



ALS

Aboriginal Legal Service (NSW/ACT) Limited

# ‘Beyond Fernando’

‘Over Representation and the Sentencing of Aboriginal People in NSW  
& The High Court Appeal of **William David Bugmy v The Queen**’

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# Overview

1. ***R v Bugmy*** (*The Fernando/Neal principles, the facts, the case history, the appellant, Wilcannia, submissions and judgment relating to Aboriginality*) (read the submissions at [www.hcourt.gov.au](http://www.hcourt.gov.au))
2. The questions raised regarding sentencing Aboriginality in NSW (*Fernando considerations, moral culpability, explanation of failure to rehabilitate & consequent recidivism, reduced weight to general deterrence, mass incarceration, over representation, rehabilitation of community, redressing racial discrimination*)
3. Will the High Court move NSW law in this regard *beyond Fernando*? (*The question of full weight, the Canadian approach, clarifying the true meaning of the purposes of sentencing particularly community protection, relevance of race discrimination*)
4. 'Justice Reinvestment' as a necessary counterpart to a re-conceptualisation of the purposes of sentencing (*The potential significance of the intervention of the Human Rights commission in R v Bugmy as amicus curia*)
5. Conclusion – Victims of the System

# R v Bugmy

- The High Court of Australian in Bugmy will consider for the first time the '*Fernando*' principles.
- It is 31 years since the High Court has made any comment about principles that apply when sentencing Aboriginal offenders in *Neal v The Queen* (1982) 149 CLR 305 per Brennan J:

*“The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the even administration of criminal justice.”*

# *R v Fernando* (1992) 76 A Crim R 58

- The most commonly cited NSW authority on the principles potentially applicable when sentencing an Aboriginal person
- Wood J sentenced Stanley Fernando, then 47 years old, on conditional liberty for an offence of domestic violence against an Aboriginal woman
- John Nicholson SC appeared for *Fernando* and placed before the court an array of evidence, reports and other publications

# The Fernando Propositions

- (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
- (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
- (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.
- (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

# The Fernando Propositions Ctd.

(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.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

# R v Bugmy – The Facts & Case History

- Mr. Bugmy was on remand in the Broken Hill jail in early 2011 for assault police and other charges.
- After a scheduled (and rare) family visit could not proceed Mr. Bugmy uttered threats and then assaulted three prison officers by throwing pool balls at them.
- One Mr. Gould was blinded in one eye (and suffered various other serious and ongoing medical problems).
- Mr. Bugmy pleaded guilty to assault officer x 2 and 1 offence of intentionally inflicting grievous bodily harm.
- Sentenced by DCJ Lerve, February 2012 in Dubbo District Court to **6 years and 3 months**, with a non parole period of **4 years and 3 months**, a recommendation of entry in full time residential rehabilitation as a parole condition was made
- The Crown appealed successfully to the CCA: Hoeben, Schmidt, Johnson JJ, increased the sentence to **7 years and 9 months** with a non parole period of **5 years and 3 months**. The residential rehabilitation recommendation was deleted.
- In May 2013 the High Court granted special leave and in August the matter will be argued.

# The Man before the Court - William Bugmy *of* Wilcannia

- 29 years old at the time of the offence
- A history of family separation, foster care and juvenile justice
- Exposed to brutal domestic violence from an early age within the context of serious alcohol abuse. A history of drug and alcohol abuse from a young age
- Majority of his immediate family dead or in jail
- Multiple periods in custody as a youth
- Multiple suicide attempts
- Illiterate with limited prior employment
- A history of physical and mental ill health including a schizophreniform illness
- Gave an account of a history of over policing and negative contact with authority figures, with the psychiatrist referring to 'family and cultural issues' in that regard.
- A lengthy criminal history, entirely summary and significantly involving many offences against police. Never been to rehab before, jailed first at 12, and regularly thereafter, including for his first offence as an adult.
- An exemplar of the failures of the system (summary justice, social service provision in remote communities)



# The Community of Wilcannia

- On the Darling River in far western NSW, remote community 200 kms from Broken Hill
- A population of 800, predominantly Aboriginal
- A product of mission/reserve policy, with a significant population of the town still living on the two old missions on the outskirts of town
- A handful of Barkandji language speakers left, with previous state policies of denuding Aboriginal people of language and culture seemingly having succeeded
- Extremely high rates of domestic violence and other crime is well documented
- Terrible social and health indicators, a life expectancy of 36.7 years for Aboriginal men
- A reality of mass incarceration with crime and punishment a highly normalised part of town life
- A community almost entirely surviving on welfare
- A social reality of 'hopelessness'- though in many ways a surviving community
- Long standing police/community problems

# What was said about Aboriginality in R v Bugmy (District Court)

## District Court:

Submissions, “He was born in Broken Hill, but grew up in Wilcannia, Judge – Kennedy applies? Counsel - Yes that’s the submission. **There’s evidence in the psychiatric reports and the pre sentence reports of Mr. Bugmy being an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment. He grew up amidst alcohol abuse and according to the material extreme domestic violence. He tells the psychiatrist that he saw his father stab his mother 15 times and it could not be considered surprising that with that history he has a lengthy criminal history and has spent a large part of his life in institutions. It goes further as something that mitigates his moral culpability than it does in many other cases because he also suffers from a schizophrenia type illness that in the opinion of Dr Westmore arises independently of drug and alcohol abuse. So he’s to be considered and sentenced as a man who grew up in an environment with many if not all of the features identified in the Fernando jurisprudence but he’s also someone who in that context has suffered from a serious mental illness. It cant be understood without putting very much to the fore those subjective circumstances of which he is a product clearly. No doubt those circumstances precipitated and contributed to his serious drug and alcohol problems which are also detailed in the reports and the inter play between those early life circumstances and mental illness and drug and alcohol abuse is impossible to concisely or precisely explain but in my submission its an interplay that the court would well understand. “To compare the moral culpability of the choices made by Mr. Bugmy to similar choices made by a notional ordinary person would be a fruitless and unfair exercise without taking into account the interplay of which I have spoken”.**

Judgment – “I am certainly prepared to allow some moderation to the weight to be given to general deterrence because of those issues”. “It is submitted on behalf of the offender that he is, “an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment” and Fernando type considerations will it is submitted be relevant”. “Clearly enough the Fernando/Kennedy type issues are present in this matter, and accordingly, I will need to take them into account when considering the subjective case for the offender”.

# What was said about Aboriginality in R v Bugmy (CCA)

## Court of Criminal Appeal –

Submissions, *“The position of the Crown is that that sentence or case (Fernando) is now twenty years old. He’s been before the court on numerous occasions since. The crown raises the issue about the age of personal responsibility and says that in these circumstances, notwithstanding his background, it doesn’t actually inform the happening of the circumstances of this event within the prison system, and therefore, for that fact to accrue to him in some way to his credit or as a factor for consideration should not have occurred”.*

In argument, Hoeben CJ at CL, said, *“I think the situation with Fernando is that with a first offender or someone in the early stages of offending it’s a powerful consideration, but when you’ve got a list of offences and a history such as the current respondent has, one cant help wondering how many times one can cash that cheque before it runs out?”*

Judgment - Upheld the appeal (on other grounds) and re-sentenced Mr. Bugmy, holding, *“I agree that with the passage of time, the extent to which social deprivation in a person’s youth and background can be taken into account must diminish. This is particularly so when the passage of time has included substantial offending .... Here for the reasons set out in Ah-See, the extent to which his Honour could take those matters into account was limited”.*

# The *Fernando* related appeal ground in the High Court

- The Court of Criminal Appeal erred in holding that, “*with the passage of time, the extent to which social deprivation in a person’s youth and background can be taken into account must diminish. This is particularly so when the passage of time has included substantial offending*” (at [50]) and, that for this reason, any “*reduction*” to the weight to be given to general deterrence on account of “*Fernando considerations ... would be modest*” (at [52]) (a reference to *R v Fernando* (1992) 72 A Crim R 58 at 62-63)

# Bugmy in the context of over-representation

- In *Bugmy* the High Court will particularly consider whether the CCA was correct to hold that the extent to which these factors pertaining to Aboriginality can be “*taken into account*” “*must diminish*” over time and with re-offending.
- An issue of particular importance for Aboriginal people in NSW where they make up 2.5% of the state population, 22.1% of the daily prison population.
- In 2011 in the NSW Local Court 2609 of the 6809 people jailed were Aboriginal (38.3%). In higher courts 420 of 2040 (20.5%). In the Children’s Court 432 of 733 (59%)
- In Western NSW the situation is much worse than even these statistics suggest, and many of the outlier Aboriginal communities in western NSW have been identified as ‘over representation hot spots’ by the justice reinvestment campaign. The prisons of western NSW are black prisons.
- In the North Western Government area for example Aboriginal people are 15% of the population, yet between 2007 and 2012 of all juveniles jailed 245 were Aboriginal, 12 non Aboriginal.

# Sentencing Aboriginality – Questions

- This core “*must diminish*” question has led us as Mr. Bugmy’s legal representatives on something of an intellectual journey, involving considerations of various questions including the following:
- Is *Fernando* an accurate/exhaustive statement of the principles?
- What is really meant when one uses the common short hand and talks of a matter being, “one to which the *Fernando* principles apply”? Is this useful short hand or an actual obscuring of the actual issues?
- What is the relevance of over-representation and its causes to the sentencing of Aboriginal people? Is over-representation *per se* a relevant consideration within the context of proportionate sentencing?
- Is the concept of “mass imprisonment” and its effect on social cohesion a relevant matter? A concept from the USA that has been applied in Australia particularly in the work of Professor Brown from UNSW.

- What is the relevance of the offender's background to sentencing? Particularly when the offender's background can in various ways be described as one of 'social deprivation'. How should it be evidenced?
- What is the relevance of historical and systemic facts and issues that have created the social realities of Australia, and the place of Aboriginal Australians within it? If it is relevant how should a court have regard to it?
- What is the relevance of the general state of Aboriginal Australia in sentencing any given Aboriginal person? If it is relevant how should a court have regard to it?
- What is the relevance of the particular state of the offender's family and community? Is rehabilitation more important when sentencing Aboriginal offenders because of the damaged and vulnerable state of so many Aboriginal communities? Is it relevant that the social reality is a result of racist state policies?
- Should there be a special focus or special measures for an identifiable group who are not only disproportionately represented but constitute a critical mass of those being dealt with by the system? Is the gross and worsening trend of over-representation a legitimate focal point of the criminal justice system – particularly sentencing courts?

# Beyond Fernando?

Will the High Court accept the submission that *'in many cases, social deprivation and its sequelae may be aggravated by the passage of time'* & that the *'underlying assumption in the reasoning of the CCA that the passage of time of consequent ageing will provide an offender with an opportunity to escape the impact of a difficult childhood was particularly inapposite in its application to an Aboriginal recidivist offender who had spent his life in either the same very remote Aboriginal community of Wilcannia or in custody'*?

Will the High Court accept that a *"passage of time" with repeated periods of incarceration, may in fact, serve to exacerbate social dislocation and 'Fernando' considerations and further decrease moral culpability'*?

Will the High Court adopt the approach taken in Canada (R v Gladue [1999] 1 SCR 688 and R v Ipeelee [2012] 1 SCR 433) *'requiring Courts to take into account (by judicial notice) the unique historical, systemic or background factors which have played a role in bringing Aboriginal offenders before the Court, even where there is a lengthy criminal history'*? Or will such information have to be adduced time and time again?



Will the High Court accept that equality before the law requires the proper recognition and considerations by courts (without diminution in weight) that *'Indigenous Australians are over represented in the jail population, have a cultural history of dispossession and colonisation and have far worse whole life indicators than the non indigenous population in so far as health, life expectancy, mortality rates, suicide and self harm rates, educational attainment, home ownership and employment'?*

Will the High Court accept that to do the above *'is not to detract from the duty to fashion a sentence that is fit and proper but rather to recognise that it is appropriate for all levels of sentencing courts to (a) endeavour to reduce crime rates in Aboriginal communities by imposing sentences that 'effectively' deter criminality and rehabilitate offenders'.*

Will the High Court accept that *'it is appropriate for sentencing courts to sentence with an awareness of the role the criminal justice system has and continues to play in the over-representation of Aboriginals in that system and the consequences of diminished social cohesion' in order to guard against further entrenchment'?*

# Justice Reinvestment

The HRC has applied to intervene in R v Bugmy, and in doing so put before the High Court the concept of justice reinvestment.

The affidavit of the President of the HRC served states they seek to make submissions addressing:

- 1. The relevance of international human rights law to the concepts of equality before the law and proportionality*
- 2. The application of the concepts of equality before the law & proportionality to the judicial task of sentencing*
- 3. The way in which the personal history and circumstances of an offender should be taken into account in the sentencing process*

The affidavit also notes their 'current priority area' of 'the issue of justice reinvestment, stating, '*Justice reinvestment is a localised criminal justice policy approach that seeks to address the underlying causes of crime in local communities where there is a high concentration of offenders through diverting a portion of the funds that would have been spent on imprisonment to programs and services in those communities'*

# A Re-conceptualisation of the Purposes of Sentencing

- If sentencing is truly to play a role in reducing crime, reducing recidivism and over representation and repairing damaged and vulnerable Aboriginal communities it will surely only occur in conjunction with a true justice reinvestment approach. The existing tools are simply too crude and limited.
- This will require not only the necessary reinvestment but also the acceptance by all arms of government that deterrence is of limited effect, protection of the community only rarely achieved by jail and perhaps also that the criminal justice system itself is wreaking social havoc in communities, that in fact the system itself is now 'causing' crime through the effects of mass incarceration.
- Can the Bugmy case be a step along the road to an approach to crime and punishment that is more just and more effective?

The End