

"Equal Justice, Mandatory Sentencing and the Rule of Law"

Keynote Address at the Legal Aid Commission Conference on 2 July 2014 by the Honourable Justice Stephen Rothman AM.

It is the high point of my life, that I have children and grandchildren of which I am immensely proud and whom I love unconditionally. Their task, on the other hand, is to keep my feet firmly on the ground. When one of them learnt I was to give the keynote address here today, she said: "Why you?"; "I thought you had to be important to do that!".

So today, although I don't feel any more important, I am honoured to be giving this address to a body of lawyers that, as a group, has my unqualified admiration and support. Legal Aid is in many respects a cornerstone of our democracy – a means by which fairness can be applied and inequality addressed.

As we move into another period of fiscal restrictions, and greater clamouring to punish beyond reason, or before guilt has been proved, it is each of you that stands as the last line of defence of the rule of law and, with it, democracy.

Before developing that theme, I was requested by those that organised this event to recount two anecdotes that I gave in a paper recently, which paper, I was requested, should form the basis of this address. It does.

As a child, I grew up with a story, repeated to me many times, the details of which are no doubt apocryphal. As I think everybody here would know, I am Jewish. My Great Aunt likewise was Jewish, and was born overseas. Her family nickname was Dolly, like the sheep (not as in "incapax"). She had facial features not dissimilar to mine, was about 4' 9", short jet-black curly or wavy hair, with very dark olive skin. When she was in Northern New South Wales, as an adolescent, working in another relative's shop, she was herded against her protestations, on the bus for return to the mission. My family had to collect her. This story was told by my Aunt with some pride that she was "so

Australian”; but with consternation that the mere fact that she looked Aboriginal caused her to be treated in a manner so inconsistent with fundamental freedoms in her own country.

The second anecdote is a reiteration of an historical fact I mentioned at a Supreme Court conference some time ago. West of Gosford and west of the Sydney-Newcastle Freeway, there is an area upon which there lived Aboriginal people. Their language and culture, while similar to those in surrounding areas, was distinct. There is no living descendant of that people. There are remnants of their culture; drawings; carvings; middens and the like. This nation, this people, was exterminated. Some died from disease. Most were murdered by hunting parties, organised sometimes for sport, sometimes after church, much as the English hunted fox.

With great respect to many leaders of our society, with very few exceptions, in Australia, white Anglo-Saxon heterosexual males have no understanding of discrimination. Even the exceptions understand it from an observer’s perspective; not from personal experience.

And discrimination is not confined to race, colour, religion, gender and sexuality. In most Western countries, discrimination on the basis of wealth and power is far more prevalent even than those matters covered by various anti-discrimination statutes. But political leaders, generally, not universally, have never experienced that kind of disempowerment.

EQUAL JUSTICE

The High Court in *Green v R; Quinn v R* [2011] HCA 49; (2011) 244 CLR 462 at [28] makes clear that the principle of equal justice is a fundamental aspect of the exercise of judicial power. But the High Court went further. It made clear that equal justice embodies the norm expressed in the term “equality before the law”. It is a fundamental aspect of the rule of law. It is that thesis, which I will seek to develop in this address in dealing not only with the issues of sentencing in the criminal law but also as the basis for opposition to the concept of mandatory sentencing.

Equal justice requires that like should be treated alike and that the difference in treatment of different persons should be rational: see *Postiglione*, supra. Equal justice is a principle that is fundamental to the exercise of judicial power and may also be fundamental to, and a limitation on, the exercise of legislative power in a constitutional democracy in which the implementation of the rule of law is required. In the US, it is guaranteed by a combination of the Fifth Amendment and Fourteenth Amendment: see, inter alia, *Slaughter-House Cases*, 83 U.S. 36 (1873); *United States v Virginia*, 518 U.S. 515 (1996), and in Canada by s 15 of the *Charter of Rights*: see, inter alia, *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

In *Andrews*, supra, McIntyre J recited the principle by reference to the Aristotelian principle of formal equality, namely, that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood”: *Ethica Nichomacea*, trans. W. Ross, Book V3, at p. 1131a-6 (1925).

While the High Court of Australia has considered the doctrine of equal justice in relation to parity in sentencing and referred to it as a fundamental of the exercise of judicial power, its more general application as a limitation on legislative power has not been the subject of discussion: but see, in relation to the race power, s 51(xxvi) of the *Constitution*, *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 (the Hindmarsh Bridge Case) at 365-366, [40]-[42], per Gaudron J; and see also *Native Title Act Case* (1995) 183 CLR 373 at 461.

Whatever be the situation as to limits on the legislature in the promulgation of legislation that irrationally differentiates between classes of persons, it cannot be doubted that the exercise of judicial power must be devoid of capriciousness and arbitrariness. It is to the lack of capriciousness and arbitrariness (and perceived capriciousness or arbitrariness) that the principle of equal justice is directed.

It is the principle of equal justice that has found expression in the principles of parity as between co-offenders and discrimination law and is the notion that stops governments gaoling all red-haired lawyers, or killing all blue-eyed babies.

In my view, if the rule of law is guaranteed by Chapter III of the Constitution, as is suggested by the High Court in *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1, then the rule of law or the abolition of it, is a step too far in the legislative competence of either Federal or State governments. That is the essential premise behind the comments of her Honour, Gaudron J in *the Hindmarsh Bridge Case* referred to above.

If Chapter III of the Constitution were, as is suggested by the High Court, a guarantee as to the application of the rule of law, then equal justice as a fundamental and norm of the rule of law must be guaranteed by the provisions of Chapter III.

Of course, notwithstanding the foregoing comment, the High Court has already spoken on (or at acquiesced in) mandatory sentencing: see, for example, *Palling v Corfield* [1970] HCA 53; (1970) 123 CLR 52 (in which the validity of mandatory sentencing was assumed); *Baker v R* [2004] HCA 45; (2004) 223 CLR 513; *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562.

The discussion on mandatory sentencing has occurred either before recent developments in the operation of Chapter III of the Constitution on legislative power in relation to courts and sentencing, or has been assumed in the context of a debate on other ancillary aspects.

Further, past consideration of mandatory sentencing has focused on the concept of the integrity of the court in the sense in which the High Court discussed the issues in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Fardon v Attorney-General of Queensland* [2004] HCA 46; (2004) 223 CLR 575.

The High Court has not been asked to consider the issue of mandatory sentencing in the context of the principles in *Kirk* and the entrenchment in Chapter III of the Constitution of the doctrines of the rule of law and with it the principles of equal justice.

Of course, it is possible, strictly, to adhere to the principle of equal justice notwithstanding a regime which included mandatory sentencing. It is difficult to achieve, but it is possible. It is possible only in circumstances where the mandatory sentence is treated as a mandatory minimum sentence for the lowest possible level of objective seriousness for an offender requiring the greatest degree of consideration for subjective circumstances.

In that situation, an offender that was required to be sentenced could be sentenced to a heavier sentence that still applied a rational difference as between all offenders for that offence. Nevertheless, even that hypothetical (which is an extreme situation) is difficult to apply in circumstances where, consistent with the majority in *Green v Quinn* at [29], the equal justice norm applies to persons charged with similar offences and is not confined to persons who are charged with the same offence arising out of the same criminal conduct.

Therefore, persons charged with different offences arising out of the same criminal conduct, in circumstances where one offence is governed by a mandatory sentence regime and another is not, would starkly identify the difficulty associated with the application of the norms of equal justice.

Whatever be the constitutional restriction on legislative power to impose mandatory sentence in the State arena, or federally, there is no doubt that, as a matter of policy, democracy depends fundamentally on the application of the rule of law and the lack of arbitrariness and capriciousness in the sentencing of individuals. Ultimately, democracy depends upon the notions of equal justice.

It may be, on the basis of precedent and a proper comity with legislative power, that the High Court determines that mandatory sentences may be promulgated as part of a legislative scheme. Whether or not it is legally valid, mandatory sentences are both undemocratic and immoral and ought not be a feature of any true democracy.

Democracy is defined, traditionally, as a system of government by the people, for the people and of the people, in which everyone has equal political rights. To deny people equal political rights is inconsistent with the very notion of democracy itself. In that context, a legal right is a political right.

The unfairness and immorality of mandatory sentencing is best illustrated by an example. Let us assume there is legislation that a person affected by alcohol who assaults another causing death is required to be sentenced to a minimum term.

There are fundamental issues associated with irrationality of such a proposition, in the first place. No person, affected by alcohol, about to punch another, stops and determines whether it is appropriate to punch the person now (or do so later) because of the effect of the mandatory sentencing regime. The whole notion of general deterrence in that situation is moot.

Further, as has been pointed out in some judgments, the proposition that a person affected by alcohol is required to be sentenced to a particular minimum, in circumstances where the same conduct by the same person who is not affected by alcohol would not be, does lead to obvious irrationality in approach.

Let us take the example of the one-punch manslaughter committed in Kings Cross. I will not discuss the merits or otherwise of the sentence imposed by the trial judge, as the matter is the subject of appeal to the Court of Criminal Appeal and the judgment is reserved. As I understand the facts, the accused was affected by alcohol; was intent on causing some damage; and, unprovoked, punched a person who, as a result, died. There is a mandatory

minimum sentence that, if current legislation that has been promulgated or proposed is effective, would be required to be imposed on the accused.

Against that example, I wish to give the instance of a person I was required to sentence early in my career as a judge. The accused was an Aboriginal who was drinking with some friends at a pub in La Perouse. Into the pub walked a Caucasian who, upon entry into the pub and sighting a number of Aboriginals, spewed forth racist epithets. Some of the drinking friends of the accused wanted to “have a go” at him. The accused calmed them down; suggested that the Caucasian was just being an idiot; and ought to be left alone. That situation arose two to three times during the course of the evening.

Finally, the accused herded his drinking mates out of the pub and into transport home. The accused, who lived nearby, then commenced to walk home, was half on the road leaving the footpath, when the Caucasian made a comment relating to the accused’s mother and her sexual habits; whereupon the accused turned, punched the Caucasian on the chin and the Caucasian fell back and died.

The proposition, which necessarily arises from a mandatory sentencing regime, that the aforementioned Aboriginal in the example with which I was required to deal some years ago, should be treated in like manner to an offender who has committed manslaughter in the circumstances currently subject to appeal, shows manifest inequality and absurdity.

If I have not made it absolutely clear, I reiterate that mandatory sentence is a blight on the exercise of judicial power; is inconsistent with democratic principles, particularly that associated with equal justice; ought not be implemented as an exercise of legislative discretion; and, lastly, ought not be allowed in a country in which the rule of law and equal justice is guaranteed by a written constitution.

EQUALITY IN SENTENCING

Before dealing with the principles of equality in sentencing I wish to introduce some facts relating, particularly, to Aboriginal offenders. Aboriginal and Torres Strait Islanders make up approximately 2.5% of the Australian population; these figures are from the 2011 Census and therefore relate to October 2011. In New South Wales, the figure was the same. Yet in New South Wales, as at February 2014, Indigenous persons accounted for 24.2% of the prison population; 23.4% of the male and 33.8% of the female prisoner population.

A comparison with earlier data shows that, notwithstanding the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody, the proportion of Aboriginal prisoners is greater than it was when the Royal Commission was investigating; and the rate of incarceration has increased. While it is not a matter directly relevant to this paper, it should be noted that the vast majority of Aboriginal persons in gaol are on remand. See comments of the Court of Criminal Appeal in *R v Michael John Brown* [2013] NSWCCA 178 at [35] and [36].

THE JUDGMENT IN BUGMY & MUNDA

In Bugmy, the Crown appealed against the alleged manifest inadequacy imposed by the District Court. The primary sentencing judge, in fixing a sentence, referred to the offender as “an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment” and applied the judgments of the Court of Criminal Appeal in *R v Fernando* [1992] 76 A Crim R 58 (“*Fernando*”) and *Kennedy v The Queen* [2010] NSWCCA 260 (“*Kennedy*”).

Simply for ease of readers, it is appropriate to reiterate the often-cited passage in *Fernando* at [62]:

- (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.
- (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.

In *Kennedy*, Simpson J, with whom Fullerton and RA Hume JJ agreed, commented on the universal applicability of the principles and noted particularly that there was no rule that the weight to be given to these factors diminished over time or because of earlier offending. Further, her Honour remarked that the factors were not confined to rural or remote community members.

The Court of Criminal Appeal, the appeal from which is the High Court judgment *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 (*"Bugmy"*), commented that the ameliorating effects to which Wood J referred in *Fernando* diminished with time "particularly when the passage of time has included substantial offending."

Nevertheless, the Court of Criminal Appeal in *Bugmy* took account of the "*Fernando* factors", but confined their effect to a modest one on the foregoing recited basis. In the High Court, the issue of Aboriginality as a factor in sentencing was approached by the appellant in two ways. Both are important; only one was successful.

First, the narrow basis was that the principles summarised in *Fernando* were misapplied. Secondly, a broad ground was advanced that sentencing courts should take into account the "unique circumstances of all Aboriginal offenders" as relevant to moral culpability for an individual offence.

Notwithstanding its attitude below, in the High Court the Crown conceded the narrow basis. The High Court confirmed the approach of Simpson J in *Kennedy*: neither time nor prior offending diminished the applicability of the *Fernando* principles.

In so doing, the High Court confined to the dustbin of judicial history a growing body of opinion, in New South Wales and elsewhere, which sought to restrict

the principles so that they did not apply in circumstances mentioned by the Court of Criminal Appeal, namely, the effect of the passage of time and prior, even repeated, incarceration.

I will return later in this paper to the broad basis argued on appeal in the High Court in *Bugmy*. Before so doing, I will deal briefly with *Munda v Western Australia* [2013] HCA 38; (2013) 249 CLR 600 ("*Munda*").

The judgment of the High Court in *Munda* does not add significantly to *Bugmy* on issues relating to sentencing Aborigines, except in one respect, with which I will deal later.

Generally, *Munda* turns on the role of an intermediate appellate court (as against the High Court) and general sentencing issues. The dissent of Bell J is instructive.

Essentially, Bell J differed from the majority in the way in which her Honour assessed the range available and the undescribed departure by the WA Court of Appeal from the range evidenced by past sentences. Her Honour concluded that, in light of the past sentences and the failure of the WA Court of Appeal either to find error in the consideration of background and circumstances, or to depart from the previous range of sentences, the WA Court of Appeal's reasons disclosed error. Because, on that basis, her Honour commented, the sentencing judge must have been within range.

The majority essentially declined to act as a sentencing court and otherwise failed to find error. They reiterated that subjective circumstances affecting moral culpability must be considered, but a court (in this case, the WA Court of Appeal) was required to balance such circumstances with the seriousness of the offending. Because the Court of Appeal had performed that task, the High Court was not prepared to gainsay that exercise.

In other words, Bell J found that the WA Court of Appeal should have taken a similar approach as the High Court did. While the WA Court of Appeal, unlike the High Court, is a "sentencing court", they must find error. There was no error

in the principles applied by the sentencing judge, so the only basis for the WA Court of Appeal to intervene was if it were to find manifest inadequacy. Since the WA Court of Appeal did not suggest that the range evidenced by the previous judgments was wrong, by definition, the sentence imposed must have been within range.

THE BROAD GROUND – EQUAL JUSTICE

Fundamental to the expression of some of the opinion in *Munda* and to the broad ground in *Bugmy* is the treatment or implementation of the principles of equal justice.

There is nothing in the express terms of the judgments that is even arguably incorrect in this area. Nevertheless, the implication necessarily arising from the comments, if used incorrectly, may result in flawed reasoning.

You may wonder why it is relevant to any of us that the High Court may be wrong: “Ours not to reason why... ours is but to do and die.” Yet, it is important for those of us at the coalface to understand these principles and to understand the fallacy that may arise if they are not properly understood in order to deal with the sentence, in a practical manner.

In *Munda*, at [53], the majority said:

Mitigating factors must be given appropriate weight, but they must not be allowed to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. It would be contrary to the principles stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an

Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

In *Bugmy*, the Court (Gageler J agreeing, at least to the extent that it is shown still to be an operative factor) said at [40], [41] and [42]:.

“[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 perpetrate them. The circumstances 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.

[41] Mr. Fernando was a resident of an Aboriginal community located near Walgett in far-western New South Wales. The propositions stated in his case are particularly directed to the circumstances of offenders living in Aboriginal communities. Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*. Nonetheless, the appellant’s submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender’s background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.

[42] It will be recalled that in the Court of Criminal Appeal the prosecution submitted that the evidence of the appellant’s deprived background lost much of its force when viewed against the background of his previous offences. On the hearing of the appeal in this Court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.

In *Bugmy*, as to the broad approach, the High Court distinguished the Canadian judgments upon which the appellant relied in argument.

The Canadian approach was distinguished because under Canadian law specific reference was made to Aboriginality as a factor, of itself, in sentencing. The terms of section 718.2(e) of the Canadian Criminal Code [RSC 1985 c. C-46] are relevantly recited at [29] of the judgment in *Bugmy*, and I repeat the paragraph for completeness.

“All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*” (Emphasis in the High Court judgment).

Yet the High Court approach epitomised in the earlier extract from *Munda*, while logically sound, fails to appreciate the significance of the facts; and fails to appreciate the effect of section 15 of the Canadian Bill of Rights (the Charter).

Let me start from the notions of equal justice. They have been expounded in various sentencing judgments, particularly in relation to parity principles.

Like should be treated alike and relevant difference treated rationally different.

That principle is a fundamental aspect of the exercise of judicial power. *Green v R*; *Quinn v R* [2011] HCA 49 at [28] excerpted in *R v Clarke* [2013] NSWCCA 260:

“Equal justice” embodies the norm expressed in the term “equality before the law”. It is an aspect of the rule of law. It was characterised by Kelsen as “the principle of legality, of lawfulness which is immanent in every legal order”. It has been called “the starting point of all other liberties”. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen* [2001] HCA 64: “Equal justice requires identity of outcome

in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect” (emphasis in original). Consistency in the punishment of offences against the criminal law “is a reflection of the notion of equal justice” and “is a fundamental element in any rational and fair system of criminal justice”. It finds expression in the “parity principle” which requires that like offenders should be treated in a like manner. As with the norm of “equal justice’, which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect the different degrees of culpability and/or different circumstances.

In *Jimmy v R* [2010] NSWCCA 60; (2010) 77 NSWLR 540, I traced the notion, through the judgments of the Canadian Supreme Court to Aristotelian principles of formal equality. In *Green*, the High Court traced it to Solon’s “isonomia” transported to England in the 16th century. Whatever its origin, it is fundamental to the rule of law and the exercise of judicial power.

The manner in which the Canadian Supreme Court has applied the section 718.2(e) reference to Aboriginal offenders (and the reference to equality in section 15 of the Charter) is by application of the principle of equal justice. Any other method would be inconsistent with the Charter and render section 718.2(e) invalid.

As to section 15 of the Charter, in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, the Supreme Court said:

The concept of equality has long been a feature of Western thought. As embodied in s15(1) of the Charter, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the Charter, it lacks precise definition.

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognised at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may

frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well known words of Frankfurter J in *Dennis v United States* [1950] 339 U.S. 162 at pg.184: It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

The same thought has been expressed in this Court in the context of s.2(b) of the Charter in *R v Big M Drug Mart Ltd* [1985] 1 S.C.R 295, where Dickson C.J. said at p. 347: The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between “A” and “B” might well cause inequality for “C, depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law – and in human affairs an approach is all that can be expected – the main consideration must be the impact of the law on the individual or the group concerned. Recognising that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

First, having referred to the Charter, it is clear that in Canada, in the United States of America and in Australia, the notions of equal justice are offended as much if not more by the equal treatment of unequals as by the unequal treatment of equals: see: *Dennis v U.S.* 339 US 162 (1950) at 184 per Frankfurter J; *Waters v Public Transport Corporation* (1991) 173 CLR 349, particularly at 402 - 4 per McHugh J.

Next, I turn to the treatment of s718.2(e) by the Canadian Supreme Court. In *R v Gladue* [1999] 1 SCR 688, the Canadian Supreme Court said:

The sentencing judge is still required to craft a sentence which is appropriate for the offence and the offender; it would be a misapplication of s718.2(e) to automatically reduce a sentence or exclude imprisonment merely because a particular accused is of Aboriginal descent. However, the provision calls on a sentencing judge to undertake a fundamentally different analysis when sentencing an Aboriginal person, because Aboriginal persons have unique circumstances. Such an analysis must begin with an assessment of the degree to which systemic and background factors unique to Aboriginal offenders have played a role in a particular accused's life and appearance before the court. These factors will often include poverty, substance abuse, lack of education, and lack of employment opportunities. Where these factors have played a significant role in an Aboriginal accused's life, the analysis shifts to an assessment of the availability of appropriate alternatives to imprisonment as a sentence.

The sentencing judge accordingly made two errors of law in the present case. As noted above, he unduly restricted the application of s718.2(e) to offenders residing on reserve. Perhaps as a result of the first error, the sentencing judge took no systemic or background factors unique to Aboriginal persons into account in crafting the sentence, and that omission also constituted an error of law.

In *R v Ipeelee* [2012] 1 SCR 433 the Canadian Supreme Court remarked:

Section 718.2(e) of the Criminal Code was implemented in order to address the overrepresentation of Aboriginal people in the Canadian criminal justice system. The restorative justice approach including the consideration of an Aboriginal person's status as such as explained in *R v Gladue*. The Supreme Court called upon judges to consider different methods in sentencing Aboriginal offenders and required them to consider the possibility of systemic and background factors having a role in an Aboriginal accused being involved in the criminal justice system. The failure of the legislative and judicial efforts to address the overrepresentation of Aboriginals in the criminal justice system is partially due to fundamental misunderstanding and misapplication of the laws found in *R v Gladue* and s718.2(e) of the Code.

Under s718.2(e) trial judges have a statutory duty to consider the unique circumstances of Aboriginal offenders in sentencing. To fail to apply *R v Gladue*

would result in unfit sentences that are not consistent with the principle of proportionality and would be a violation of that statutory duty. The error of failing to consider and apply the *Gladue* principles would justify appellate intervention.

I return to [53] of *Munda*. As a statement of principle, it is flawless. As an outcome, if applied superficially, it ignores the very principle it espouses.

Every individual before the courts for sentencing must be treated equally – as that notion is described above - and as an individual. Any non-Aboriginal who has suffered as a part of a 200 year history of dispossession from their own land; exclusion from society; discrimination; and disempowerment is entitled to have such circumstances considered. In Australia, such persons are confined to the Indigenous population. To treat Aborigines differently in Australia by taking account of such factors is an application of equal justice; not a denial of it. Of course, even within the totality of Aboriginal offenders, individuals will differ. Some will suffer the consequences of such conduct more than others. Some may not have suffered any such consequences.

Nothing in the foregoing circumscribes the necessity to impose an appropriate sentence. Rather, it argues for a consideration of those circumstances that are applicable to each Aboriginal offender, because of her or his treatment as an Aborigine.

DISCRIMINATION AS A FACTOR IN SENTENCING

The High Court adopted and applied the principles in *Kennedy* and *Fernando*. As the High Court explains, *Fernando* itself is a summary of the approach to be taken: see, particularly, [17] and [18] of *Bugmy*.

Yet, the High Court in its judgment assumed that an endemic environment of alcohol abuse and violence explains the recourse to violence and the level of frustration that may have led to it. Of this it took judicial notice. There was evidence that the individual suffered from such an environment. Otherwise the psychological affect is assumed or asserted by the courts or by experts.

I do not cavil with that approach. But with respect, what is it about the treatment of Aborigines generally that militates against or precludes similar treatment? The answer lies in the fallacy of common sense and experience.

We assume that such an environment of alcohol and abuse has effects. We do not accept that discrimination, exclusion and disempowerment, have similar effects. Yet scientific evidence supports the latter proposition.

In recent studies, Professor Baumeister has tested the effect of social exclusion on individuals. The results are astounding. Social exclusion causes directly reduced academic performance, in speed, accuracy and comprehension; decreased self-regulation for longer term benefits, for example, food choice, understanding consequences; increased anti-social behaviour and a greater likelihood of criminal behaviour, including a reduced sensitivity to pain.

In other words, social exclusion, the effect of discrimination and disempowerment on an individual, directly caused increased anti-social and criminal behaviour; decreased health by incorrect lifestyle choices; and decreased academic and intellectual performance.

None of this was before the High Court; and none was considered by it.

THE BAUMEISTER TESTS

In *New South Wales v Hill (No 5)* [2013] NSWSC 140, I had occasion to deal, in the context of an application for variation of an Extended Supervision Order, with a submission that Mr. Hill had resisted authority and his behaviour was, for that reason, described as “problematic” and “unsatisfactory and challenging”. At [17] of *Hill (No.5)*, I remarked:

“As earlier stated, this is not a time for a discussion of the general issues associated with discrimination and exclusion.

Nevertheless, studies by Professor Baumeister (now a Professor of Psychology at Florida State University) deal with the effect of exclusion and disempowerment on the behaviour of persons suffering from it, much of which accords with the issues just discussed.”

On the other hand, this is an appropriate occasion to discuss the psychological effect on an individual of discrimination and exclusion, at least to the extent relevant to understanding behaviour, or moral culpability, relevant to sentencing. I am deliberately going to set out some of the findings of Professor Baumeister at length, so practitioners know what is to be adduced from experts called or in submissions made.

By way of introduction I should comment that Professor Baumeister’s original thesis was that rejection or social exclusion causes emotional distress, which in turn affects behaviour. This thesis was tested; and disproved. The tests disclosed that social exclusion and/or rejection affects behaviour, but not emotion.

The effect on behaviour caused by social exclusion was statistically among the largest effects of any physical stimulant in the Professor’s career. In other words, social exclusion directly affects the behaviour of individuals, but these effects do not depend on emotional distress. I will not describe the tests. It is sufficient for the purposes of this paper to note that scientific method was utilised, including a control group. I recite some of the findings:

In R.F Baumeister & C.N DeWall, “The Inner Dimension of Social Exclusion: Intelligent Thought and Self Regulation Among Rejected Persons” (2005) *Journal of Personality and Social Psychology*, 88, 589-604, the authors remarked:

It is easy to propose how people ideally or optimally would respond to social exclusion. They ought to redouble their efforts to secure acceptance. Toward that end, they should reduce their

aggressive and antisocial tendencies and increase prosocial behaviour. They should improve self-regulation so as to perform more socially desirable actions. And even if improved social acceptance is not a promising option, they ought at least to become more thoughtful and intelligent and should avoid self-defeating behaviours, so as to fare better on their own if necessary. Yet our laboratory studies have found the opposite of all these to be close to the truth.

Initially we thought that emotional distress would be the central feature of the impact of social rejection, and all behavioural consequences would flow from this distress. This too has been disconfirmed. Across many studies we have found large behavioural effects but small and inconsistent emotional effects, and even when we did find significant differences in emotion these have failed to mediate the behaviours. Indeed, the sweeping failure of our emotion mediation theories has led us to question the role of emotion in causing behaviour generally (but that is another story).

Self-regulation and cognition, instead of emotion, have emerged from our most recent data as the most important inner processes to change in response to social exclusion. Rejected or excluded people exhibit poor self-regulation in many spheres. They also show impairments in intelligent thought, though these are limited to forms of thought that are linked to self-regulation (i.e., thinking processes that depend on effortful control by the self's executive functioning).

Nonetheless, the findings from this work have helped shed light on both the inner and outer responses to exclusion. They help illuminate why many troubled individuals may engage in maladaptive or seemingly self-destructive behaviours. They may also have relevance to the responses of groups to perceived exclusion from society as a whole. Although there are some exceptions, such as the intellectually vigorous culture maintained by Jews during the centuries of discrimination and ghettoization, many groups who felt excluded or rejected by society have shown

patterns similar to those we find in our laboratory studies: high aggression, self-defeating behaviours, reduced prosocial contributions to society as a whole, poor performance in intellectual spheres, and impaired self-regulation. Our findings suggest that if modern societies can become more inclusive and tolerant, so that all groups feel they are welcome to belong many broad social patterns of pathological and unhealthy behaviour could be reduced.

See also, J.M Twenge, R.F. Baumeister, C.N DeWall, N Ciarocco, J.M Bartels, "Social Exclusion Decreases Prosocial Behaviour" (2007) *Journal of Personality and Social Psychology*, 92, 56-66. There is also an article by Professor Baumeister written in non-technical language and available on the internet: R.F Baumeister, "Rejected and Alone" (2005) *The Psychologist*, 18, 12.

Interestingly, from my own particular background, the foregoing extract cites the Jewish experience as an exception. Professor Baumesiter, who is not Jewish, failed to realise that the Jewish community provides no exception, other than one that "proves the rule". The Jewish community developed, over the centuries of social exclusion, its own mechanisms, similar to those adumbrated by Professor Baumesiter as a result of his studies, that according to his tests, would overcome the effects of social exclusion by empowerment and cultural self-confidence and support.

This paper is not concerned with possible government or community action to reverse the effects of social exclusion on the Aboriginal community. Rather it is concerned with the current effect on individual Indigenous Australians of the social exclusion that each may, and probably has, suffered, which currently exists and has existed in the past. It is sufficient, for present purposes, to remind participants of the effect of the work of Inspector Freudenstein in Redfern which has had similar outcomes in the reversal of the effect of social exclusion and, coincidentally, operates on the same lines as those suggested by Professor Baumeister.

CONCLUSION AS TO EQUAL JUSTICE AND SENTENCING

There are a number of matters raised, somewhat eclectically, in the foregoing from which there are significant lessons.

First and foremost, practitioners need to ensure that the evidence and material before the court covers the matters to which the High Court has referred. It is insufficient for judicial officers to rely on the mere fact of Aboriginality. Material needs to be deduced on the background of the offender being sentenced.

Sentence proceedings can be quite informal, particularly for lesser offences. The material in these circumstances need not necessarily be formal. Nevertheless, pre-sentence reports or reports as to the suitability of the offender for alternative sentences to custody, can and should contain such material, if it applies.

I do not underestimate the workload on Magistrates and District Court judges. It may not always be possible to adjourn proceedings to obtain such material. If not, then legal practitioners, especially from Legal Aid and the Aboriginal Legal Service (ALS), need to ensure that they have the material to inform the court and possibly obtain it from the offender him/herself.

The passage in *Bugmy*, to which reference has already been made, makes clear that there needs to be material before the court on which the sentencing judge can base any assessment. Mere general knowledge of the circumstances of Aborigines cannot be applied, without a proper basis, to any particular individual.

There are two absolutes that arise from the High Court judgment. First, the view sometimes expressed that the passage of time, itself, ameliorates the effect of such a background has no place in the reasoning process of judicial officers. Secondly, prior incarceration, even repeated incarceration, does not,

of itself, affect the factors to which *Fernando* directs us. Statements to the contrary of either of those propositions by the Court of Criminal Appeal in some other cases, should be disregarded.

Of course, as the High Court makes clear, none of these factors entitle a sentence to be imposed that does not reflect the seriousness of the offending.

Further, time and prior incarceration may have been used for treatment, courses and counselling that have ameliorated some of the effects of such a background. That would need to be the subject of significant evidence.

Without the necessary material on background, an Aboriginal offender may ultimately be treated unfairly. In *R v Kelly* [2005] NSWCCA 280, parity was refused on appeal in part because *Fernando* factors were not raised by the ALS for the appellant at first instance, but were taken into account for the co-offender.

The expression at [41] of *Bugmy* points fundamentally to the need for material in relation to each offender for whom these factors are arguably relevant. The foregoing may also direct us to the way in which the “broader” aspects may be appropriately considered.

While the High Court has, in my view, misconstrued the approach of the Canadian Supreme Court, the result may nevertheless be the same. The Canadian Supreme Court is not known for its imprecision of language. The authorities on s718.2(e) of the Canadian Code refer to **unique** circumstances of Aboriginal offenders. If the circumstances are “unique”, it is not a distortion of the principles of equal justice to have regard to them. To the extent that such circumstances render an Aboriginal offender different from a non-Aboriginal offender in an otherwise similar situation, it would be contrary to the principles of equal justice not to have regard to those circumstances.

Ultimately, this may be all that the High Court is saying on that broader issue. First, there must be material that allows the sentencing court to find that the

offender has suffered from the factors sought to be taken into account. There can be no assumptions of suffering.

Secondly, there must be material that shows that such factors have affected the offender's conduct or moral culpability. It is for that reason that I have set out in this paper some extracts of the studies that have been conducted. Those factors may need to be put to psychologists and others who provide reports.

Thirdly, it is only after that has occurred on a sufficient number of occasions that judicial officers may eventually be able to take such effects "on notice".

Finally, each individual must be treated as such. There can never be a "group discount" on sentence just because of a person's membership of a particular race, religion, or ethnic group.

Just as judicial officers need to be vigilant in guarding against racial or other profiling by police, jurors or judges, and over policing by all, so too we are not entitled to sentence other than on the basis of the circumstances of the offence and the particular offender. If "broader" factors were to be considered, it must be shown that the factors have impacted the offender and have compromised that offender's "capacity to mature and to learn from experience" (*Bugmy* at [43]).

More generally, the principle of equal justice, most directly applied in sentencing co-offenders, must be understood as a fundamental norm of the rule of law and of democracy.

Laws that are inconsistent with the norm, to the extent that they are valid, threaten the very fabric of the democracy under which we live. As earlier described, democracy is a system of government. The legislature is entitled to regulate the relations between the members of society. However, in doing so, lawmakers are not entitled to treat equals unequally or persons who are relevantly unequal as equals.

Judicial officers who do so are committing an error of law. Lawmakers who promulgate such inequality are acting illegitimately.

BIBLIOGRAPHY

A Articles/Books/Reports

- Anthony, Thalia, "Before the High Court: Indigenising Sentencing? *Bugmy v The Queen*" (2013) 35 *Sydney Law Review* 451
- Aristotle, "Ethica Nichomacea", trans. W. Ross, Book V3 (1925)
- Baumeister, Roy F., "Rejected and Alone" (2005) 18 *The Psychologist* 12
- Baumeister, Roy F. and C. Nathan DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self Regulation Among Rejected Persons" (2005) 88 *Journal of Personality and Social Psychology* 589
- Baumeister, Roy F., Jean M. Twenge, C. Nathan DeWall, Natalie J. Ciarocco and J. Michael Bartels, "Social Exclusion Decreases Prosocial Behaviour" (2007) 92 *Journal of Personality and Social Psychology* 56
- Baumeister, Roy F. and Mark R. Leary, "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117(3) *Psychological Bulletin* 497
- Bond, Christine and Samantha Jeffries, "Differential Sentencing of Indigenous Offenders: What Does Research Tell Us?" (2013) 8(7) *Indigenous Law Bulletin* 15
- House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011)
- The Honourable Geoffrey M Eames QC, "Criminal Law and Sentencing Issues Amongst Indigenous Communities: Questions from Aurukun" (2008) 12 *Australian Indigenous Law Review* 22
- The Honourable Justice Stephen Norrish QC, "Sentencing Indigenous Offenders: Not Enough 'Judicial Notice'?" (Paper presented at Judicial Conference of Australia Colloquium, Sydney, 13 October 2013)
- Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System* (2010)

B Cases

- Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562
- Andrews v Law Society of British Columbia* [1989] 1 SCR 143
- Baker v R* [2004] HCA 45; (2004) 223 CLR 513

Bugmy v The Queen [2013] HCA 37; (2013) 249 CLR 571

Dennis v U.S. 339 US 162 (1950)

Fardon v Attorney-General of Queensland [2004] HCA 46; (2004) 223 CLR 575

Green v R; Quinn v R [2011] HCA 49; (2011) 244 CLR 462

Jimmy v R [2010] NSWCCA 60; (2010) 77 NSWLR 540

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

Kartinyeri v Commonwealth [1998] HCA 22; 195 CLR 337

Kennedy v The Queen [2010] NSWCCA 260

Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1

Munda v Western Australia [2013] HCA 38; (2013) 249 CLR 600

Native Title Act Case (1995) 183 CLR 373

New South Wales v Hill (No 5) [2013] NSWSC 140

Palling v Corfield [1970] HCA 53; (1970) 123 CLR 52

R v Clarke [2013] NSWCCA 260

R v Fernando [1992] 76 A Crim R 58

R v Gladue [1999] 1 SCR 688

R v Ipeelee [2012] 1 SCR 433

R v Kelly [2005] NSWCCA 280

R v Michael John Brown [2013] NSWCCA 178

Slaughter-House Cases 83 U.S. 36 (1873)

United States v Virginia 518 U.S. 515 (1996)

Waters v Public Transport Corporation (1991) 173 CLR 349

C Legislation

Canada Act 1982 (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*')

Canadian Criminal Code [RSC 1985 c. C-46]

Commonwealth of Australia Constitution Act 1900 (Imp)

D *Other*

Australian Bureau of Statistics, *Characteristics of Aboriginal and Torres Strait Islander Australians 2011 – Population Distribution and Structure*, 27
November 2011