Bugmy 10 years on: Principles and practice

IT IS 10 YEARS SINCE THE HIGH COURT'S LANDMARK JUDGMENT IN BUGMY WHICH ESTABLISHED CRITICAL PRINCIPLES FOR HOW SENTENCING COURTS ACCOUNT FOR A PERSON'S ADVERSE LIFE EXPERIENCES. BY SOPHIE PARSONS & LAUREN ROYCROFT

Introduction

The second of October 2023 marks 10 years since the High Court delivered its landmark judgment in *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) (*Bugmy*). The case of *Bugmy* established principles for how material about a person's background of adverse life experiences may be relied on in mitigation following a plea of guilty. The judgment is of particular significance for First Nations people in Australia, although it also applies to non-First Nations people. The *Bugmy* Bar Book resource provides practitioners with information to assist with the practical application of *Bugmy* principles.

Sentencing and the significance of Bugmy

Criminal offending is often the result of a combination of factors reflecting a person's life experiences. Criminal defence lawyers understand this particularly well, typically representing people with complex backgrounds involving adverse trauma and health issues, socio-economic inequality and structural disadvantage.

To revisit first principles, the sentencing exercise undertaken by the court is discretionary. This process, termed "instinctive synthesis", requires a sentencing court to evaluate a number of considerations, often in conflict, before arriving at a single result which takes into account all factors and translates community and legal values into a quantified sentence. There is no one decisive sentencing principle, purpose or factor; and, equally, no "right" answer from its application.[1]

The *Sentencing Act 1991* (Vic) (Act) sets out the only purposes for which sentences may be imposed:

- the just punishment of the offender
- the specific deterrence of the offender and general deterrence of others
- the facilitation of rehabilitation of the offender
- the denunciation of the offending conduct
- the protection of the community
- a combination of these purposes.

Among other factors, s5(2)(d) of the Act also requires a consideration of a person's culpability and degree of responsibility for the offence.

It is the role of criminal defence lawyers in sentencing hearings to make submissions to the court about a client's circumstances through the framework of relevant sentencing principles. This is intended to ensure that a fair and just sentence is imposed through the synthesis of different factors.

Bugmy is significant because it establishes that a person's background of deprivation and disadvantage is relevant to an assessment of moral culpability and may moderate the application of specific and general deterrence.[2]

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Sentencing of First Nations people

To ignore the lived and historical experiences of First Nations people is arguably artificial and unfair. However, to sentence First Nations people by taking judicial notice of collective circumstances may fail to do justice to individual experiences.[3] The jurisprudence that developed in relation to sentencing First Nations people and ultimately led to *Bugmy* grapples with these conflicting issues.

The first consideration of Aboriginality in sentencing in the High Court was by Brennan J in his minority judgment in *Neal v The Queen* [1982] HCA 55 (24 September 1982) (*Neal*) when he recognised that sentencing courts are bound to consider all relevant factors that "exist only by reason of the offender's membership of an ethnic or other group".[4]

Following *Neal*, and the findings of the Royal Commission into Aboriginal Deaths in Custody, was the decision of Wood J in the Supreme Court of New South Wales of *R v Fernando* (1992) 76 A Crim R 58 (*Fernando*). Wood J enunciated propositions relevant to sentencing First Nations people who have a background of disadvantage. *Fernando* acknowledged mitigation should be afforded in sentencing First Nations people from disadvantaged communities with grave social difficulties and that rehabilitation of the individual must be given full weight in sentencing to avoid recidivism. The *Fernando* principles were ultimately affirmed by the High Court in *Bugmy*, recognising that social disadvantage often precedes the commission of criminal offences.[5]

Following *Fernando*, the Victorian Court of Appeal considered sentencing principles applying to First Nations people in *R v Fuller-Cust* [2002] VSCA 168 (2 October 2002). Eames JA held that factors relevant to an individual, such as First Nations status and race, are always relevant when considering personal background and history, and cannot be overlooked by a simplistic assumption that equal treatment in sentencing requires First Nations status and race be ignored.[6]

There have been other efforts to ensure culturally appropriate sentencing of First Nations people in Victoria. In 2002, the Magistrates' Court of Victoria Koori Court was introduced and in 2008, the County Koori Court was established as a Division of the County Court. Koori Courts allow for a more culturally relevant approach to sentencing which has been effective in reducing reoffending and strengthening the role of community elders and family structure.

SNAPSHOT

- *Bugmy v The Queen* established sentencing principles for how a person's adverse life experiences may be considered in mitigation following a plea of guilty.
- The judgment is of particular significance for First Nations people in Australia, although it applies to all people.
- The *Bugmy* Bar Book provides practitioners with vital information to assist clients and apply the *Bugmy* principles.

Bugmy

On 2 October 2013, the High Court delivered its judgment in the appeal of *Bugmy*. The judgment set out how evidence of a person's background of deprivation applies to and informs the sentencing process.

William David Bugmy is a First Nations man from far-western New South Wales. Mr Bugmy was raised in an environment of problematic alcohol and drug use and significant family violence. He received little education and used drugs and alcohol from a young age. He was first charged at age 12 and was regularly detained in juvenile detention until he was transferred to an adult prison at age 18. He had a history of head injuries and auditory hallucinations, and throughout lengthy periods of incarceration Mr Bugmy repeatedly attempted suicide.

Mr Bugmy came before the courts following the assault and grievous bodily harm of a correctional officer on 8 January 2011. The offending arose when Mr Bugmy, who had been imprisoned at the Broken Hill Correctional Centre since November 2010, became distressed after learning his visitors would not arrive before the end of visiting hours. On 16 February 2012, Mr Bugmy pleaded guilty to the offending and was sentenced to a total effective sentence of six years imprisonment, with a non-parole period of four years and three months. However, the Director of Public Prosecutions (NSW) appealed this decision. The NSW Court of Criminal Appeal allowed the appeal and Mr Bugmy was resentenced to seven years and six months imprisonment with a non-parole period of five years, based on the finding that the offending was more serious and Mr Bugmy's criminal history more relevant than the initial sentencing judge allowed. Mr Bugmy subsequently appealed this decision to the High Court of Australia.

High Court Ruling

The High Court delivered *Bugmy* on the same day as *Munda*. Both cases considered the sentencing of First Nations people. While acknowledging First Nations people are subject to endemic social and economic disadvantage, a majority of the High Court rejected a submission that courts should take judicial notice of the systemic background of deprivation of First Nations people.[7] This is because it is antithetical to individualised justice and to do so would deny First Nations people their full measure of human dignity by consigning them by reason of their race to a category of persons less capable than others of decent behaviour.[8]

Each case must be determined on an individual basis to evaluate whether a background of social deprivation mitigates moral culpability, regardless of race.

A childhood of deprivation, such as exposure to problematic substance use and violence, may mitigate sentence by operating to reduce moral culpability and moderating the application of general and specific deterrence. Acknowledging that a background of profound deprivation leaves an indelible mark on a person, these effects were held not to diminish with the passage of time or repeat offending and must be given full weight in every sentencing decision.[9]

Importantly, a reduction in moral culpability operates in two distinct ways. The first is that evidence of childhood deprivation may mitigate the sentence because a person's moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[10] The second is that such a background may operate to compromise the person's capacity to mature and learn from experience, or explain the person's recourse to violence when frustrated, so

reducing moral culpability. However, the majority considered that, in an appropriate case, there may be a correlating increase in the need for community protection from the person owing to the inability to control that impulse.[11]

The application of Bugmy principles in Victoria

In 2014, the VSCA applied the *Bugmy* principles in *Marrah v The Queen* [2014] VSCA 119. The Court held that although factors relevant to an offender's childhood disadvantage had been mentioned by the sentencing judge in the context of applying the *Verdins* principles, the sentencing judge had not given appropriate weight in mitigation consistent with the *Bugmy* principles.[12]

The *Bugmy* principles were applied in a general sense in *Director of Public Prosecutions v Drake* [2019] VSCA 293, at [32], where the Court recognised that the "profound dysfunction, disadvantage and abuse experienced by the respondent during his formative years were relevant to an appropriate evaluation of his moral culpability", although the appeal was mainly about standard sentences.

The *Bugmy* principles were applied in a more specific way in *Director of Public Prosecutions v Snow (a pseudonym)* [2020] VSCA 67. Evidence was presented at hearing that the offender was raised in a small, remote community, and had experienced a childhood which was marked by what could only be described as extreme deprivation and disadvantage. Accepting this evidence, the sentencing judge found a nexus between childhood disadvantage and the offending resulting in a reduction of moral culpability and moderation of general deterrence. The Court, which also accepted evidence of the offender's outstanding prospects of rehabilitation and did not disturb the sentencing judge's findings, dismissed the Director's appeal against the sentence.

More recently, in *Director of Public Prosecutions v Herrmann* (2021) VSCA 160 (11 June 2021) (*Herrmann*) a five-judge bench of the VSCA considered the *Bugmy* principles and the issue of whether a "causal link" between a background of disadvantage and offending is required.[13]

In *Herrmann*, the offender had experienced profound childhood deprivation and trauma and had been diagnosed as suffering a severe personality disorder, a psychiatric condition which impaired his mental functioning. The Court quoted, at [46], from *Snow* that "the impact on the decision-making of individuals growing up, and living, in circumstances of prolonged and widespread social disadvantage".

The Court emphasised the general and specific ways in which a background of disadvantage may be relevant to an assessment of moral culpability. First, it may be taken into account in a general way where an offender has been raised in a community surrounded by alcohol abuse and violence. Second, there is a specific way, where specific exposure to alcohol and violence may explain the offending to which the person is pleading guilty, and where a causal nexus between the deprivation and offending is established.[14]

Critically, it was held that a causal link is not required to establish the general application of the *Bugmy* principles, because "the significance of the 'general' approach enunciated in *Bugmy* is that the relevance of deprivation to sentencing does not depend on proof of such a nexus". This recognised that "the impact of disadvantage is complex, multilayered, non-linear and not easily 'diagnosed' or measured".[15]

The *Bugmy* principles have proved to be a valuable sentencing consideration in Victoria. In *Herrmann* the VCSA acknowledged that "in 2019-2020 alone, this Court on 26 separate occasions affirmed the applicability of the *Bugmy* principles to an offender's circumstances".[16]

Resources – the Bugmy Bar Book

In practice, criminal defence lawyers seeking to rely on the *Bugmy* principles as a significant factor in mitigation must point to material tending to establish a background of deprivation and disadvantage and identify the importance of the background in the sentence process. This is not an easy task and requires significant preparation to achieve favourable outcomes for clients.

The *Bugmy* Bar Book resource has been produced as a resource for all practitioners and can be found at https://www.publicdefenders.nsw.gov.au/barbook. The resource is produced by a committee comprised primarily of NSW based practitioners, although it may be applied throughout Australia. The resource has been referred to in judgments from NSW, the Queensland District Court, and the ACT Magistrates Court.[17]

The *Bugmy* Bar Book provides practitioners with summarised key research about the impacts of specific disadvantage across numerous issues including:

- foetal alcohol spectrum disorders
- exposure to family violence
- incarceration of a parent or caregiver
- interrupted school attendance and out-of-home care
- childhood sexual abuse, abuse and neglect
- Stolen Generations/cultural dispossession
- acquired brain injury
- homelessness/unemployment and poverty
- impacts of imprisonment and remand in custody.

The research has been drawn from major reports and leading research, each chapter being verified by a committee of senior lawyers, academics and experts in the field to ensure it is reliable, credible and reflects the general body of research available for a topic. The resource aims to educate and assist legal practitioners about adverse life experiences, health and mental health diagnoses and social deprivation and its impacts on clients, to improve the overall representation of clients with a background of disadvantage. There are also useful articles published by committee members that explain how the resource can be used most effectively, notwithstanding the articles are NSW-focused.[18]

Practical tips for criminal defence lawyers

Criminal defence lawyers may rely on the research collated by the *Bugmy* Bar Book to better understand a client's subjective circumstances, inform the preparation of expert reports and prepare detailed and persuasive submissions. Criminal defence lawyers may also tender the research in evidence.

While the case law in Victoria establishes that a causal link between a person's background of deprivation and offending is not required for the general application of the *Bugmy* principles, greater weight is likely to be given to the *Bugmy* principles as a sentencing consideration where there is a strong foundation in evidence and a causal link to the offending.

The approach to preparation is similar to that required to establish the *Verdins* principles and, in the same way, practitioners ought to be aware that an application of the *Bugmy* principles may produce complex and conflicting sentencing considerations.

The research addressing the specific experience of First Nations people is likely to be received favourably in sentencing hearings in the Koori Courts.

Acknowledging 10 years of Bugmy

Bugmy provides a positive and practical step in the sentencing of First Nations people, and invaluable legal principles to be relied on in the sentencing of all people. The sentencing principles established in *Bugmy* remain essential knowledge for criminal defence lawyers advocating for clients, especially First Nations people. The *Bugmy* Bar Book is a vital resource serving to enhance the understanding and knowledge of practitioners and sentencing courts. ■

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1. *Wong v The Queen* [2001] HCA 64 (15 November 2001), at [75]; *Markarian v The Queen* [2005] HCA 25 (18 May 2005), at [51]; *R v Storey* [1998] 1 VR 359 at 366.
2. *Bugmy v The Queen* [2013] HCA 37, [44]-[45].
3. *Munda v Western Australia* [2013] HCA 38 (2 October 2013), at [53] (*Munda*); Note 2 above, at [39].
4. *Neal* at 326.
5. Note 2 above, at [37].
6. *Fuller-Cust* at [78]-[80].
7. Note 2 above, at [41].
8. Note 2 above, at [41]; *Munda* at [53].
9. Note 2 above, at [42] and [44].
10. Note 2 above, at [40].
11. Note 2 above, at [44].
12. *Marrah* at [17]-[18].
13. This issue is presently a point of difference between jurisdictions. For further discussion refer to "The Bar Book Project: Presenting Evidence of Disadvantage and Evidence Concerning the Significance of Culture on Sentence", Judge Sophia Beckett (October 2021), "a conflict between States and Territories as to causal link" (https://www.publicdefenders.nsw.gov.au/Documents/JudgeBeckett-TheBarBookPaper2021.pdf).
14. *Director of Public Prosecutions v Herrmann* (2021) VSCA 160, at [45]-[46].
15. Note 14 above, at [45].
16. Note 14 above, at [40].
17. Summary of Published Judgments referring to the *Bugmy* Bar Book last updated 3 March 2023 (https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/judgments.aspx)
18. *The Bar Book Project: Making Use of the Bar Book in Sentence and Section 32 Proceedings*, Rebecca McMahon (2019) (https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/The%20Bar%20Book%20project%20RMcMahon.pdf).