Childhood, Infant and Perinatal Exposure to, and Experience of, Domestic and Family Violence

Case Summaries

***Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37** (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ)

Cause grievous bodily harm with intent – disadvantaged childhood as Aboriginal offender – general sentencing principles – relevance of early exposure to alcohol abuse and violence

- Aboriginal offender whose background included growing up in a household where alcohol abuse and violence commonplace – limited formal education – commenced alcohol and drug abuse at 13 years of age – saw father stab his mother 15 times – all offender's siblings had criminal records and offender commenced own record at 12 years of age – spent many years in custody – mental health issues possibly from alcohol: **at [12]–[13]**

> [40] Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.
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> [43] … The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
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> [44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

R v Fernando **(1992) 76 A Crim R 58** (Wood J)

Malicious wounding – disadvantaged childhood as indigenous offender – general sentencing principles – relevance of exposure to alcohol abuse in community

- Offender sentenced for maliciously wounding his de facto partner with a knife – disadvantaged background included early introduction to alcohol and long-standing abuse of it within communities where such conduct is not only the norm but positively encouraged by peer group pressure

> (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
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> (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects. (pp 62–3)

Maher; Maher **[2021] NSWDC 80** (Yehia SC DCJ)

Inflict GBH – causal link between disadvantaged background and offending – reference to Bugmy Bar Book chapters on stolen generations and exposure to family and domestic violence

- Evidence established offenders Aboriginal brothers with deprived and disadvantaged childhood – intergeneration trauma resulting from mother's removal from family as a child – exposure to family and domestic violence and alcohol abuse – introduction to substance abuse at early age – unstable educational history resulting in learning and behavioural difficulties: **at [54]–[67]**
- Both offenders exposed to violence and alcoholism throughout childhood – reference made to the 'Childhood Exposure to Domestic and Family Violence' chapter of *Bugmy Bar Book*:

> [70] Irrespective of the age of a child, it is ongoing exposure to violence which has been associated with the highest likelihood of behavioural difficulties. Indeed, research shows that prolonged exposure to violence may cause children to experience trauma and post-traumatic stress disorders which have lasting effects on the child's development, behaviour and well-being. These symptoms include low self-esteem, poor coping mechanisms and substance abuse, as well as complex disturbances such as an inability to regulate emotion, and cognitive and behavioural developmental delays.
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> [71] The offenders' history of deprivation and disadvantage is relevant to reducing their moral culpability. Growing up experiencing or witnessing anger and/or violence and being exposed to such violence in families and communities can lead to individuals responding with anger and violence 'almost automatically' in response to other people's behaviour of perceived provocation, and a reduced capacity to access other ways of dealing with these triggers.

> [72] This history of deprivation, and the research material tendered in the proceedings relating to the potential impact of such a background upon individuals exposed to such disadvantage in their childhood, is directly relevant to the way in which the offenders (in particular, Trevor) reacted on this occasion. His capacity to self-regulate and contain his anger was impaired. This is not to excuse his conduct in any way. The victim suffered serious injury that has resulted in ongoing impairment. Although the victim was the initial aggressor, he did not deserve the beating he received at the hands of the offenders (either directly or by way of joint criminal enterprise). That history is, however, relevant to an assessment of moral culpability and the weight to be given to some of the purposes of sentencing.

- Background of disadvantage and deprivation reduced moral culpability but balanced with protection of the community: **at [74]**

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

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

- 'History of trauma, dispossession, abandonment and deprivation explains how it is that Ms Turnbull comes to be where she is today': **at [27]** – no father figure and little parental support throughout life – mother drank heavily and often left children to fend for themselves – exposed to violence and sexual abuse – homelessness and early drug abuse – first child at 14 years – significant impact of loss of second child during pregnancy at 24 weeks – adult life marred by domestic violence – post traumatic stress disorder: **at [27]–[45]**
- Extraordinary history of abuse and trauma taken into account as causally connected to drug abuse and offending: **at [38]**
- Referred to failure of system:

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

***Kliendienst* [2020] NSWCCA 98** (N Adams J, Simpson AJA and Rothman J agreeing)

*Use offensive weapon and reckless wounding (glassing) – unprovoked and violent attack – evidence of violent background – failure to refer to and apply **Bugmy** principles – classic case*

- Sentencing judge accepted psychologist's description of ongoing impact of offender's exposure to violence at hands of father – anger management difficulties related to flight or fight response – inappropriate emotional regulation and interpersonal skills – normalisation of violence and drug use – difficulty trusting people – reckless behaviour including substance abuse: **at [21], [61]**
- Although not explicitly referred to by applicant's counsel at sentence hearing Sentencing Judge erred in failing to apply ***Bugmy*** principles where uncontested evidence – 'classic Bugmy case where the "sins of the father" have resulted in the applicant turning to violence when frustrated. His inability to control that impulse reduces his moral culpability': **at [68]**

***Primmer* [2020] NSWCCA 50** *(Hamill J, Leeming JA and Harrison J agreeing)*

Specially aggravated break and enter – Crown appeal – childhood trauma caused PTSD – Bugmy *and* Millwood *applied at first instance – Crown appeal dismissed in exercise of residual discretion*

- Difficult childhood – both parents heroin addicts – exposure to drug abuse including driving with father to source drugs – parental incarceration – exposure to family violence – transient accommodation with father – early drug abuse and self-harm – diagnosis of PTSD: **at [25]–[27]**
- Accepted psychologist opinion as to impact of PTSD on offending – risky, reckless and self-destructive behaviour – inability to self-regulate – aggression, substance use and deficits in impulse control – developmental trauma: **at [28]**
- Applied ***Bugmy*** and ***Millwood*** **[2012] NSWCCA 2 at [69]** – justified sentence well below range: **at [37]**

***Hoskins v R* [2020] NSWCCA 18** (RA Hulme J, Basten JA and N Adams J agreeing)

Failure to stop after accident – childhood trauma and Bugmy *considerations relevant to explanation for non-violent offence*

- Offender struck and killed pedestrian with car – no culpability for accident but failed to stop
- Childhood history of exposure to drug and alcohol abuse, physical abuse, domestic violence and multiple care givers – possible PTSD: **at [49]–[59]**
- Accepted on appeal psychologist's suggestion that failure to stop linked to impaired judgment and poor decision making in context of emotional distress and panicked state: **at [71]–[74]**
- Concluded disadvantaged and dysfunctional background operated to provide some explanation for offence – while self-interest and self-preservation still key factors moral culpability reduced in view of childhood trauma: **at [78]**

***DPP v Green* [2020] VSCA 23** (Maxwell P, Priest and Kaye JJA)

Crown appeal against sentence for robbery, theft and attempted kidnapping offences – dysfunctional childhood combined with sexual and physical abuse while adolescent in youth custody – link to offending and criminal record

- Offender suffered dysfunctional childhood combined with sadistic and sustained sexual and physical abuse while in several youth detention centres: **at [34]–[42]**
- No challenge to findings of psychiatrist linking childhood abuse to offending, substance abuse and criminal record:

> [80] …
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> (1) The respondent had developed moderately severe PTSD with panic attacks and dissociative symptoms as a consequence of the abuse and circumstances he had experienced while in custody during his period of ward ship.

> (2) The dysfunctional family environment, in which the respondent had grown up, had rendered him very vulnerable to the development of that disorder.
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> (3) The respondent's conduct was attributable to his reactions to the innumerable sadistic sexual and physical assaults on him while in custody in the vulnerable teenage phase of his development. His substance abuse was consistent with his reaction to the trauma of that abuse, the respondent having resorted to illicit substances for symptomatic relief. As a consequence, he had become enmeshed in the drug sub-culture and a life of crime, characterised by lack of control and the need to fund the procurement of substances.

- These matters constituted significant mitigating factors on sentence under *Bugmy* principles – justified reduction in moral culpability – Crown appeal dismissed: **[79]–[86], [96]**

***R v Irwin* [2019] NSWCCA 133** (Walton J, Simpson AJA and Adamson J agreeing with additional comments)

Multiple offences involving firearms, police pursuit and drugs – causal link between abusive childhood, drug addiction and offending – found error in refusal to apply Bugmy *principles – sentence manifestly inadequate despite error*

- Description of childhood included exposure to parents' substance abuse and violence at hands of father – sexually assaulted by male friend of family – commenced substance abuse at early age: **at [32]–[39]**
- Found Sentencing Judge erred in declining to apply *Bugmy* principles – accepted causal link between background, drug addiction and offending: **at [110]–[123]**

> [39] Dr Furst concluded his pathway into addiction and drug related offences was connected to his exposure to parental alcoholism, domestic violence and physical abuse victimisation

- Despite error, and although background represented 'reasonably significant subjective feature relevant to the sentencing of the respondent' concluded sentences manifestly inadequate and allowed Crown appeal: **at [136]**

***Perkins v R* [2018] NSWCCA 62** (Hoeben CJ at CL, White JA in a separate judgment, Fullerton J dissenting in a separate judgment)

Murder – considered relevance of exposure to family violence where no causal connection to offending established – relevance as general mitigating circumstance – reference to general research on impact of family violence

- At sentence hearing for violent stabbing murder by 18 year old male psychologist report referred to offender's childhood exposure to family violence at hands of step father but drew no conclusions as to possible impact on offender – on appeal all three judges considered sentencing judge understated evidence of background but, by majority, dismissed appeal
- Hoeben CJ at CL **at [40]–[42]** concluded no mitigation where no evidence to either infer or establish link between offender's background and offending.

> [42] ... On my reading of *Bugmy* it is not sufficient to simply establish some elements of a deprived upbringing and/or the presence of domestic violence unless there is evidence or it can be properly inferred that such exposure 'may explain the offender's recourse to violence

> when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced.' (*Bugmy* at [44]).

- White JA **at [71]–[88]** acknowledged ***Bugmy*** did not provide clear answer as to whether causal connection required but accepted background of serious social deprivation could still constitute general mitigating factor on sentence even where no such connection established – concluded in this case no lesser sentence warranted in view of seriousness of offence.
- In dissent Fullerton J accepted there was no evidence of causal connection between offender's background and offence such as to justify reduction in his moral culpability but was prepared to take evidence into account generally as subjective mitigating factor – found error in assessment of applicant's subjective circumstances warranted re-sentence: **at [96]–[102], [136]**
- Fullerton J also referred to general research on effects of exposure to family violence:

> [99] First, the insidious effects of exposure to family and domestic violence on children in their formative years, and the potential for that exposure to play out in unforeseen ways as a young child develops from adolescence into adulthood, are well researched and documented. Recognition of these effects and their potential for lasting harm has found expression and application in a range of academic and forensic disciplines. In curial contexts, where the safety and welfare of a child is the court's primary concern, in particular where placement outside the family home is under consideration, the need to give full weight to the harm associated with family and domestic violence and the direct and indirect impact of that harm on a child is obvious. The potential impact of exposure to family and domestic violence is no less obvious when the subjective circumstances of an offender are assessed for sentencing purposes, irrespective of the age of the offender.

Note: Special leave to appeal to the High Court from this decision was refused on 14 December 2018.

***R v Munro* [2018] NSWDC 331** (Yehia SC DCJ)

Drug supply – evidence of exposure to family violence and change in behaviour of offender accepted as relevant to sentence – reference to general research – rejected argument that evidence not relevant to moral culpability for planned offences

- 19 year old male sentenced as a low-level dealer engaging in drug supply to support addiction – accepted evidence from mother of offender's exposure to family violence at 15 years and consequent change in behaviour – accepted violence occurred in formative years for offender – found offender adversely affected justifying reduction in moral culpability: **at [72]–[74]**
- Mother's evidence justified consideration of general research and academic writings describing psychological and behavioural impacts experienced by children exposed to domestic violence – impacts include anxiety, trauma symptoms, antisocial behaviour, low social competence, low self-esteem, mood problems, loneliness and difficulties at school: **at [40]–[53]**
- Rejected Crown submission that ***Bugmy*** considerations only relevant where offence was spontaneous response to frustration – compromised capacity to mature and learn from experience may be just as relevant to planned offence depending upon circumstances of offence: **at [57]–[68]**

***Ohanian v R* [2017] NSWCCA 268** (Hamill J, Gleeson JA and Rothman J agreeing)

Supply prohibited drug – history of dysfunctional childhood including early exposure to physical abuse and illicit drug culture – error to find impact of dysfunctional background diminished because offender had 'ample opportunity to address his difficulties'

- Expert evidence established 29yo offender had been exposed to physical and emotional abuse by his father as a very young child then introduced to illicit drug culture, and accompanying criminal activity and violence, by his step-father – dysfunctional childhood caused mental health issues: **at [14]–[15]**
- Sentencing judge erred in finding these factors were of diminished value because offender was 'a mature man who has had ample opportunity to address his difficulties' – contrary to ***Bugmy***: **at [21]–[22]**
- On re-sentence found offender's dysfunctional childhood and early exposure to drug culture provided 'a compelling explanation for his addiction and ongoing involvement in criminal offences' as well as causing his 'significant and chronic mental health problems' making custody likely to be more onerous: **at [35]**

***IS v R* [2017] NSWCCA 116** (Campbell J, Gleeson JA and Harrison J agreeing)

Aggravated robbery and intentionally destroying property with fire – juvenile offender – acceptance of relationship between childhood deprivation and offending – emphasis on reduction of moral culpability and rehabilitation over deterrence and protection of community

- Juvenile offender with an upbringing marked by parental criminal activity, substance abuse, severe and chronic neglect and familial violence within the home – became a ward of the state at 7 years and moved frequently: **at [26]-[35]**
- Juvenile Justice report noted likely consequences of exposure to violence and relationship to offending.

> [33] … [The applicant] has a history of using physical aggression as a means to problem solve and manage conflict.
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> …
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> [The applicant] has a history of exposure to familial violence as a problem solving and conflict resolution strategy. It may therefore be likely that [the applicant] has developed a level of acceptance of this type of behaviour as a means to meet his identified needs and wants and as a strategy to deal with others.
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> …
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> [The applicant's] offending demonstrates a direct association with his substance misuse, impulsiveness, antisocial thinking, poor decision making skills and negative peer influences.

- Found Sentencing Judge had failed to give any weight to reduction of offender's moral culpability because of emphasis on general deterrence and community protection: **at [58]** youth and history of childhood deprivation required greater emphasis on rehabilitation and lesser emphasis on general deterrence: **at [71]**

***Turner v R* [2016] NSWCCA 208** (RS Hulme AJ, Leeming JA and McCallum J)

Assault occasioning actual bodily harm and unrelated offences of aggravated sexual intercourse without consent against former partner – failure to take into account childhood of domestic violence, neglect and substance abuse – relevance to reduced self-control – general detrimental impacts

- Appeal against sentence imposed for an assault in 2009 and unrelated serious sexual offences against estranged partner in 2011 – found insufficient weight given at first instance to evidence of mental health and upbringing
- Background included physical, psychological and sexual abuse – early substance abuse – lived on street from late teens – developed serious mental health issues, substance dependence and personality disorder: **at [18], [50]**
- On appeal Court accepted opinion of psychiatrist that:

> [37] (the offender) also has a history of poor attachment to his parents and marked behavioural disturbance in his youth. It is likely that the early onset of his alcohol abuse and the severe childhood sexual abuse, trauma and neglect he was exposed to adversely affected his personality formation and made him more prone to angry outbursts, difficulty sustaining relationships and impulsivity.

- In relation to first assault accepted upbringing and mental condition significantly contributed to applicant's lack of control in response to provocation of victim: **at [40]**
- In relation to sexual offences concluded inadequate reference to, and consideration of, applicant's background: **at [88]-[91]**

> [90] I have set out above some of Dr Furst's views as to the significance of the Applicant's childhood. Indeed one hardly needs evidence that exposure and subjection to appreciable violence while a child is likely to have lasting and detrimental impacts. And it would be surprising if parents who practised such violence ever inculcated in their children proper standards of self-control, resilience in the face of adversity, and as to the treatment of others.
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> …
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> [114] When to the Applicant's mental disability is added the impact of his upbringing, the Applicant's offending is not to be judged by normal standards

***R v Sharpley* [2014] NSWDC 253** (Yehia SC DCJ)

Aggravated break, enter and steal offence – sentencing of offender from disadvantaged rural Aboriginal community – evidence of socio-economic conditions of community – relevance to understanding moral culpability of offender – background of deprivation reduced moral culpability

- Young male from rural Aboriginal community – parents separated when offender young due to domestic violence – continued exposure to father's alcohol abuse and violence – learning difficulty and barely literate – little employment: **at [26]–[31]**
- Evidence of social-economic conditions of community provided by Aboriginal Legal Service field officer – referred also to findings of the Walgett Gamilaroi Working Community in 2005 – issues include: widespread violence and alcohol abuse – severe deprivation – racism and stereotyping – inequalities and lack of opportunity – lack of resources and living conditions – welfare mentality – difficulty accessing services – low levels of literacy and numeracy – low student retention and high truancy rates – high levels of criminal and anti-social activity – unemployment: **at [22]–[23]**
- Evidence of extreme deprivation, substance abuse and violence within community relevant and essential to understanding and assessing moral culpability of offender:

> [25] The level of substance abuse and violence coupled with the lack of opportunity gives rise to a sense of hopelessness and disempowerment amongst some members of the local community that cannot be ignored when assessing the moral culpability in the individual's case. This offender's history of deprivation and exposure to alcohol abuse, violence and the lack of opportunity to thrive in such an environment is intrinsically connected to his current predicament. …
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> [40] The uncontested evidence before me is that the community from which the offender comes and in which he has been raised has experienced an appalling degree of deprivation over a long period of time. This offender is a product of that community and it is therefore necessary for me to assess his moral culpability, bearing in mind the particular socio-economic factors that exist in his community that have inevitably had an impact upon him. Failure to do so would be a failure to fulfil the principle of individualised justice. …
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> [49] Prolonged and widespread social disadvantage has produced a community so demoralised and alienated that many within it, like this offender, have succumbed to alcohol abuse, criminal misconduct and a sense of hopelessness. That background of disadvantage and of deprivation may impact upon the individual so deeply and so broadly that it serves to shed light on matters such as, for example, the offender's recidivism.
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> …
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> [52] This offender has grown up with alcohol abuse being a normal part of his home life and also a devastating and entrenched problem in his peer group and his community. He committed these offences whilst affected by alcohol. The offender's self-induced intoxication is not normally to be taken into account as a mitigating factor. However, the evidence before me demonstrates that he has experienced a deprived upbringing, including exposure to significant alcohol abuse and domestic violence resulting in a dysfunctional family environment and a significant degree of disadvantage. I am satisfied that his background of deprivation operates to reduce his moral culpability and thereby mitigate the sentence.