and impose new non parole period
- Mullighan J referred to mitigating factors in offender's background including major challenges faced in moving from Aboriginal community life to urban environment: **at 209-210**

> (The offences) were committed against the background of problems encountered by him in adjusting to city life as an Aboriginal boy from the relative security of Aboriginal community life. True it is that he had been living in the city for five years or so, but it should not be assumed that the problems which he initially encountered had been resolved. It is not easy to fully appreciate the plight of Aboriginal persons, such as the appellant, who find themselves in city life with all of its temptations and distractions at a young age without the discipline previously experienced in mission and family life. Of course the same sentencing principles must apply to all sections of the community: *Neal* (1982) 149 CLR 305 at 324; 7 A Crim R 129 at 143, per Brennan J. Nevertheless, the courts have acknowledged that special problems experienced by Aborigines living on reserves and of tribal Aborigines must be considered when imposing penalty: see *Neal's* case; *Friday* (1984) 14 A Crim R 471 and *Houghagen v Charra* (1989) 50 SASR 419, per Bollen J at 422. The courts have done no more than acknowledge the sentencing principle that the circumstances of the offender, whatever they may be, must be brought into consideration. Relevant considerations due to an offender being an Aboriginal living in an urban environment must also be considered. The appellant experienced considerable problems after he moved to the city. His relationship with the victim commenced soon after. He committed the assault and the rapes against the background of his relationship with her and the effects it had upon him. Whilst the severity of the assault cannot be excused by any of these matters, they do provide an explanation for his conduct.

- White J also accepted the impact of transition to city life as a mitigating factor relevant to the setting of the non-parole period on re-sentence: at **pp.205, 208**

***Neal v R* [1982] HCA 55, (1982) 149 CLR 305** (Murphy J and Brennan J in separate judgements, Gibbs CJ and Wilson J allowing appeal on procedural basis)

Appeal against sentence of imprisonment for unlawful assault – appeal allowed on basis of procedural unfairness – comments made by Murphy J and Brennan J as to relevance of 'race relations' as mitigating factor

- Aboriginal Chairman of the Council at an Aboriginal Community Reserve in North Queensland sentenced to imprisonment for spitting at the white manager of the shop on the Reserve – on appeal by offender Court of Appeal increased sentence - appeal to High Court allowed on basis of failure to give appellant opportunity to withdraw appeal before increasing sentence
- In an obiter judgment Murphy J referred to the case as a 'race relations case' and described the offender's 'deep sense of grievance at the paternalistic treatment of white authorities' on the reserve as well as referring to the offender's sense of powerlessness and exclusion: **at pp.315-319**
- In a separate obiter judgment Brennan J concluded the 'emotional stress' resulting from the 'paternalistic system of life on the reserve' should have at least been considered as a possible mitigating factor: **at pp.324-5**