MURDER, MERCY AND MANDATORY SENTENCING: THE "ANOMALOUS" CASE OF ZAK GRIEVE

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In December 2018, after serving 8 years of a life sentence for murder, Zak Grieve received a letter from the Administrator of the Northern Territory informing him that the prerogative of mercy was being exercised in his favour. His non-parole period would be reduced from the statutory minimum of 20 years to 12 years. In many respects, Zak's case was an "anomaly", to use the descriptor applied to it by Chief Minister Michael Gunner and in other respects it was not. Yet the case also illustrates the grave potential for injustice created by generally applicable Northern Territory laws of criminal liability and penalty, specifically the mandatory sentencing laws for murder. This paper will explore both the ordinary and extraordinary aspects of Zak's case and highlight the cautionary tale it offers for everyone. Judges, prosecutors and defence lawyers working within the Territory criminal justice system can all learn from Zak's case — particularly in circumstances where there is no extra-appellate system to review a miscarriage of justice other than a mercy petition.

Zak's success depended on the Indigenous Justice and Exoneration Project (IJEP), founded by Professor Felicity Gerry QC, which supports prisoners in the Northern Territory serving 10 years or more to find lawyers. The project is currently unfunded but has previously been supported by Charles Darwin University, Northern Territory Legal Aid and the Northern Territory Law Society. IJEP was coordinated by Tamzin Lee, then Julia Kretzenbacher, and later supported by a research grant from Colombia University for research provided by Julian Murphy, together with litigation support by Rebecca Tisdale at the Deakin Law Clinic (whose criminal law practice also provided Deakin student research assistance). The IJEP team also worked with journalists who produced the Logie award-nominated documentary *The Queen & Zak Grieve* in which Charles Darwin University student Emma Fuller played a pivotal role.

Proceeding in four parts, the first part of this paper is dedicated to Zak's trial and sentence. The second part of this paper discusses the mercy petition process, strategy and result. Then, an analysis will be conducted of the Northern Territory's mandatory sentencing regime for the crime of murder. Finally, the paper will highlight potential lessons from Zak's case for everyone involved in the current justice system, including judges, prosecutors and defence lawyers.

I. THE TRIAL & SENTENCE[1]

On or about 24 October 2011, Raffaeli Niceforo was killed in his home in Katherine by Christopher Malyschko and Darren Halfpenny. Four people were charged and

[1] Unless otherwise indicated, this factual summary is drawn from Transcript of Proceedings, *R v Zak Grieve* (Supreme Court of the Northern Territory, 21136195, Mildren J, 9 January 2013). See also Felicity Gerry QC, Rebecca Tisdale, Julian R Murphy, Julia Kretzenbacher, "Petition for Mercy in the Matter of Zak Grieve" (20 July 2019) [11]-[18] <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf> .

sentenced in relation to the death – Mr Halfpenny, Mr Malyschko, Mr Malyschko's mother Bronwyn Buttery, and Zak.

The details of the trial will not be recited here, except to say that the prosecution case was that Zak was an active participant. The defence case was that Zak had discussed murder but on the actual day he was not present (and had gone home to sleep). He was cross-examined on whether his steps to withdraw from the murder plan were sufficiently reasonable and he was found guilty of murder. It was not clear on what basis. The judge found that he was not present at the murder but the jury must have concluded he was complicit and had not sufficiently completed withdrawal.

Mr Malyschko and Mr Halfpenny were both also found guilty of murder. Ms Buttery was found not guilty of murder, but guilty of manslaughter (presumably on the basis of provocation). It was uncontroversial that Ms Buttery had been involved in the initial organisation of the murder, although not its effectuation.

The sentencing judge imposed the following sentences:

- Ms Buttery was convicted of manslaughter and was sentenced to imprisonment for 8 years, with a non-parole period of 4 years.
- Mr Malyschko was sentenced to life imprisonment with a non-parole period of 18 years ("exceptional circumstances" were found to allow the judge to depart from the 20 mandatory minimum non-parole period).
- Mr Halfpenny was sentenced separately on 3 July 2012. He was sentenced to life imprisonment with a non-parole period of 20 years (no "exceptional circumstances" were found, such that the judge was bound to impose at least the 20 year mandatory minimum non-parole period).
- Zak was convicted of murder and sentenced to the mandatory minimum sentence of life imprisonment with a non-parole period of 20 years, even though the sentencing judge found that Zak was not present at the killing. In sentencing Zak, Justice Mildren made the following remarks:

  > "I take no pleasure in this outcome. It is the fault of mandatory minimum sentencing provisions which inevitably bring about injustice."
  >
  > "Legislation of this kind is unprincipled and morally insensible; it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy." (quoting Professor Norval Morris)
  >
  > "However, the prerogative of mercy which rests with the Crown can still be enlivened. … I recommend to the Administrator that after you have served a minimum of 12 years of that sentence … you be released on parole"

II. THE MERCY PETITION

A. Mechanisms of mercy

The prerogative power of mercy is vested in the Governor-General of Australia and in the Governors of each State. While this residual power undoubtedly remains today, it has been supplemented by a variety of legislative avenues to pardon, exoneration,

remission of sentence, and conditional release. In the Northern Territory, the prerogative is reposed in the Administrator of the Northern Territory and derives from sections 31 and 32 of the *Northern Territory (Self-Government) Act 1978* (Cth) whereby the Administrator assumed certain prerogative powers of the Crown.

The Administrator's prerogative of mercy has not been displaced by legislation.[2] As such, the traditional prerogative might be described as a common law prerogative. The common law prerogative can be exercised to remit a sentence, or to conditionally or fully pardon a person. It operates prospectively to remove "all pains, penalties and punishments" associated with a conviction, although it does not remove the conviction itself.[3]

Without compromising the plenary nature of the Administrator's common law prerogative of mercy, there are specific statutory avenues available for the exercise of the prerogative, should the Administrator choose to avail herself of them. They are:

1. Release on recognisance;[4]
2. Release on undertaking;[5]
3. Release on parole.[6]

In addition, there is the power of the Administrator to remit (that is, reduce) a sentence.[7] This power should be understood to be a statutory power independent of the prerogative of mercy.[8]

In Zak's petition for mercy, the prerogative was described as the "common law prerogative". However it might be more accurate to describe it as "a statutory prerogative", the statute in question being the *Northern Territory (Self-Government) Act*. Regardless of the descriptor, the power has rarely been exercised in the Northern Territory.

B. Mercy petition strategy in Zak's case

In drafting Zak's mercy petition, our strategy was to mount both legal and public policy arguments. This dual concern can be seen in the two distinct components of the petition "Reasons for bringing the petition" and "Grounds for seeking mercy". The former component of the petition was deliberately placed in the opening pages of the petition with a view to catching the eye of the public and the media. Phrased in plain language and light on footnotes, the purpose of this section was to make a moral and political argument for the injustice of Zak's case, an argument that would hopefully appeal to the public, and thus persuade the Government that a grant of mercy would not only be the right decision, but would also be viewed by the public in that way.

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[2] See *Criminal Code* (NT) s 431(1); *Sentencing Act* (NT) s 115; *Parole Act* (NT) s 16.

[3] *R v Cosgrove* [1948] Tas SR 99, 105-106; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 371 (Wilson J); *R v Foster* [1985] QB 115, 130; *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350-351 (Heydon J). See also G R Rubin, 'Posthumous Pardons, the Home Office and the Timothy Evans Case' (2007) (Jan) *Criminal Law Review* 41, 47.

[4] *Criminal Code* (NT), s 432.

[5] *Sentencing Act* (NT), s 115(1)(a).

[6] *Sentencing Act* (NT), s 115(1)(b).

[7] *Sentencing Act* (NT), s 114(2).

[8] See Felicity Gerry QC, Rebecca Tisdale, Julian R Murphy, Julia Kretzenbacher, "Petition for Mercy in the Matter of Zak Grieve" (20 July 2019) [107]-[122] <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf>.

The more substantive component of the petition dealt with the three "Grounds for seeking mercy", they were:

1. The imposition of a mandatory sentence in this case prevented the judge from imposing a sentence consistent with Zak's moral culpability;
2. The imposition of a mandatory sentence in this case violated fundamental human rights, freedoms and liberties and exacerbates the disadvantage experienced by Indigenous people and young people;
3. The imposition of a mandatory sentence in Zak's case was contrary to the public interest.

IV. MANDATORY SENTENCING

While certain aspects of Zak's case are unusual, particularly his low level of involvement in the crime for which he was ultimately found guilty, the injustice is largely attributable to a tragically common root cause — mandatory sentencing.

A. Mandatory sentencing just doesn't work

At the CLANT conference two years ago, Attorney-General Fyles made the following commitments:

> "There are two key questions our government is looking at with mandatory sentencing: Is there evidence showing mandatory sentencing reduces crimes? What are the costs — both financially and socially of various forms of mandatory sentencing?"

Empirical research suggests that mandatory sentencing does little to deter crime and make communities safer, instead mandatory sentencing provisions increase public expense by discouraging early guilty pleas. There is not the space here to rehearse all of the evidence contradicting the claimed deterrent and protective effects of mandatory sentencing. It is sufficient for present purposes to say that there is now a near consensus among researchers and experts that mandatory sentencing laws have little effect on crime rates and community protection.[9]

The evidence is clear: mandatory sentencing does not work. While it is the proper place of the Northern Territory government to consider how best to repeal and replace mandatory sentencing laws, until then, it was appropriate for the Administrator to ameliorate the particular irrationality of mandatory sentencing laws in Zak's case by exercising the prerogative of mercy.

B. Exemption from mandatory sentencing

Admittedly, the Northern Territory's mandatory sentencing laws for murder do contain a carve-out provision, but that provision only operates for the non-parole period (the life maximum is immutable). Even then, the carve-out is narrow, and has only successfully been engaged on two occasions. The first was Evelyn Namatjira, an

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[9] See, e.g., Michael Tonry 'Functions of Sentencing and Sentencing Reform' (2005) 58 *Stanford Law Review* 37, 52-53 ("Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed by Republic presidents, reached that conclusion, as has every major survey of the evidence." citations omitted).

Aboriginal woman from the Alice Springs region who received a 15-year non-parole period for the murder of her sister.[10] The second was Christopher Malyschko, Zak's co-offender, who was received an 18-year non-parole period.[11]

The Northern Territory's mandatory sentencing laws are currently under review by the Attorney-General's Department. The opaque nature of that review, and the absence of any call for public submissions, is concerning. In any event, Zak's case should serve as a timely reminder to the Attorney-General's Department of the injustice inevitably caused by mandatory sentencing regimes of all shapes and sizes. The extremely narrow exemption from the murder minimum non-parole period must be expanded or, preferably, the mandatory provision itself should be repealed.

V. LESSONS LEARNED

Apart from the Attorney-General's Department, it is worthwhile thinking about what most of us gathered here (judges, prosecutors and defence lawyers) might learn from this episode.

A. Judges

Zak's case might remind judges of the positive changes that can flow from judicial comments on issues that, strictly speaking, are beyond the purview of the courts. We are talking here about Justice Mildren's suggestion that the Administrator exercise the prerogative in Zak's case. It is no coincidence that, after the mercy petition was submitted, Zak's non-parole period was remitted to that suggested by Justice Mildren. It seems clear to us that the Attorney-General's Department (or the Solicitor for the Northern Territory) placed considerable weight on Justice Mildren's remarks when recommending to the Administrator that Zak's sentence be remitted. There is nothing surprising about this. Justice Mildren's comments, while without legal force, were carefully considered and grounded in decades of experience in criminal sentencing. Not only did he understand the complicity issues in the trial, it was his years of experience that allowed him to say with authority that the mandatory sentence for murder was "unprincipled and morally insensible".

Courts across Australia have regularly felt justified in criticising patently unjust criminal laws, while accepting that those laws must be applied until they are amended. Mandatory sentencing laws have been a special focus of judicial ire.[12] In the Northern Territory, there has been considerable judicial criticism of mandatory sentencing laws.[13] Federally, the laws requiring five year terms of imprisonment for crews of asylum boats were criticised by at least ten different judges, one judge going

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[10] *R v Evelyn Namatjira* (Supreme Court of the Northern Territory, 21100086, Southwood J, 3 July 2012).

[11] *R v Christopher Malyschko* (Supreme Court of the Northern Territory, 21136198, Mildren J, 9 January 2013).

[12] Anthony Mason, "Mandatory sentencing: implications for judicial independence" (2001) 7 *Australian Journal of Human Rights* 21, 27. See also *Kuczborksi* (2014) 254 CLR 51, 901 [108]-[109] per Hayne J.

[13] See, eg, Steven Schubert, "NT coroner criticises mandatory sentencing, says indigenous law should be considered" *ABC* (online) <https://www.abc.net.au/news/2017-12-01/nt-coroner-slams-mandatory-sentencing-scheme/9216106>.

so far as to call the laws "savage".[14] More often than not, judicial comments of this nature may not result in any legislative or executive change. Sometimes, however, they will instigate such change. In the case of the mandatory sentencing laws for "people smugglers", buckling to public pressure, the Attorney-General issued a directive instructing prosecutors to prefer alternative charges, except in very limited circumstances.[15]

B. Prosecutors

It might be said that prosecutors have little to learn from Zak's case. After all, the prosecution case was firmly, but fairly, put and a conviction was secured. However, where an acknowledged injustice has resulted, it provides an occasion for each actor in the system to reflect on their own role and contribution to the overall result. In Zak's case, it is at least arguable that the prosecution should have preferred a different charge, namely one of conspiracy to murder.[16] A review of conspiracy to murder sentencing case law across Australia reveals a number of factual circumstances with striking similarities to Zak's. While it must be accepted that it was open to the prosecution to proceed on the murder count, it was also eminently open to them to proceed only on a conspiracy to murder count, on the view that such a charge would more adequately reflect Zak's overall criminality.[17] Of course, if the prosecution had preferred a charge of conspiracy to murder the sentencing court would not have been bound by the mandatory life sentence for murder,[18] nor the mandatory non-parole period.[19] Instead the judge would have been free to impose an individualised, appropriate sentence and would have avoided the injustice of mandatory sentencing.[20] In the petition,[21] a review of interstate case law[22] suggested that had Zak been

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[14] Jared Owens, "Tenth judge decries 'savage' mandatory sentences against boat crewmen" *The Australian* (online) (11 January 2012).

[15] Attorney-General (Cth), "Director of Public Prosecutions – Attorney-General's Direction 2012) in Commonwealth, *Gazette*, No GN 35, 5 September 2012, 2318019. See also Andreas Schloenhardt and Colin Craig, "Prosecutions of People Smugglers in Australia 2011-14" (2016) 38 *Sydney Law Review* 49, 55-57.

[16] For a detailed discussion of the relationship between complicity and conspiracy see David Lanham "Complicity, Concert and Conspiracy".

[17] The DPP Guidelines require that "Charges must adequately and appropriately reflect the criminality that can be reasonably proven. … Substantive charges are to be preferred to conspiracy where possible. However conspiracy may be the only appropriate charge in view of the facts and the need to reflect the overall criminality of the conduct alleged." Guidelines of the Director of Public Prosecutions (2016), [4.4] – [4.6]. <http://www.dpp.nt.gov.au/about-us/Publications/DPP%20Guidelines%20-%20Current%202016.pdf>.

[18] *Criminal Code* (NT), s 157(3).

[19] *Sentencing Act* (NT), s 53A(1) (applying the mandatory non-parole period only for the offence of murder, not conspiracy for murder).

[20] The offence of conspiracy is contained within *Criminal Code* (NT), s 43BJ(2). Sub-s (1) states that, unless otherwise provided, the maximum penalty for conspiracy to commit an offence will be the same as that provided for the offence itself. Section 157(3) provides that the maximum penalty for conspiracy to commit murder is 14 years' imprisonment, no mandatory non-parole period is provided.

[21] Felicity Gerry QC, Rebecca Tisdale, Julian R Murphy, Julia Kretzenbacher, "Petition for Mercy in the Matter of Zak Grieve" (20 July 2019) [44]-[50] <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf>.

sentenced for the offence of conspiracy to murder he may have received a head sentence in the order of 6 to 9 years.

It must be understood that mandatory sentencing does not just *constrain* the discretion and power of judges, it also *increases* the power and discretion of prosecutors. It has been observed that:

> "in Australia, mandatory sentencing provisions have … transferred discretionary power from the judiciary. Discretion is generally transferred in the first instance to the police informant who decides on the charge to be laid. It is then up to the Director of Public Prosecutions ('DPP') in indictable cases, to decide what charge to proceed on and how to conduct the case."[23]

To impose a responsibility on prosecutors to prefer, whenever appropriate, charges that do not incur mandatory sentencing is to do nothing more than demand that public powers are exercised in the public interest.[24]

C. Defence lawyers[25]

What Zak's case teaches defence lawyers is that, even after all appeal avenues have been exhausted, certain sentences can be reduced by properly presented mercy petitions. Acknowledging that successful mercy petitions will inevitably remain rare, there is significant scope for an increase in the rate of successful applications. Four strategies in particular are likely to improve a petitioner's prospects of success, namely:

- Inviting judicial comment;
- Invoking extra-legal imperatives, policy considerations and international law;
- Comparing other jurisdictions; and
- Engaging with the media.

It is also worthwhile remembering that there are no evidentiary criteria limiting the material that may be taken into account by the repository of the prerogative power.[26]

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[22] *R v Duffy* (2014) 297 FLR 359; *R v XX* [2004] VSCA; *R v Elkins* (Unreported, Supreme Court of New South Wales, Maxwell J, 22 May 1987); *R v Steven Radalj* (unreported) discussed in *Green v The Queen* [1993] WASC; *King & Fulton v The Queen* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Hampel and Nathan JJ, 3 November 1994); *Andrea Morgan v The Queen* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Hayne JA and Southwell AJA, 13 August 1996); *R v AC* [2016] NSWSC 404; *John Morgan v The Queen* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Hayne JA and Southwell AJA, 13 August 1996); *Sleiman v The Queen* (2011) 34 VR 80; *R v Garry Charles Hargrave* [2009] VSC 634; *R v Proud* [2017] NSWSC 286; *R v Blundell* [2016] NSWSC 1810; *Sonnet v The Queen* [2013] VSCA 2.

[23] Candace McCoy and Tony Krone, "Mandatory Sentencing: Lessons from the United States" (2002) 5 (17) *Indigenous Law Bulletin* 19, 21 (citations omitted).

[24] For a discussion of prosecutorial decisions relating to people smuggling mandatory sentencing charges see Andrew Trotter and Matt Garozzo, "Mandatory Sentencing for People Smuggling: Issues of Law and Policy" (2012) 36 *Melbourne University Law Review* 553, 610-615.

[25] See also Martin Hinton and David Caruso, "The Institution of Mercy" in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519,

[26] *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ); *Martens v Commonwealth* (2009) 174 FCR 114, 128-129 [54]-[65] (Logan J).

Accordingly, lawyers can refer to news reports, hearsay, letters from family and any other material that they might consider helpful.

VI. CONCLUSION

Courts here and abroad have recognised that the prerogative of mercy affords "an independent protection for individual citizens against the enforcement of oppressive laws that [the legislature] may have passed".[27] If the prerogative is to live up to its protective promise then perhaps we need to start engaging it on a more regular basis in the Northern Territory. For Zak, there is a long way to go, but it has been a privilege to represent him.

[27] *In re Aiken City*, 725 F.3d 255, 264 (D.C. Cir. 2013).