The Third Tony Fitzgerald Memorial Lecture

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Virginia Bell

It is always a pleasure to have an excuse to visit Darwin. It is a particular pleasure to do so to deliver the third Tony Fitzgerald Memorial Lecture. It is good to see our professional associations celebrating the life and work of a lawyer who saw the practice of law as a means of contributing to the attainment of a more just society. Tony Fitzgerald's working life as a lawyer was spent with the Aboriginal Legal Service and the Legal Aid Commission before his appointment as Anti-Discrimination Commissioner. His untimely death deprived the Territory of a lawyer of goodwill and commitment to the redress of disadvantage and racial inequality.

I asked Russell Goldflam, who invited me to give tonight's lecture, about issues of current interest to the Criminal Lawyers Association of the Northern Territory. Russell responded delphically that Territory criminal lawyers are presently interested in the separation of powers and *Bugmy v the Queen*[1]. It has not been entirely easy to weave the two together into a coherent whole, but I will do my best.

In *Director of Public Prosecutions v Humphreys* Lord Salmon observed that the judge "has not and should not appear to have any responsibility for the institution of prosecutions"[2]. The separation of judicial and executive functions in the administration of the criminal

[1] (2013) 302 ALR 192; [2013] HCA 37.

[2] *Director of Public Prosecutions v Humphreys* [1977] AC 1 at 46.

law is self-evidently critical to the maintenance of the impartiality of the court. In Australian law the division of those functions is the subject of Constitutional command. No entity other than a Ch III court may exercise the judicial power of the Commonwealth[3] and, conversely, no Ch III court may exercise legislative or executive functions other than those that are incidental to the discharge of the court's judicial functions[4]. The strictness with which Australian law treats the separation of judicial and prosecutorial functions informs recent decisions of the High Court touching on trial procedure and sentencing.

Lord Salmon's injunction in *Humphreys* is reflected in Australian law in a line of authority holding that the prosecutor's exercise of discretion in charge selection involves the exercise of executive functions of a kind that are unreviewable. In the celebrated case of *Barton v The Queen*[5] lengthy committal proceedings were somewhat abruptly brought to an end by the decision of the prosecutor to withdraw the charges. Contemporaneously the Attorney-General of New South Wales filed ex officio indictments in the Supreme Court of New South Wales, which substantially repeated the charges that had been the subject of the incomplete committal hearing. The Bartons commenced proceedings seeking to challenge the propriety of the filing of the ex officio indictments. It is unnecessary to refer to the complex procedural history. Among the arguments on the appeal in the High Court was the Bartons' contention that as the Attorney-General's power to file an ex officio indictment in the Australian

[3] *Forge v ASIC* (2006) 228 CLR 45 at 73 per Gummow, Hayne and Crennan JJ; [2006] HCA 44.

[4] *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

[5] (1980) 147 CLR 75; [1980] HCA 48.

jurisdictions is statutory[6], its exercise was necessarily examinable by the courts. The argument was rejected.

In their joint reasons Gibbs ACJ and Mason J observed[7]:

> "It would be surprising if Parliament intended to make the Attorney's information subject to review. It has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced ... ."

The authority of the court to review the prosecutor's discretion in the selection of the charge on which to proceed was the issue in *Maxwell v The Queen*[8]. Mr Maxwell was indicted for the murder of his wife before the Supreme Court of New South Wales. The prosecution accepted Mr Maxwell's plea of guilty to manslaughter in full discharge of the indictment. The plea was accepted on the basis of Mr Maxwell's diminished responsibility for the killing. McInerney J, the primary judge, expressed reservations about acceptance of the plea in light of the opinions contained in the medical reports that were tendered on the sentence hearing. The hearing was adjourned and the parties were invited to make submissions on the question. At the resumed hearing the prosecutor tendered a further medical report. This report contained an opinion that Mr Maxwell was not suffering from a significant degree of psychiatric disorder such as to diminish his responsibility for the killing. The prosecutor did not withdraw from his

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[6] *Australian Courts Act* 1828 (Imp) 9 Geo IV c83, s 5.

[7] *Barton v The Queen* (1980) 147 CLR 74 at 94-95.

[8] (1996) 184 CLR 501.

acceptance of the plea but invited McInerney J to reject Mr Maxwell's plea of guilty. His Honour concluded that he had the power to do so[9].

On appeal, the New South Wales Court of Criminal Appeal found that a trial judge has a residual discretion to reject a plea that has been accepted in discharge of an indictment charging a more serious offence[10]. Gleeson CJ (as his Honour then was), giving the leading judgment, said that "[i]t is impossible to define the circumstances in which it is appropriate for such discretion to be exercised more closely than by saying it is to be exercised where the interests of justice so require"[11].

Mr Maxwell was granted special leave to appeal to the High Court. Toohey J, in dissent, agreed with the Court of Criminal Appeal that circumstances may make it appropriate for the court to reject an accused's plea of guilty in a case in which acceptance of the plea would involve the accused's acquittal of a more serious charge of which he or she had been indicted. His Honour endorsed the "interests of justice" test for the exercise of the power[12]. His Honour also endorsed Gleeson CJ's observation that "[q]uestions of this kind … arise at the margin between executive and judicial power. They are ordinarily resolved in a practical way"[13].

In the High Court the majority in *Maxwell* held that McInerney J did not have a discretion to reject Mr Maxwell's plea since the

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[9] *Maxwell v The Queen* (1996) 184 CLR 501 at 504-506 per Dawson and McHugh JJ; 516-518 per Toohey J; 526-529 per Gaudron and Gummon JJ.

[10] *R v Maxwell* (1994) 34 NSWLR 606.

[11] *R v Maxwell* (1994) 34 NSWLR 606 at 614.

[12] *Maxwell v The Queen* (1996) 184 CLR 501 at 525.

[13] *Maxwell v The Queen* (1996) 184 CLR 501 at 525.

decision to accept a plea of guilty to a lesser offence is a matter entirely for the executive[14]. In their joint reasons Dawson and McHugh JJ observed that the role of the prosecution "is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system"[15]. Their Honours went on to say[16]:

> "No doubt a court may, if it thinks it desirable to do so, express its view upon the appropriateness of a charge or the acceptance of a plea and no doubt its view will be accorded great weight. But if a court does express such a view, it should recognise that in doing so it is doing no more than attempting to influence the exercise of a discretion which is not any part of its own function and that it may be speaking in ignorance of matters which have properly motivated the decision of the prosecting authority."

McInerney J had approached the sentencing of Mr Maxwell upon the view that notwithstanding the prosecutor's acceptance of his plea of guilty to manslaughter it remained to establish that Mr Maxwell was suffering from an abnormality of mind that had substantially impaired his mental responsibility for the killing. However, as Dawson and McHugh JJ explained in their joint reasons, upon the prosecutor's acceptance of the plea of guilty, Mr Maxwell's diminished responsibility ceased to be an issue between the parties[17]. It is of the first importance to appreciate that under our adversarial system of criminal justice it is the parties who define the issues. There being no

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[14] *Maxwell v The Queen* (1996) 184 CLR 501 at 513 per Dawson and McHugh JJ; 534 per Gaudron and Gummow JJ.

[15] *Maxwell v The Queen* (1996) 184 CLR 501 at 513 citing *R v Apostilides* (1984) 154 CLR 563 at 575; [1984] HCA 38.

[16] *Maxwell v The Queen* (1996) 184 CLR 501 at 514.

[17] *Maxwell v The Queen* (1996) 184 CLR 501 at 514.

issue that Mr Maxwell's responsibility for the killing was substantially impaired the task for the court was to sentence him accordingly[18].

One passage in the present context in the joint reasons of Gaudron and Gummow JJ in *Maxwell* should be noted. Their Honours said this[19]:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what." (Footnotes omitted)

This statement of the principle was endorsed by five members of the Court in *Likiardopoulos v The Queen*[20]. French CJ allowed that the existence of the jurisdiction conferred on the High Court by s 75(v) of the *Constitution* (and the constitutionally-protected supervisory role of the Supreme Courts of the States) raises the question whether there is any statutory power or discretion that is insusceptible of judicial review[21]. Nonetheless, his Honour observed that the general unavailability of judicial review of prosecutorial decision-making rests on important considerations including the separation of executive

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[18] *Maxwell v The Queen* (1996) 184 CLR 501 at 514.

[19] *Maxwell v The Queen* (1996) 184 CLR 501 at 534.

[20] (2012) 247 CLR 265 at 280 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 37.

[21] *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 269-270 [4].

power from the judicial power to hear and determine criminal proceedings[22].

By contrast, English courts have been willing to review the exercise of prosecutorial decision-making on administrative law grounds. In *R v Director of Public Prosecutions; Ex parte C*[23] the Queen's Bench (Divisional Court) set aside the decision of the Director of Public Prosecutions not to prosecute C's husband for offences of buggery. The Court received evidence from the head of the Police Complaints Division of the Crown Prosecution Service concerning the conduct of a review of the decision not to prosecute[24]. The Court held that the decision was flawed because the officer had not determined the review in accordance with the settled policy of the Code that is issued under the *Prosecution of Offences Act* 1985 (UK)[25].

C's husband argued that even if the decision was flawed it should stand as he had been informed that he would not be prosecuted for the alleged offences and the determination of the judicial review application had involved delay. The Court found that the delay had not prejudiced C's husband and the matter was remitted to the Director of Public Prosecutions for consideration in light of the reasons of the court[26].

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[22] *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 269 [2] citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39 per Brennan J; [1989] HCA 46.

[23] [1995] 1 Cr App 136.

[24] *R v Director of Public Prosecutions; Ex parte C* [1995] 1 Cr App 136 at 138, 141-142 per Kennedy LJ.

[25] *R v Director of Public Prosecutions; Ex parte C* [1995] 1 Cr App 136 at 144-145 per Kennedy LJ.

[26] *R v Director of Public Prosecutions; Ex parte C* [1995] 1 Cr App 136 at 145 per Kennedy LJ.

Ex parte C was decided before the enactment of the *Human Rights Act* 1998 (UK), which gives application in domestic law to the rights stated in the European Convention on Human Rights ("the ECHR"). In addition to these rights, which include the right of an accused person to the fair trial of criminal proceedings[27], there has been a move in recent years towards strengthening the rights of victims of crime in the European Union. The European Commission has proposed a directive of the European Parliament in this respect[28]. Article 10 of the draft Directive sets out victims' rights in the event of a decision not to prosecute. The Explanatory Memorandum to the Directive states[29]:

> "The purpose of [Article 10] is to enable the victim to verify that established procedures and rules have been complied with and that a correct decision has been made to end a prosecution in relation to a specific person. Precise mechanisms for a review are left to national law. However, such a review should as a minimum be carried out by a person or authority different to the one that took the original decision not to prosecute."

A right of this kind has been recognised by the Court of Appeal (Criminal Division)[30]. The content of the right is illustrated by the facts in *Killick*. In February 2006 two complainants, who each suffer from cerebral palsy, complained to the police that Mr Killick had sexually

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[27] *European Convention on Human Rights* (1950), Art 6.

[28] European Commission, Brussels, 18 May 2011, *Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, COM (211) 275 Final.

[29] European Commission, Brussels, 18 May 2011, *Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, COM (211) 275 Final, at 8.

[30] *R v Killick* [2011] EWCA Crim 1608; [2012] 1 Cr App R 10.

assaulted them. The assaults were said to have occurred in the period 1996 to 2005. Mr Killick was arrested and interviewed in April 2006. He denied the allegations. In June 2007 the Crown Prosecution Service ("the CPS") determined not to proceed with the prosecution and so advised Mr Killick.

Following the June 2007 determination, the complainants' solicitors submitted a complaint to the CPS asserting that the decision was unreasonable, in breach of the Code of Practice for Victims of Crime and contrary to the *Disability Discrimination Acts* 1995 and 2005 (UK)[31]. The CPS' complaints process was elaborate. Initially it involved a review of the case by a CPS special casework lawyer. This review took some two years. Part of the delay was occasioned by the decision to brief a Queens Counsel with experience in the prosecution of sexual offences to advise on the correctness of the decision not to prosecute. Counsel advised that the decision had taken into account all relevant considerations and was not *Wednesbury* unreasonable. In July 2009 the reviewing lawyer concluded that the decision was the correct decision because it could not be said that a jury was more likely than not to convict Mr Killick[32].

Following the July 2009 determination, the complainants' solicitors advised the CPS of their clients' intention to commence judicial review proceedings[33]. The advice prompted a further review. Ultimately the Director of Public Prosecutions' principal legal adviser found that the earlier decisions were wrong although they were not unreasonable. She determined that there was a realistic prospect of conviction and that it was in the public interest that there should be a

[31] *R v Killick* [2011] EWCA Crim 1608 at [27].

[32] *R v Killick* [2011] EWCA Crim 1608 at [28].

[33] *R v Killick* [2011] EWCA Crim 1608 at [35].

prosecution. The complainants were informed of the decision in December 2009 and an unreserved apology was extended to them for the distress and frustration that had been occasioned by the earlier decisions. It appears that Mr Killick was not advised of the fresh determination until February 2010 when he was summonsed to appear before the Magistrates Court[34].

Mr Killick applied unsuccessfully for a stay of proceedings on the ground that their continuance amounted to an abuse of process[35].

In December 2010 Mr Killick was convicted by majority verdict of a number of the counts in the indictment. He was granted leave to appeal against his convictions on a ground which challenged the refusal to stay the proceedings. The appeal was dismissed. The Court of Appeal characterised the decision not to prosecute as being in reality "a final decision for a victim"[36]. The Court considered that there must be a right to seek a review of such a decision. In this context their Lordships held that English law is conformable with the right expressed in Art 10 of the Draft EU Directive[37]. In the result, although the delay in the conduct of the reviews had been lamentable, the Court concluded that it had not amounted to an abuse of process[38].

The strain imposed on the victims of crimes in their contact with the administration of the criminal law has come to be better understood over the past twenty years. Provisions restricting cross-

[34] *R v Killick* [2011] EWCA Crim 1608 at [36]-[37].

[35] *R v Killick* [2011] EWCA Crim 1608 at [37].

[36] *R v Killick* [2011] EWCA Crim 1608 at [58].

[37] *R v Killick* [2011] EWCA Crim 1608 at [49].

[38] *R v Killick* [2011] EWCA Crim 1608 at [55]-[56].

examination of an offensive character, enabling the evidence of complainants to be taken by closed-circuit TV and the like have made the experience of participating in the criminal trial less arduous for complainants. No serious argument can be advanced against reforms of this kind. However, the concept of a complainant's right to have a decision not to prosecute reviewed may be thought to raise considerations of a different character. Conventionally the criminal law is conceived as vindicating the interest of society generally and the prosecutor as representing society's interest as distinct from that of the investigating police or the complainant[39]. There is a tension between this conception of the criminal law and the provision of administrative law remedies to complainants or other persons who are aggrieved with decisions made by the prosecutor.

The insistence in Australian law on the maintenance of clear separation between judicial and prosecutorial functions is prominent in the reasoning of the majority in a decision handed down earlier this month which deals with the duty of the trial judge in summing up to the jury. At issue in *James v The Queen*[40] was the extent of obligation to direct the jury of the availability of alternative verdicts for lesser, uncharged, offences at a trial at which neither party has proposed that the jury might convict of the lesser offence. Mr James' invited the Court to extend the principles stated in *Gilbert v The Queen*[41] and *Gillard v The Queen*[42] respecting the failure to leave

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[39] Cesare Beccaria, *An Essay on Crimes and Punishments* (1872, New Edition, W C Little & Co, Albany) at 16; Andrew Ashworth *The Criminal Process* (1994, Clarendon Press, Oxford) at 34-37; Nicholas Cowdery, "Challenges to Prosecutorial Discretion" (2013) 39(1) *Commonwealth Law Bulletin* 17 at 19.

[40] [2014] HCA 6.

[41] (2000) 201 CLR 414; [2000] HCA 15.

[42] (2003) 219 CLR 1; [2003] HCA 64.

manslaughter on the trial of a count of murder, to the trial on indictment of any offence.

Prior to *Gilbert*, intermediate appellate courts in Australia had expressed differing views concerning the duty to leave uncharged alternative verdicts for the jury's consideration. In New South Wales and Queensland it was considered unwise for the trial judge to introduce consideration of an uncharged offence if the parties had not done so[43]. A different approach was favoured in South Australia[44]. King CJ was of the view that the trial judge was obliged to direct the jury on every alternative verdict open on a view of the facts notwithstanding that the parties had not adverted to these offences[45]. His Honour took into account that a person might successfully raise a plea in bar when indicted for an offence of which he or she might lawfully have been convicted on an indictment at an earlier trial[46]. King CJ favoured clearing the indictment by leaving to the jury consideration of the guilt of the accused of every offence of which he or she might be convicted. Otherwise, his Honour observed, the prosecution might be precluded from proceeding against the accused for the lesser offence on another occasion[47]. The analysis conceives the duty of the trial judge as embracing the public interest in the conviction of persons who break the criminal law.

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[43] *R v Cameron* [1983] 2 NSWLR 66 at 71; *R v Pureau* (1990) 19 NSWLR 372 at 375-377 per Hunt J; *R v Willersdorf* [2001] QCA 183 at [17], [20] per Thomas JA, McPherson JA agreeing at [3], Chesterman J agreeing at [32].

[44] *Benbolt v The Queen* (1993) SASR 7.

[45] *Benbolt v The Queen* (1993) SASR 7 at 15-19.

[46] *Benbolt v The Queen* (1993) SASR 7 at 15, 17, 18.

[47] *Benbolt v The Queen* (1993) SASR 7 at 15.

King CJ's analysis is in line with the analysis of Lord Bingham of Cornhill in *R v Coutts*[48]. His Lordship proposed that at any trial on indictment, irrespective of the wishes of trial counsel, any obvious alternative verdict should be left for the jury's consideration[49]. Such a rule it was suggested would serve the public interest in the administration of justice: benefitting the accused by protecting against an excessive conviction and, in other instances, benefitting the public by providing for the punishment of a law-breaker who is deserving of punishment[50].

The idea that the court takes into account the public interest in the prosecution and conviction of those who break the law is a familiar one. This public interest is taken into account in determining whether to stay proceedings on indictment[51]. In such a case the court is being asked to refuse to exercise its jurisdiction to try a person charged with criminal offending. It is less apparent that at the conclusion of a trial at which the prosecution has not elected to seek the jury's verdict for a lesser offence that the trial judge should of his or her own motion instruct the jury of an alternative pathway to conviction. *James* holds that there is no such obligation.

The test for determining whether the omission to direct the jury of the availability of a lesser alternative verdict has occasioned a miscarriage of justice in Australian law asks whether the interests of the justice to the accused require that the alterative be left to the

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[48] [2006] 1 WLR 2154 at 2167 [23]; [2006] 4 All ER 353.

[49] *R v Coutts* [2006] 1 WLR 2154 at 2167 [23].

[50] *R v Coutts* [2006] 1 WLR 2154 at 2167 [23].

[51] *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30 per Mason CJ, 61 per Deane J, 72 per Toohey J.

jury[52]. The reason that test does not take into account the public interest in the conviction and punishment of wrongdoers is found in the separation of functions in an adversarial system of criminal justice. The conduct of the prosecution in not inviting the jury to convict the accused of a lesser offence should it fail to prove guilt of the more serious offence is a choice of the same character as the selection of the charge or the entry of a nolle prosequi. In Australian law it is not the function of the trial judge to prevent the outright acquittal of an accused in a case in which the prosecution has elected not to seek the jury's verdict for a lesser alternative[53].

The adversarial system of criminal justice leaves the parties free to decide the ground upon which issues will be contested[54] and in this way maintains the appearance and the reality of the impartiality of the judge. It is a system the respects the autonomy of the parties[55]. As Gleeson CJ has observed, the system does not require the adversaries to be of equal ability. Some players, his Honour pointedly noted, are faster, or stronger, or more experienced than others and the circumstance that opposing counsel may be mismatched does not make the process relevantly unfair[56]. The right to a fair and impartial trial was described by Isaacs J as a personal right "so deeply rooted in our system of law and so elementary as to need no authority to support it"[57]. Every conviction set aside, every new criminal trial

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[52] *R v Keenan* (2009) 236 CLR 397 at 438 [138] per Kiefel J, 422 [80] per Hayne J agreeing, 425 [92] per Heydon J agreeing, 425 [93] per Crennan J agreeing; [2009] HCA 1.

[53] *James v The Queen* [2014] HCA 6 at [37] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[54] *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35.

[55] *Doggett v The Queen* (2001) 208 CLR 343 at 346 [1] per Gleeson CJ; [2001] HCA 46.

[56] *Nudd v The Queen* (2006) 225 ALR 161 at 166 [11]; [2006] HCA 9.

[57] *The King v Macfarlane; ex parte O'Flanagan* (1923) 32 CLR 518 at 541.

ordered, were his Honour said, "exemplifications of this fundamental principle"[58].

It remains to be borne in mind that the determination of whether a trial is unfair turns upon the appellate court's consideration of the conduct of the trial[59]. The failure to object to evidence, or to apply for a further direction, may mean that the reception of the evidence, or the omission of the direction, did not make the trial unfair. The issue will usually turn on the fairness of the process and not the wisdom of the counsel[60]. Gleeson CJ's remarks underscore the need for counsel on both sides of the record to be conscientious in the preparation and conduct of a criminal trial. They are remarks that should encourage circumspection in the acceptance of a brief which counsel fears may be beyond his or her competence.

The separation of judicial and prosecutorial functions has been prominent in the High Court's recent consideration of sentencing. It informed the Court's rejection in *Elias v The Queen*[61] of a claimed common law principle articulated in *R v Liang*[62]. This principle required the judge to take into account in mitigation of sentence that the prosecution could have charged the accused with a "less punitive offence" which the court considered to be "as appropriate or even more appropriate" to the facts than the charge for which the offender was being sentenced[63].

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[58] *The King v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 542.

[59] *Dietrich v The Queen* (1992) 177 CLR 292 at 300 per Mason CJ and McHugh J; [1992] HCA 57.

[60] *Nudd v The Queen* (2006) 225 ALR 161 at 164 [9] per Gleeson CJ.

[61] (2013) 248 CLR 483; [2013] HCA 31.

[62] (1995) 82 A Crim R 39 at 44 per Winneke P, Ormison JA and Crockit AJA agreeing.

[63] *Elias v The Queen* (2013) 248 CLR 483 at 485 [1], citing *R v Liang* (1995) 82 A Crim R 39 at 44 per Winneke P, Ormison JA and Crockit AJA agreeing.

In *Elias* the appellants pleaded guilty before the Supreme Court of Victoria to offences including attempting to pervert the course of justice, a common law offence punishable under the *Crimes Act* 1958 (Vic) by imprisonment for 25 years. The offences arose out of the appellants' association with Tony Mokbel who had been convicted of a Commonwealth offence. The appellants complained that it had been open to charge them under Commonwealth law with attempting to pervert the course of justice in relation to the judicial power of the Commonwealth, an offence carrying a maximum penalty of imprisonment for five years[64].

The Court of Appeal of the Supreme Court of Victoria endorsed the *Liang* principle, saying that it serves to ensure that the prosecutor's selection of the charge does not "constrain the [c]ourt's sentencing discretion" resulting in the court "impos[ing] a heavier sentence" that it considers appropriate[65]. Their Honours confined the application of the principle to offences of differing seriousness within the same jurisdiction[66].

Mr Elias and his co-accused appealed by special leave to the High Court. The Court rejected the Liang principle. Prominent among the reasons for that rejection is the separation of judicial and prosecutorial functions which does not allow the court to canvass the exercise of the prosecutor's discretion in charge selection[67]. Another difficulty with the *Liang* principle is that it is apt to suggest that the court is sentencing for the "offending conduct and not for the

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[64] *Crimes Act* 1914 (Cth), s 43.

[65] *Elias v The Queen* (2013) 248 CLR 483 at 493 [26] citing *Pantazis v The Queen* (2012) 217 A Crim R 31 at 41-42 [28].

[66] *Elias v The Queen* (2013) 248 CLR 483 at 492 [22].

[67] *Elias v The Queen* (2013) 248 CLR 483 at 497 [34].

offence"[68]. The Court pointed out that if it is right for the judge to take into account that the offender's conduct might have resulted in conviction for a less serious offence, it is difficult to see why the judge should not be able to take into account facts disclosing a circumstance of aggravation that could have been, but was not charged[69].

Elias rejects that the prosecutor's charge selection operates to constrain the sentencing judge to impose an inappropriately severe sentence for the offender and the offence. In this respect the Court, again, has laid stress on the width of the sentencing discretion[70].

The separation of judicial and executive functions is critical to understanding the decision in *Magaming v The Queen*[71] in which the majority of the High Court rejected a challenge to a provision of the *Migration Act* 1958 (Cth) that prescribes a mandatory minimum term of imprisonment for the aggravated offence of people smuggling.

The *Migration Act* creates two offences of organising or facilitating the bringing to Australia of non-citizens who have no lawful right to come to Australia. One offence described as "people smuggling"[72] prescribes organising or facilitating the bringing to Australia of another person who is an unlawful non-citizen. A second offence, described as an "[a]ggravated offence of people

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[68] *Elias v The Queen* (2013) 248 CLR 483 at 493 [26]

[69] *Elias v The Queen* (2013) 248 CLR 483 at 493 [26].

[70] *Elias v The Queen* (2013) 248 CLR 483 at 494-495 [27], and see *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.

[71] (2013) 302 ALR 461; [2013] HCA 40.

[72] *Migration Act* 1958 (Cth), s 233A.

smuggling"[73], prescribes the organising or facilitating of the bringing to Australia of a group of at least five persons, at least five of whom are unlawful non-citizens. The basic offence carries no mandatory minimum sentence, the aggravated offence carries a mandatory minimum term of imprisonment for five years with a minimum non-parole period of three years[74]. A person who smuggles a group of five or more unlawful non-citizens to Australia could be charged with either offence.

Mr Magaming was convicted of the aggravated offence. The Chief Judge of the District Court of New South Wales said that it was "perfectly clear that [Mr Magaming] was a simple Indonesian fisherman who was recruited by the people organising the smuggling activity to help steer the boat towards Australian waters"[75]. Chief Judge Blanch considered the seriousness of Mr Magaming's part in the offence was "right at the bottom end of the scale" and that, in the ordinary course of events, the application of sentencing principle would not have required a sentence as heavy as the mandatory minimum term[76].

Mr Magaming argued that the elements of the offences of people smuggling and aggravated people smuggling were identical save for the number of unlawful non-citizens concerned. It followed, on this argument, that where the number of unlawful non-citizens brought into Australia is five or more persons the two provisions are

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[73] *Migration Act* 1958 (Cth), s 233C.

[74] *Migration Act* 1958 (Cth), s 236B(3)(c).

[75] *Magaming v The Queen* (2013) 302 ALR 461 at 463 [7] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[76] *Magaming v The Queen* (2013) 302 ALR 461 at 463 [7] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

co-extensive[77]. The argument failed at the outset insofar as it depended upon acceptance that the two offences are coextensive. While proof of the aggravated offence would constitute proof of the basic offence, the reverse was not true. The offences overlapped but were not coextensive[78].

Mr Magaming's central contention was that in a case of facilitating the bringing to Australia of five or more unlawful non-citizens the prosecuting authority has a *choice* about the sentence that an accused person suffers on conviction[79]. The joint reasons acknowledge that the choices made by the prosecutor may, on conviction, affect the punishment that is imposed. Commonly the choice to proceed on indictment rather than summarily will have an effect on the sentence in the event of conviction[80]. However, recognition that prosecutorial decision-making may have an effect on the ultimate sentence does not entail that the prosecutor is exercising judicial power[81]: it is the court that imposes sentence and only upon the accused's conviction.

Finally, let me turn to *Bugmy v The Queen*[82]. The determinative issue in *Bugmy* was the New South Wales Court of Criminal Appeal's

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[77] *Magaming v The Queen* (2013) 302 ALR 461 at 464 [11] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[78] *Magaming v The Queen* (2013) 302 ALR 461 at 465 [17] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[79] *Magaming v The Queen* (2013) 302 ALR 461 at 466 [24] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[80] *Magaming v The Queen* (2013) 302 ALR 461 at 467 [26] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[81] *Magaming v The Queen* (2013) 302 ALR 461 at 469 [38] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[82] (2013) 302 ALR 192; [2013] HCA 37.

conclusion, upholding a prosecution appeal against sentence, that it was unnecessary to determine whether the sentence under appeal was manifestly inadequate. The Court of Criminal Appeal found that the primary judge had erred in his assessment of the objective gravity of Mr Bugmy's offence and in the weight given to Mr Bugmy's subjective case[83]. The Director of Public Prosecutions argued that implicit in those findings was the conclusion of manifest inadequacy[84]. It was, of course, clear that the Court of Criminal Appeal disagreed with the sentence imposed by the primary judge and that it favoured the imposition of a more severe sentence. However, its authority to substitute a sentence on the Director's appeal brought on the ground of manifest inadequacy, depended upon a conclusion that the primary judge's discretion miscarried in that the sentence fell outside the range of sentences that could justly be imposed for the offence[85].

Of wider interest is *Bugmy*'s consideration of arguments respecting the sentencing of Aboriginal offenders. The submissions filed on Mr Bugmy's behalf referred to authoritative reports evidencing that Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices[86]. Mr Bugmy relied on this material in support of the submission that courts should take into account the "unique circumstances of all Aboriginal offenders" including the high rate of incarceration of Aboriginal

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[83] *R v Bugmy* [2012] NSWCCA 223 at [39] per Hoeben J.

[84] *Bugmy v The Queen* (2013) 302 ALR 192 at 198-199 [24].

[85] *Bugmy v The Queen* (2013) 302 ALR 192 at 198-199 [24] citing *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ; [1994] HCA 49; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [15]-[16] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

[86] *Bugmy v The Queen* (2013) 302 ALR 192 at 203 [41] citing Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage*, 2011.

Australians in sentencing an individual Aboriginal offender[87]. The submission drew on decisions of the Supreme Court of Canada[88], holding that the judge when sentencing an Aboriginal offender is to take into account "unique systemic or background factors" that may have played a part in bringing the offender before the court[89].

The Canadian decisions reflect provisions of the Canadian *Criminal Code* governing the sentencing of offenders. In particular, the Code directs the court to consider the availability of non-custodial penalties and, in this respect, to pay particular attention to the circumstances of Aboriginal offenders[90]. The Supreme Court of Canada has said of this provision that it constitutes legislative recognition of the unique circumstances of Aboriginal offenders and of the disproportionate incarceration of Aboriginal peoples[91].

The sentencing statute in New South Wales contains no equivalent to the provisions of the Canadian Code respecting the sentencing of Aboriginal offenders. The judicial function of sentencing requires the court to determine the appropriate sentence for the offender and the offence[92]. In so doing the court is required to apply recognised principles of sentencing. To sentence an Aboriginal offender taking into account in mitigation the social and economic disadvantage of Aboriginal Australians as a group or the high level of

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[87] *Bugmy v The Queen* (2013) 302 ALR 192 at 199 [28].

[88] *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

[89] *R v Gladue* [1999] 1 SCR 688 at [66].

[90] Canadian *Criminal Code*, s 718.2(e).

[91] *R v Gladue* [1999] 1 SCR 688 at [37], [50]-[65].

[92] *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14; *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57; *Markarian v The Queen* (2005) 228 CLR 357; *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45.

incarceration of Aboriginal Australians would plainly enough be to depart from individualised justice[93]. It would involve the court implementing a policy aimed at reducing the incidence of incarceration of Aboriginal Australians. This is no part of the function of the court. Whether in light of s 10 of the *Racial Discrimination Act* 1975 (Cth) the Parliament of New South Wales might validly enact a provision of the kind enacted in the Canadian Criminal Code is a question that did not arise for consideration in *Bugmy*[94].

Bugmy rejected the proposition that age and substantial offending diminish the significance of evidence of an offender's background of social deprivation. The joint reasons acknowledge that the experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life, compromising the person's capacity to mature and to learn from experience[95]. Equally the joint reasons point out that an offender's deprived background may not have the same mitigatory relevance when considering all the purposes of punishment. While childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated, the inability to control violent impulses may increase the importance of protecting the community from the offender[96].

All of this was to emphasise the point so well made in *Veen v The Queen (No 2)*, that sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large

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[93] *Bugmy v The Queen* (2013) 302 ALR 192 at 202 [36].

[94] *Bugmy v The Queen* (2013) 302 ALR 192 at 202 [36].

[95] *Bugmy v The Queen* (2013) 302 ALR 192 at 203 [43].

[96] *Bugmy v The Queen* (2013) 302 ALR 192 at 203 [44].

measure from the unavoidable difficulty in giving weight to each of the purposes of punishment[97].

[97] (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.