Fetal Alcohol Spectrum Disorders (FASD)

Case Summaries

***R v Krey (No 4)* [2021] NSWSC 826** (Ierace J)

Manslaughter – substantial impairment – offender diagnosed with FASD, Complex Post-Traumatic Stress Disorder and intermittent explosive disorder

- The offender has significant mental conditions that directly contributed to the offence: FASD; complex PTSD; and intermittent explosive disorder. Those diagnoses and the impact on the offender of his deprived background, activate considerations of reduced moral culpability and lessen reflection of general deterrence and retribution in his sentence, pursuant to the principles recognised in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 and ***Bugmy v The Queen*** (2013) 249 CLR 571: **at [25], [98].**
- Expert report regarding offender's behavioural traits throughout childhood characteristic of FASD: **at [64]-[65].**

***Hiemstra v The State of Western Australia* [2021] WASCA 96** (Buss P, Mazza JA and Beech JA)

Armed robbery - FASD a mitigating factor decreasing moral blameworthiness – Appeal allowed

- The Court allowed the appeal on the ground that the judge failed to give 'full weight' to the mitigation arising from the applicant's traumatic childhood (*Bugmy v The Queen*).
- The mitigation requiring 'full weight' included the appellant's FASD deficits which decreased moral blameworthiness for the offending. The judge incorrectly regarded it as relevant only to prospects of rehabilitation: **at [113]-[118].**
- Discussion of FASD and *LCM v State of WA* [2016] WASCA 164; (2016) 262 A Crim R 1: **at [66]-[71]; [86].**

***LCM v State of WA* [2016] WASCA 164; (2016) 262 A Crim R 1** (Mazza JA and Beech J; Martin CJ agreeing with additional comments)

Manslaughter of offender's child – male, aged 15 – FASD a significant mitigating factor: ***at [2]; [132]*** *– Appeal allowed.*

- Comprehensive discussion of Australian and overseas cases and literature regarding FASD: **at [3]-[25].**

- Court allowed tender of additional evidence relating to FASD: **at [124]**.
- FASD is a mental impairment: **at [121]**. FASD involves a spectrum of disorders. Blanket propositions about how FASD bears on the sentencing process should be avoided. Attention must be directed to details of the particular diagnosis of FASD, including nature and extent of specific disabilities and deficits, and how they bear upon the considerations relevant to sentence: **at [123]**.
- FASD a mitigating factor: **at [132].** FASD left appellant with significant deficits in cognitive, linguistic and executive functioning; compromised reasoning, logical thought and self-control: **at [125]-[126]**. FASD, and lived trauma, contributed to behaviour; a significant (but not sole) cause of offending: **at [127]**. FASD impacted upon diminished moral culpability; moderated weight as to personal and general deterrence; diminished adverse impact of primary judge's findings that appellant acted 'deliberately' and 'violently'; remorse: **at [127]**.
- Rehabilitation: capacity for learning and positive change: **at [143]**.

***Churnside v State of Western Australia* [2016] WASCA 146** (Martin CJ; Mazza JA and Mitchell JA)

*Aggravated burglary – young Indigenous male – FASD - imprisonment unlikely to deter or have any impact on prospect of reoffending: **at [69]** – Appeal allowed*

- FASD / 'Neurocognitive disorder' exacerbated by family dysfunction: **at [75]**.
- Immediate term of imprisonment not appropriate. Cognitive deficits limit the general and personal deterrent effect of imprisonment. Community protection would be short-term, as time in custody will do nothing to address a cycle of offending and imprisonment on release: **at [6]; [69]; [75]-[80]**.
- Re-sentenced to community-based option: **at [83]-[85]**.

***Pomare v R* [2017] NZCA 155** (Randerson, Clifford and Whata JJ)

Murder – male, aged 16 - relevance of FASD - culpability reduced - sentence not manifestly excessive - Appeal dismissed.

- Court accepts expert diagnosis of FASD and impact of offender's FASD: **at [18]-[27]**.
  Offending. Impaired reasoning powers significantly reduced capacity to understand cause and effect and the likely impact of his actions: **at [22]**.
  Remorse. "late guilty plea and slowness to acknowledge actions influenced by FASD": at **[21], [27]**.
  Custodial conditions. Prison will be more crushing than young offenders without a neurodisability, needs a high level of care and treatment: **at [23]**.
  Rehabilitation. Good rehabilitative prospects; "persons with FASD are not inherently dangerous": **at [23]**.
  Further. As well as primary brain damage, full range of secondary disabilities including school failure, substance abuse, trouble with law and victimised as a consequence of undiagnosed and untreated FASD. These resulting difficulties have been severe, pervasive

and lifelong: **at [18]**.

- Given expert opinion that offending was linked to FASD and that a lengthy term of imprisonment would have a crushing effect, it was available to the sentencing judge to provide a larger combined discount for youth and psychological condition: **at [24]**. Culpability is reduced because of FASD and youth: **at [30]**.
- However, final sentence not manifestly excessive: **at [30]**.

***R v MBQ; ex parte A-G (Qld)* [2012] QCA 202** (Margaret McMurdo P, Gotterson JA and Philippides J)

Crown appeal - child sexual assault - 12 year old offender, Aboriginal background - functioned as 9 year old at time of offending - FASD may have indirectly contributed to offences: ***at [9]*** *- supervision order, no conviction recorded – Crown appeal dismissed*

- Pre-sentence report based on interview with offender, mother, consultations with psychologist and counsellor and psychiatric assessment.
  Although aged 12 at time of offending, respondent's mental age was 9: **at [8], [22]**.
  Lack of appropriate sexual education and developmental immaturity arising from FASD may have contributed to offending: **at [8]-[9].**
  FASD can result in: cognitive and behavioural deficits including mental retardation, learning difficulties, hyperactivity, attention deficits and poor social skills, impulsiveness, difficulty foreseeing consequences of actions, poor sense of personal boundaries, lack of judgment and susceptibility to peer pressure: **at [9]**.
- This is not a case where detention had to be imposed: **at [46]**. The respondent's age, both actual and mental, and absence of any convictions or offending strongly militated against the recording of a conviction: **at [50]**.