Funeral Attendance and Sorry Business

Case Summaries

Cases Involving Indigenous Defendants

***DPP (NSW) v PH* [2022] NSWSC 1245** (Button J)

Detention application – juvenile – importance of attending funeral of grandfather

- Juvenile defendant pleaded guilty to child sexual offences and awaiting sentence
- Defendant relied on pending funeral of grandfather as exceptional circumstances under s 22B ***Bail Act***
- Defendant lived with grandparents – evidence suggests day leave would not be available for funeral and alternative of audio-visual link a very poor substitute to personal attendance

> [45] I certainly do not need persuasion that the marking of a death of a beloved person is an important aspect of all human cultures, and it really has been since the dawn of time. And I also take judicial notice – quite apart from the material that has been placed before me – that with regard to the cultures of First Nations people of this country, funerals and "sorry business" are exceptionally important.

- Refused detention application on basis full-time imprisonment not inevitable – if necessary would find funeral constituted exceptional circumstances: **at [50]**

***Re KF* [2022] VSC 349** (Jane Dixon J)

Bail application – serious offences – death of daughter and cultural obligation to participate in Sorry Business

- Bail application for Aboriginal woman charged with serious offences including aggravated burglary and intentionally causing serious injury
- Evidence of impoverished, chaotic and dysfunctional childhood including violence and sexual abuse
- Mother died while applicant on remand and unable to participate in Sorry Business – daughter has unexpectedly died and applicant named senior next of kin – funeral arrangements stalled without presence of applicant – applicant has cultural obligation to participate in Sorry Business – participation crucial – impact of daughter's death on poor health profound: **at [32]**
- Requirement of compelling reasons established through combination of circumstances: length of time and restrictive circumstances on remand – profound grief, sorrow and guilt associated with not being able to participate in Sorry Business for her mother and obligations as senior next of kin for daughter – unfortunate personal background – strong family support – availability of wraparound bail support services – applicant's seemingly genuine commitment to abide by restrictions: **at [40]**

> [48] The application of s 3A of the Act is centrally relevant to my consideration on the question of unacceptable risk in this case. The bereavement experienced by the applicant whilst on remand in respect of her mother and daughter, and the need for the applicant to finalise funeral arrangements for her daughter, should serve as an incentive to avoid doing anything that would return her to custody where she would be unable to participate in these important cultural obligations.

***Re Kennedy* [2020] VSC 187** (Kaye JA)

Bail application – death of sister – impact of COVID restrictions

- Bail application for Aboriginal man during COVID restrictions
- Requirement to establish exceptional circumstances include issues arising from applicant's Aboriginality

> [6] … (a) As I have already mentioned, the applicant and his family are grieving the loss of his sister, and his period of remand prevents him being with family and community during the period of grief. Part of the grieving process for the applicant's community involves being in the company of family for extended periods after the loss. In that context, the prohibition on visits by family members and others to prison would render the applicant's period of remand even more onerous.
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> (b) As an Aboriginal man, the applicant belongs to a particularly vulnerable section of the community, who are over-represented in the criminal justice system, and who also have poorer health outcomes than non-Aboriginal persons. In that connection, while he is in custody, the applicant may be at greater risk of serious infection from the COVID-19 virus than otherwise.

***Hookey; Cooper; Dates* [2009] NSWCCA 215** (Buddin J, McClellan CJ at CL and Hall J agreeing)

Escape – impact of inability to attend father's funeral recognised

- Respondent aged 18y at time of escape from minimum security prison

> [13] … Although he was found to lack insight into his offending behaviour, the sentencing judge appeared to accept that he was still affected by the authorities' decision not to allow him to attend his father's funeral which had taken place only shortly before he escaped from custody. His Honour acknowledged that he had strong family ties but described his rehabilitation prospects as "clouded".

***King; Bugmy; CJ* [2006] NSWSC 161** (Buddin J)

Imposition of sentence – manslaughter – impact of inability to attend mother's funeral recognised

- Subjective mitigating factors considered by sentencing judge include inability to attend mother's funeral

> [23] There is another issue arising from the offender's custodial situation which warrants consideration. It is described in the following terms by the author of the pre-sentence report:
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> > Mr King made various applications to visit his mother who became seriously ill after an initial stroke in February 2005, then again on 28th October when she suffered a

> second stroke. Despite an urgent request from the offender's solicitors, his application to attend his mother's hospital bed and funeral were denied. A report dated 31st October 2005 stated that, although there were no relatives of the victim housed at Broken Hill at the time, the family feud and "hostility in the community" towards the offender and his family may cause problems for the offender's partner.
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> In response, a letter from a community worker requesting information as to why the offender was not granted permission to attend his mother's bedside and funeral (held on 11th November 2005) was referred to the Commissioner on 18th November 2005. A Departmental report dated 4th December 2005, in response to this, stated that local issues and association problems, the nature of the offence, and risk of being assaulted at Broken Hill were all factors in denying Mr King his request. The report also noted that, due to the seriousness of his mother's condition, he may not have reached her bedside in time to see her.

[24] Whatever be the merits of the situation, it is not difficult to appreciate how disconcerting it must have been for the offender not to be able to attend his mother's bedside and funeral.

***SW Bugmy* [2004] NSWCCA 258** (Kirby J, Bryson JA and James J agreeing)

Appeal against conditions of suspended sentence – importance of funeral attendance for indigenous persons recognised

- Conditions of suspended sentence included to remain away from Wilcannia during term of sentence unless, upon prior application to sentencing judge, permitted to do so: **at [38]**
- Condition intended to assist appellant in drug rehabilitation while providing exception for attendance at funerals:

> [45] However, his Honour recognised that Mr Bugmy may need to attend the funeral of a relative. He said this: (ROS p13)
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> > "I acknowledge that there are obligations imposed on all Aboriginal people to attend funerals. I would not do anything to stop Mr Bugmy attending a funeral in Wilcannia, but I would be requiring him to get my consent before he did it; not just turn up. If he turned up for a funeral he could anticipate the consent would be given on strict conditions. It would mean he would go and he would return, and he would get into no trouble in Wilcannia. There is only one way he could stay out of trouble in Wilcannia and that would be to refrain from drinking."

- Condition of bond quashed on appeal – unduly harsh and unreasonable: **at [71]**

***Hickey; Hickey* [2003] NSWCCA 110** (Smart AJ; Sheller JA and James J agreeing)

Crown appeal against sentence – robbery offences – importance of attending mother's funeral

- Recount of subjective mitigating factors considered by sentencing judge include effect of inability to attend mother's funeral

> [11] The family was a large one of three boys and five girls and the mother was greatly valued. When she died both TJH and JMH applied for and were granted leave by the Prison Authorities to attend her funeral. In fact, for reasons of which they were not fully aware they were not permitted to leave Long Bay Gaol. The judge recorded that attendance at the funeral of a mother is particularly important for people in most Aboriginal communities. The judge found that both TJH and JMH had been severely affected by not attending their mother's funeral.

Cases Involving Non-Indigenous Defendants

***Isaac* [2023] NSWSC 22** (Yehia J)

Bail release application – serious drugs offences – application made after violent murder of wife

- Applicant pleaded guilty to serious drug charges – on remand for 22 months – no previous application for bail accepting will receive lengthy sentence
- Wife brutally murdered 6 days prior to application
- Special or exceptional circumstances established – needed to support four young children and arrange care for youngest two – attendance at funeral – access to familial support and grief counselling – bail granted

***Toksoz* [2015] NSWSC 1234** (Hamill J)

Bail release application – serious offences including shoot with intent to murder – impact of death of brother

- Applicant awaiting trial for serious offences – show cause circumstances include death of brother while applicant on remand and refusal of authorities to permit attendance at funeral: **at [15]**

> [16] The other evidence before me, which includes an affidavit of his mother and an affidavit of another brother, provides cogent evidence that this is an extremely close family and I accept that the inability of the applicant to attend the funeral created exceptional hardship. As his mother put it:
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> > "Being in custody has been extremely difficult for him. His brother, Tolga Toksoz, 21, with whom he was very close, passed away this year, while he was in custody. He was denied access to attend the funeral. He was extremely upset about Tolga's death and naturally remains so. He is upset not only at his passing, but also at not being able to grieve when family (this continues to today). He feels upset on a continuing basis that he did not have closure in seeing his brother before his burial and saying good bye. Ahmed is religious. In our religion it is important to farewell the spirit. Also, in our religion, the body is wrapped in cotton cloth and buried in the soil. It is only the immediate male relatives who are allowed to carry the body and bury a deceased family member. The applicant feels he failed in his duty to carry his brother's body. He has recounted to me many sad dreams where he has been unable to say good bye to his brother, and had other dreams of burying him. He tell me he prays daily for his brother. I know his anguish would exist even if he were on bail now but it is has been and continues to be worsened by his incarnation for the reasons above and his failure to do his duty at the burial. I know he will carry that with him for the rest of his life. His unhappiness is compounded by his continued separation from us as we are all still grieving for Tolga."

- Combination of delay, weak Crown case and exceptional personal hardship satisfies show cause requirements under ss 16A and 16B ***Bail Act*** – bail granted

***Doja* [2008] NSWDC 69** (Goldring DCJ)

Fraud offences – Nigerian offender

- Adjustment disorder with chronic depressed mood caused by stress of trial and inability to attend father's funeral in Nigeria

> [31] While he has been in custody he has been examined by a respected psychiatrist, Dr Jonathon Carne, who, not surprisingly, finds that he had an adjustment disorder with depressed mood, which has become chronic. Dr Carne attributes this depressive reaction to a series of stresses, notably the trial, but also to one other factor, namely the fact that he has been on bail pending the trial and because of his bail conditions, he was unable to travel to Nigeria for the funeral of his father. He is the oldest of several children and he told both Dr Carne and the probation officer that the eldest son is expected to play a leading role in the funeral. His inability to do so has caused him distress. Clearly, he is suffering from a psychiatric condition and Dr Carne recommends that he be treated for it. I will direct that when he is returned to custody, a copy of Dr Carne's report be provided to the Department of Corrective Services to go with him.