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)

***BS-X* [2021] ACTSC 160** (Loukas-Karlsson J)

Motor vehicle and burglary offences – juvenile Aboriginal offender with severe childhood trauma – individual report supported by references to Bugmy Bar Book chapters and Significance of Culture to Wellbeing, Healing and Rehabilitation Report – application of Bugmy principles

- Psychological report described 15y old Wiradjuri man with complex developmental trauma – born to drug addicted 15y mother and removed into non-indigenous foster care at 12 months – exposed to mother's drug use throughout life – experienced younger brother's removal from mother's care and placement with different carer due to mother's drug use – early substance abuse – difficult schooling period – disconnection with cultural identity - multiple significant losses and grief – externalised grief, loss and anger through maladaptive techniques - profound trauma resulting in mental health and behavioural issues
- Psychological report supported by references to multiple **Bugmy Bar Book** chapters: **at [56], [58], [62], [63]**
- Further reference to **Significance of Culture to Wellbeing, Healing and Rehabilitation Report** with emphasis on importance of culturally appropriate treatment to facilitate rehabilitation – importance of individual rehabilitation to both individual and community protection: **at [81]-[85]**
- Reference to comment in ***Hoskins*** **[2021] NSWCCA 165** that childhood deprivation does not need to be profound **at [81]-[85]**
- Application of *Bugmy* principles

***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.
>
> [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.
>
> > [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

***Turnbull* [2020] NSWSC 1785** (Hamill J)

Murder – tragic and shocking background – causal connection to drug use and offending - failure of system

- 'History of trauma, dispossession, abandonment and deprivation explains how it is that Ms Turnbull comes to be where she is today': **at [27]** – no father figure and little parental support throughout life – mother drank heavily and often left children to fend for themselves – exposed to violence and sexual abuse – homelessness and early drug abuse – first child at 14

years – significant impact of loss of second child during pregnancy at 24 weeks – adult life marred by domestic violence – post traumatic stress disorder: **at [27]-[45]**

- Extraordinary history of abuse and trauma taken into account as causally connected to drug abuse and offending: **at [38]**
- Referred to failure of system:

> [45] … There appears to have been a failure in the system to intervene at critical stages of Ms Turnbull's life. Ms Turnbull is an abandoned and vulnerable Aboriginal offender who has appeared in the lower courts on many occasions. It is difficult to escape the conclusion that intensive and culturally appropriate intervention and supervision, of the kind that a focussed and dedicated court would have provided, may have assisted the offender during her most difficult times and broken the cycle of violence, abuse and offending.

***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

***Pennington* [2015] SASCFC 98** (Gray and Sulan JJ)

Recklessly causing serious harm – impact of living in remote and disadvantaged community – intergenerational alcohol abuse – relevance to sentence

- Offender stabbed female partner in back while intoxicated – Counsel on sentence submitted offender a 'traditionally orientated aboriginal' who grew up on missions in Western Australia and lived in remote Yatala community at time of offence – exposed to intergenerational alcohol abuse and violence – 'living between two worlds and not coping with either': **at [19]-[20]**
- On appeal Gray and Sulan JJ found the sentencing judge committed numerous errors including a failure to properly consider the link between the offender's background of intergenerational alcohol abuse and violence and the offending: **at [46]**

> [35] … The Judge failed to identify, in his remarks, the link between the intergenerational alcohol abuse, the circumstances of the defendant, a traditional Aboriginal man not living on-country, and his offending conduct. It would appear that the Judge failed to adequately understand the submissions of defence counsel that the defendant was living between two worlds and not coping with either because of the degrading effects of alcohol on him, on his family, upon his extended family and upon his community. He was addicted to alcohol and had no one to turn to because they were all in the same position. The question for the Judge was whether his offending behaviour was understandable and explicable in the context of his early life and upbringing on those missions and his subsequent experiences. These were matters directly relevant to an assessment of blameworthiness and culpability.
>
> …
>
> [49] There is little doubt that the consumption of alcohol was the precipitating cause of the defendant's offending. His history of alcohol dependence and exposure to violence are relevant considerations. This history, as put by defence counsel, was not challenged and provides an explanation for the defendant's conduct. His disadvantaged background is a relevant consideration in the circumstances of this proceeding.

***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.

***Rogers and Murray* (1989) 44 A Crim R 301** (Malcolm CJ, Brisenden J agreeing in relation to Rogers, Wallace J dissenting)

Sexual offence on young child –Aboriginal offender from remote communities – relevance of intoxication as mitigating factor – impact of background on imprisonment

- Offender Rogers a 17y Aboriginal growing up in a remote community where alcohol forbidden – heavily intoxicated at time of offence
- Malcolm CJ allowed the appeal in relation to Rogers in view of mitigating factors and similar cases. Brisenden J agreed. In dissent Wallace J referred to the need to balance the context of intoxication in Aboriginal communities with the need to provide protection and deterrence within those communities.
- In his comments Malcolm CJ affirmed the principle that all offenders were subject to the same laws of the state but that within that principle the courts were permitted to take into account the social problems caused by alcohol in Aboriginal communities: **at pp.305-308**

> It may be inferred from that the fact that he was a full-blood tribal aboriginal of limited education, who rarely went to town, that he was relatively inexperienced with the use of alcohol. This is relevant to mitigation in the particular circumstances, although mere drunkenness would not normally be accepted as a mitigating factor. As Muirhead J said in *The Queen v Iginiwuni*, SupCt NT (SCC No 6 of 1975, 23-5); unreported; 12th March 1975:
>
> > "Both aboriginal and white people are generally speaking subject to the same laws. For years, however, the Judges of this Court in dealing with aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters …"
>
> It is a notorious fact that the increased use of alcohol by aboriginal persons in relatively recent times has caused grave social problems, including problems of violence, in the communities in which they live. The general circumstances which have led to problems associated with the consumption of alcohol may themselves provide circumstances of mitigation …

- In setting the sentence Malcolm CJ also took into account that Rogers would serve his imprisonment in the south of the state away from his ordinary environment: at **p.311**

***Juli* (1990) 50 A Crim R 31** (Malcolm CJ, Wallace and Pigeon JJ agreeing in separate judgments)

Sexual offences – relevance of intoxication in context of socio-economic circumstances of offender – impact of imprisonment on aboriginal offender

- Aboriginal offender from the Kimberley region –family history of instability, alcohol abuse and violence – suffering mental illness exacerbated by alcohol abuse
- Held on appeal by Malcolm CJ sentencing judge failed to take into account offender's history of alcohol abuse and intoxication at time of offending, his mental illness and the likely effect of imprisonment on a Kimberley Aboriginal: **at 36**

> (Malcolm CJ)
>
> (p.36) … Drunkenness is not normally an excuse or a mitigating factor. In particular circumstances, however, it may be relevant as a mitigating factor. In the particular circumstances of this case the applicant's abuse of alcohol reflects the socio-economic circumstances and the environment in which he has grown up and should be taken into account as a mitigating factor in the way which I suggested in *Rogers v The Queen*, unreported; CCA SCt of WA; Library No 7849; 14 September 1989 at 9-13. I do not wish to repeat what I said in *Rogers* save to say that the substantive point which I sought to make in my judgment at 10 was:
>
> > "It is a notorious fact that the increased use of alcohol by aboriginal persons in relatively recent times has caused grave social problems, including problems of violence, in the communities in which they live. The general circumstances which have led to problems associated with the consumption of alcohol may themselves provide circumstances of mitigation ..."

…

In addition, account should be taken of the impact of a sentence of imprisonment on an aboriginal person in the light of his social and cultural background. As Muirhead J said in *The Queen v Iginiwuni*; unreported; SCt of NT; SCC No 6 of 1975; 12 March 1975:

> "Both aboriginal and white people are generally speaking subject to the same laws. For years, however, the Judges of this Court in dealing with aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters ..."

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*.