Hearing Impairment

Case Summaries

Sentencing courts have taken into account "the endemic nature of hearing loss among Aboriginal people and its contribution to development of social and psychological problems": **NSW Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report No 96, October 2000) 46–7, citing *R v Russell* (1995) 84 A Crim R 386; *The Queen v AT* (unreported, Supreme Court, NT, 26 October 1992, Thomas J)**

New South Wales

***R v Bennett* [2022] NSWDC 321** (Beckett DCJ)

Property offences – hearing impairment – Indigenous defendant

- Context of disadvantage arising from hearing impairment. The *Bugmy* Bar Book collates research regarding prevalence and impact of long-term hearing impairment amongst Aboriginal and Torres Strait Islander communities: **at [39]–[41]**
- For this applicant, hearing impairment may have led to learning difficulties and may have manifested in appearance of intellectual deficits. Time in custody has been more difficult as a result of hearing impairment: **at [42]–[43]; *R v Russell* (1995) 84 A Crim R 286; *DPP (Cth) v Ramos* [2018] VSCA 290**

***R v Russell* (1995) 84 A Crim R 386 (NSWCCA)**

Consideration of hearing deficiencies suffered by many Aboriginal people – association between hearing loss and justice system – academic literature – offender mildly intellectually handicapped with serious hearing problem since childhood.

- Per Kirby ACJ (dissenting) at 392–3:

> The other factor to be considered is the particular correlation between hearing loss, aboriginality and the criminal justice system which is increasingly being brought to light by research: see eg *D Howard*, *S Quinn*, *J Blokland* and *M Flynn*, 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3 *Aboriginal Law Bulletin* 65; at p 9. In ***AT*** (unreported, Supreme Court, NT, 26 October 1992), Thomas J observed, at 48, in relation to a 16 year old Aboriginal offender who pleaded guilty to seven serious offences, including arson:
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> > "Although a hearing problem was identified early in (the defendant's) life and identified again during his childhood, it appears he has not had access to a range of services, including the possibility of surgical intervention, amplification, speech therapy, and special education, that could have minimised the communicative, social and psychological impact of these problems and I quote one section of the report prepared by Mr Howard in which he states: 'these communication difficulties have been a major contributor to the development of serious social and psychological problems'."

> See Howard et al above at p 9. Research, although still limited in this area, suggests that hearing loss amongst Australian Aboriginals is endemic. Between 20 and 40 percent of Aboriginals reportedly have some form of hearing deficiency, generally caused by unattended middle-ear infections. Such losses have been observed to cause not only learning deficits but also anti-social behaviour, low self-esteem, feelings of paranoia in some cases, social isolation, powerlessness and more. The Royal Commission into Aboriginal Deaths in Custody noted the grave effects of hearing disabilities and its prevalence in several cases of Aboriginal deaths in custody. The conclusion is open that this disability, with its attendant frustrations and handicaps, could increase the likelihood of contact between an Australian Aboriginal and with the criminal justice system. If a custodial sentence is passed, the hearing deficiency with its associated problems will also tend to make the offender's period in prison more difficult and harsh.

***R v Hunt* [2002] NSWSC 66** (Dowd J)

Murder – Indigenous defendant – hearing impairment – severe physical problems taken into account on sentence: ***at [60]***

- Deafness is relevant. ***R v Russell* (1995) 84 A Crim R 386** held that hearing loss, disproportionately common amongst Aboriginal people, was deemed to contribute to harshness of a custodial sentence: **at [59]**
- The offender, when in a group, cannot follow conversations as it becomes blurred due to his hearing: **at [59]**. Like many members of the Aboriginal community, offender is seriously affected by deafness, which will cause him to be isolated within the prison community, indeed, in any community: **at [72]**

***R v Walder* [2002] NSWCCA 310** (Smart AJ, Blanch AJ agreeing)

Aggravated indecent assault – hearing impairment – special circumstances

- Hearing impairment basis of finding of special circumstances; contributed to applicant's mental condition and extra difficulties he will experience in protective custody: **at [15]**
- Sentencing judge failed to take into account subjective features, in particular, permanent and severe deafness and underlying medical condition: **at [21]**

***R v Boyd* [2004] NSWSC 263** (Buddin J)

Manslaughter – substantial hearing impairment – relevance – custody more burdensome

- Hearing impairment only discovered after expelled from school at early age for destroying a classroom: **at [13]**
- Hearing impairment, childhood physical abuse and considerations in ***R v Fernando* (1992) 76 A Crim R 58** relevant to reduced capacity to handle stressful situations, heightened susceptibility to reacting inappropriately to behaviour he regarded as provocative. These factors all provide a context in which present offence must be evaluated and in assessing overall culpability: **at [29]**
- Time in custody more burdensome; serving sentence in protective custody due to "problems he would have in [the] main yard with his hearing problems": **at [31]**

Northern Territory

The Queen v AT **(unreported, Supreme Court, NT, 26 October 1992, Thomas J)**

Property damage, arson – male, aged 16 – Aboriginal person – hearing impairment

- Relatively severe hearing problem from age 3 with no access to services or treatment. Linguistic competence limited; trouble communicating and understanding what others say: **at [47]**.
- Expert report: communication difficulties a major contributor to development of serious social and physiological problems; negative self-concept, low tolerance of frustration, high degree impulsiveness and limited social intelligence: **at [48]**
- Action to be taken to ensure whatever can be done in respect of hearing impairment. Substantial period of supervision proposed: **at [50]**

Victoria

DPP (Cth) v Ramos **[2018] VSCA 290** (Whelan, Beach and Niall JJA)

Sexual offences by use of carriage service – hearing impairment – custody more difficult – Crown appeal dismissed

- Severe hearing impediment and learning difficulties suffered as a result: **at [11]**
- Sentencing judge accepted that intellectual deficits and hearing impediment are likely to make custody more difficult; that cognitive impairment and personality traits meant limited or no understanding of ramifications of offending conduct or insight into effect of conduct on victims. These factors provided 'insight or some explanation' for offending conduct: **at [16]**

Western Australia

Hine v Western Australia **[2010] WASCA 216** (Mazza J, Pullin JA and Newnes J agreeing)

Child sexual offences – hearing impairment – impact on social development

- Hearing disability had resulted in a quite profound effect on offender's development with particular reference to his ability to engage socially; immature for age (aged 20–22): **at [54], [70]**.