Impact of Incarceration

Case Summaries

Institutionalisation

(i) General Principles - NSW

- To *"institutionalise"* someone is "to make (someone) dependent upon an institution, such as a prison, mental hospital, etc, to the point where they cannot live successfully outside it": ***Jinnette v R* [2012] NSWCCA 217 at [99]** (Johnson J, , Hoeben JA and Beech-Jones J agreeing).
- The identification of an offender as being institutionalised or at risk of institutionalisation does not removed the obligation to impose a sentence which is appropriate to the seriousness of the offending and which is otherwise consistent with proper sentencing principles: ***RG v R* [2017] NSWCCA 60 at [109]** (Hoeben CJ at CL; Garling and Beech-Jones JJ agreeing); ***Dixon v R* [2019] NSWCCA 85 at [34]** (Bathurst CJ; Ierace J and Hidden J agreeing)
- A risk of institutionalisation, even in the face of entrenched recidivism and serious reoffending, is a factor a sentencing court may regard as a sufficiently special circumstance to warrant an adjustment to the statutory ratio under s 44(2) *Crimes (Sentencing Procedure) Act* 1999*:* ***Jackson v R* [2010] NSWCCA 162 at [25]** (Fullerton J, McClellan CJ at CL and Simpson J agreeing), although the mere identification of an offender as being institutionalised or at risk of institutionalisation does not compel a finding of special circumstances: ***Jinnette v R* at [98]; *Beale v R* [2015] NSWCCA 120 at [68]** (Beech-Jones J; Hoeben CJ at CL and RA Hulme J)
- The overall purpose of the exercise is to facilitate rehabilitation. To that end "there must exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful": ***Beale v R* [2015] NSWCCA 120 at [68]-[69]**
- Where the offender is already institutionalised, the Court should take into account the need for a sufficient period of conditional and supervised liberty to assist the protection of the community by maximising the prospect the offender will not reoffend. This approach acknowledges the fact of institutionalisation, and seeks to reduce the adverse consequences: ***Jinnette v R* at [103].**
- The protection of the community remains an important consideration. Setting a balance of term should be premised upon the basis of supervision, with associated counselling and treatment, for the period parole. The applicant being at liberty on parole without supervision does not meet the interests of the community: at ***Jinnette v R* at [106]-[108]**.

(ii) General Principles - Victoria

A judge is entitled to, indeed should, take into account in sentencing the purpose of preventing recidivism and institutionalisation and facilitating a prisoner's reintegration into the community: ***DPP(Vic) v Stone* [2003] VSCA 208 at [20]** (Charles JA; Winneke ACJ and Eames JA agreeing); cited in ***Spiteri* [2006] VSCA 214 at [35]** (Coldrey AJA; Buchanan JA and Eames JA agreeing).

(iii) Cases

***DPP v Swain (a pseudonym) (No.2)* [2025] ACTSC 209** (Taylor J)

Sentence for robbery and driving offences – juvenile offender – risk of institutionalisation – impact of incarceration on prospects of rehabilitation

- Sentencing of 17 year old Aboriginal offender for serious driving and robbery offences after participation in sentencing conversation in Pilot Circle Sentencing List – profoundly disadvantaged and traumatic childhood – removed from parents at 14 months – foster care involved abuse, separation from siblings and instability – no meaningful connection with any adult charged with his care – let down by system – history of contact with juvenile justice system – *Bugmy* considerations given full weight: **at [167]-[209]**
- Psychologist report made detailed treatment recommendations including cultural supports and cultural healing plan – emphasis on facilitating offender's cultural connectivity, identity and connectedness to culture – positive prospects of rehabilitation: **at [210]-[226]**
- Noted offender at risk of institutionalisation given his background of institutional care and evidence of short time in adult correctional centre – accelerated impact of youth detention as a source of institutionalisation compared to adults - "children are less able to tolerate highly constrained environments without distorting their developmental trajectory" (see *Institutionalisation*, Dr Robyn Shields AM and Dr Andrew, 2024): **at [218]-[219]**
- Sentencing Judge found:

> [222] ... The risk of institutionalisation has the capacity to drastically impede his rehabilitative potential. By virtue of his youth, Pedro has the capacity to be guided toward positive change notwithstanding some of the negative patterns he has thus far established: see *Azzopardi v R* [2011] VSCA 372; 35 VR 43 and *R v Forster-Jones (No 2)* [2019] ACTSC 286. The effect on Pedro of incarceration in an adult prison at this stage of his life would undoubtedly hinder his capacity for rehabilitation. This includes the risk that the environment, as well as the anti-social attitudes it fuels, will become normalised.
>
> [223] Rehabilitation is a pursuit in both Pedro and the community's interests, it being the most durable guarantor of community protection: *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [32].

***Gilkes* [2025] NSWSC 23** (Hamill J)

Murder – relevance of offender's institutionalisation – special circumstances justifying reduction in non-parole period

> [47] I am also satisfied that the sentence must be structured to allow him as long as possible on parole to assist the offender to re-integrate into the community. As Dr Hughes said, Mr Gilkes is "already quite institutionalised" and "prolonged detention will reduce the opportunity to develop general life skills, which would likely already be slower for Mr Gilkes given his cognitive difficulties." She also believed, and I accept, that the offender "will need considerable wrap-around support on his release to assist him to integrate into the community and develop basic living skills."

> [48] His condition is also relevant to sentence in that, to again quote Dr Hughes, "prolonged detention would also likely result in further negative effects on his mental health, self-esteem and self-sufficiency".

***Lowcock; Cage* [2024] NSWSC 718** (Yehia J)

Murder – need for intensive treatment and support upon release – justified variation in statutory ratio

> [187] I am conscious of the fact that the statutory ratio, without variation, would allow for a substantial period of parole. However, I find special circumstances in the case of Mr Cage and Mr Lowcock, warranting some variation of the statutory ratio. I make that finding because I accept that each offender requires intensive treatment and counselling, including but not limited to trauma counselling, anger management and substance abuse treatment once released to the community. Such rehabilitation would be better facilitated in the community.
>
> [188] Each offender is institutionalised and will require treatment and support to reintegrate into community life and reduce the risk of recidivism. The protection of the community will only be served in a meaningful way if these offenders are provided with the intensive support necessary to prevent relapse and maximise prosocial development upon release.

***DPP v Coulter* [2024] ACTSC 262** (Taylor J)

Driving offences – risk of institutionalisation – importance of extended period of supervision – rehabilitation and community protection

- 22 year old Aboriginal man with childhood marked by disruption and dysfunction – consistently exposed to substance abuse, family violence, and neglect – risk of becoming institutionalised – importance of extended period of supervision upon release from custody – imposed sentence of 3 years 2 months imprisonment, suspended after 14 months with conditions including engaging with Aboriginal rehabilitation services

> [76] The offender has engaged in serious offending since becoming an adult and is consequently familiar with the custodial environment. Ms Edwige recorded that the offender is comfortable in the custodial environment because of the predictability and routine it provides. There is a risk I think, of him becoming institutionalised. This view fits with the offender's concerns about his current capacity to comply with the strict regime of supervision that accompanies an Intensive Correction Order (ICO) such that it would "set him up to fail". It is of concern that such a young man would feel more certain of his prospects of success in a custodial environment than he would with significant supports in the community.
>
> [77] Rehabilitation is a pursuit in both the offender and the community's interests, it being the most durable guarantor of community protection: *Hogan v Hinch* [2011] HCA 47; 243 CLR 506 at [32].
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> …
>
> [86] …The effect on the offender of incarceration in an adult prison at this stage in his life is likely to hinder rather than enhance his capacity for rehabilitation. This includes the risk that the environment, as well as the anti-social attitudes it houses, will become normalised.
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> …
>
> [101] There is a compelling basis upon which to conclude that an extended period of supervision would provide the offender with the best opportunity to pursue rehabilitation in

> the community. This will be the longest period the offender has ever spent in full-time custody and his release back into the community, given the predictability of prison life, may be a difficult experience requiring significant support over an extended period.

Knight **[2023] NSWSC 321** (Yehia J)

Murder – sentencing for single stabbing of female partner – consideration of adverse impact of incarceration on mental health

- Evidence established offender's childhood marked by deprivation and dysfunction – violence, poverty and exposure to substance abuse – mental health issues: **at [58]-[74]**
- Reference to executive summary of ***Bugmy*** **Bar Book Chapter** on 'Impacts of Imprisonment on Remand in Custody' highlighting adverse impact of incarceration on mental health: **at [104]**
- Found special circumstances based on real risk offender will become institutionalised – lengthy period of imprisonment, first time he will serve term of full-time imprisonment, risk of developing major depression and requirement of lengthy period on parole to assist with readjusting to life in community and accessing culturally appropriate rehabilitation programs: **at [107]**

Escalante **[2023] SASC 138** (Kimber J)

Application to fix non parole period – multiple breaches of 'no drugs' parole condition – relevance of institutionalisation to explain drug use

- Offender sentenced to life imprisonment for murder – released to parole 2016 – over five years parole cancelled on three occasion due to continued use of prohibited drugs – In granting application to set new non-parole period accepted psychologist's opinion that drug use explained by offender's institutionalisation:

> [25] ... Mr Williams opined that an aspect of Mr Escalante's circumstances that could more readily explain his offending behaviour is his long-term incarceration; effectively, Mr Escalante suffers from what is broadly labelled as institutionalisation. The result of a person being subject to external controls which govern their routines and social interactions and the experience of a long-term stigmatised status from an early age can be such that a person does not develop their autonomy, personality or capacity for independent judgment which impairs their ability to function effectively outside of the institutional environment. Mr Williams has observed that Mr Escalante's descent into drug use correlated with a reduction in his hours of employment which lessened his structural restraints and increased his free time.
>
> …
>
> [41] The circumstances in which Mr Escalante breached his parole on both occasions are best viewed in light of Mr Williams' assessment of the aetiology of Mr Escalante's behaviour and its relationship with his psychological functioning. That is, that Mr Escalante's institutionalisation has impaired his sense of autonomy and ability to make independent choices rendering him more reliant 'on external contingencies and environmental constraints to control behaviour'. This goes some way to explain Mr Escalante's first relapse into illicit substance abuse after the passing of his young child and subsequent relationship breakup. Furthermore, given the importance of structure and external contingencies such as full-time

> work, these factors shed light on the circumstances of his second relapse and cancellation of parole where, by virtue of undertaking the Matrix program, he had more free time.

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

Multiple armed robbery and dishonesty offences – Crown appeal against sentence – relevance of risk of institutionalisation

- Difficult childhood included history of drug and alcohol abuse and serious sexual and violent abuse while in custody resulting in serious mental health issues: **at [54]**
- At conclusion of current sentence will have spent all but 22 months of 25 years in custody: **at [88]**

> [93] It was in the interests of the community that the sentences imposed on the respondent be such as to enhance, rather than undermine, his rehabilitation prospects. In view of the respondent's history of repeated incarcerations, there was, in any event, a significant prospect that, by the completion of the further term of imprisonment imposed by the judge, he would have become institutionalised, so that his prospects of rehabilitation would thereby be compromised. Nevertheless, in the particular facts of this case, it was material that the total effective sentence, to be imposed on the respondent, not be such as to crush those prospects, with the consequence that, on release, the respondent readily return to his offending conduct.(*DPP v Stone* [2003] VSCA 208 at [20])

- Appeal by DPP dismissed in view of subjective mitigating factors including 'need to ensure that, in the end, the sentences allow some scope for the rehabilitation of the respondent on the completion of his sentence of imprisonment': **at [97]**

Tabbah [2019] NSWCCA 324 (Johnson J, Bathurst CJ and Fullerton J agreeing)

Manslaughter – re-sentence after successful appeal – relevance of applicant's institutionalisation

- Appeal against sentence allowed – Sentencing Judge erred in application of statutory aggravating factors – evidence of applicant's institutionalisation accepted on re-sentence

> [137] … The issue of the Applicant's institutionalisation is also relevant to the special circumstances issue. The Court should take into account the need for a sufficient period of conditional and supervised liberty to assist the protection of the community, by maximising the prospect that the Applicant will not reoffend when the time comes for him to be released into the community. This approach does not involve the somewhat unrealistic suggestion that institutionalisation can be avoided in the Applicant's case. Rather, it acknowledges the fact of institutionalisation and seeks to reduce the adverse consequences of that state of affairs: *Jinnette v R* [2012] NSWCCA 217 at [103].

DPP v Chaouk [2019] VSC 381 (Bell J)

Murder - minimising danger of offender becoming so institutionalised by further imprisonment

- The sentence should establish conditions which facilitate rehabilitation taking into account "the purpose of preventing recidivism and institutionalisation and facilitating a prisoner's reintegration into the community": **at [18]**; ***DPP(Vic) v Stone* [2003] VSCA 208 at [20].**

- In mitigation, the offender has spent so much of adult life in prison there is a danger of becoming so institutionalised by further imprisonment as to be unable to function in society upon release - the law should never give up on the prospects of someone avoiding institutionalisation, especially someone who out of self-respect wants to do so - however, this is only a consideration, and community protection is the most important one: **at [18]**, **[26]**.

***Ingrey v R* [2016] NSWCCA 31** (Hoeben CJ at CL; Adams J and Fullerton J agreeing)

Attempted armed robbery - Institutionalisation relevant on re-sentence – 22 year old Aboriginal male

- Appeal allowed on basis disadvantage not taken into account – risk of institutionalisation a relevant consideration on resentence given applicant's age and potentially crushing nature of sentence: **at [45], [47]**.

***Hart v R* [2014] NSWCCA 172** (Bellew J; Gleeson JA and Adamson J agreeing)

Robbery in company - Aged 43, in custody from age 24 – institutionalised – unchallenged expert opinion – error in declining to find special circumstances

- Applicant's institutionalisation a matter of considerable significance at sentence hearing - although sentencing judge was not bound to accept counsel submissions, he was bound to consider them: **at [29]**.
- Sentencing Judge erred in declining to find special circumstances by not referring to unchallenged expert opinion that applicant was institutionalised - absence of any reference to institutionalisation indicates judge had no regard to it: **at [30], [42]-[44**].
- No lesser overall sentence warranted, but special circumstances established - significant positive signs that with longer period on parole, rehabilitation likely to be successful, as opposed to mere possibility: **at [57], [59]**

Nature and Impact of Incarceration - General

***Hodson* [2024] NSWCCA 238** (Mitchelmore JA, Fagan and Dhanji JJ agreeing in separate judgments)

Crown appeal against sentence for child sexual offences – judicial concern expressed in relation to inability of State to provide adequate protection for prisoners

- Crown appeal against sentence for multiple child sexual offences allowed – sentence found to be manifestly inadequate
- Evidence at first instance included diagnoses of PTSD from period on remand – respondent constantly stood over in relation to buy-ups and sexual favours – bullied by prison guards – assaulted and sexually assaulted on multiple occasions - witnessed bashings and rapes within prison setting, including one bashing that led to death of victim: **at [44], [71]**
- Although concluding, in circumstances of case, maintenance of public confidence in the administration of justice required re-sentencing, two judges expressed concern about prison conditions and inability of state to provide adequate protection for prisoners.

> Per Fagan J
>
> [82] I have had the advantage of reading in draft the reasons of Dhanji J. I share his Honour's grave concern about the apparent exposure of the respondent to violence and sexual abuse at the hands of other inmates while in custody on remand. I am unable to say more, particularly as to whether fault or neglect may be attributed, because the evidence on the appeal, naturally, did not include comprehensive evidence of the nature and surrounding circumstances of the relevant incidents.
>
> Per Dhanji J
>
> [87] It would be entirely understandable if the victims of the respondent's crimes, and indeed others in the community, were to feel no sympathy for the respondent's complaints of being sexually assaulted given the crimes he has committed. It is not, however, the question of sympathy for the respondent. Offenders are imprisoned because we as a society insist on adherence to our laws. That same insistence does not stop at the prison gates.
>
> [88] Failures such as those which have occurred here place the courts in a difficult position. In cases such as this, the State complains the term of imprisonment was inadequate. Yet the State, through a different arm, has failed to provide appropriate conditions for that imprisonment. Similar concerns arise daily for judicial officers considering bail applications, particularly where significant delay is expected prior to resolution of the charges.
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> …
>
> [90] I have given anxious consideration to whether the appellant has satisfied its onus to establish this Court should exercise its discretion so as to intervene and correct sentence. The failure of the State and the consequent additional impact of imprisonment on the respondent is a powerful factor against intervention.

Re JB [2024] VSC 549 (Croucher J)

Bail application - juvenile charged with car theft, robbery and burglary offences – criminogenic impact of incarceration

- Consideration of exceptional circumstances justifying grant of bail included reference to applicant's youth and criminogenic impact of continued incarceration:

> [36] Many of the factors in s 3B apply to JB's application. For example, releasing JB on bail would allow the relationship between him and his parents to be strengthened or at least preserved, would promote his education, would minimise the stigma associated with incarceration, and would reduce the criminogenic risks of further incarceration, particularly for a child like JB, who is of Sudanese descent. There is evidence before the Court, which I accept, that JB presents as an impressionable young person, one easily influenced by peers. As a result, in JB's case, the criminogenic impact of further time in custody is likely to be high. Further, releasing him on bail would give proper weight to the injunction that incarceration is regarded as a last resort for a child.

***Scroop* [2024] NSWDC 515** (Haesler SC DCJ)

Domestic violence offences – reference to chapter from Bugmy Bar Book – danger of institutionalisation and exposure to violent environment in custody

- Sentencing of offender for domestic violence offences

- Lengthy history of offending - first went into custody in 1993 as a young adult – after short time in community served significant period in custody for murder - when released repeatedly reoffended - spent only three of the last 33 years in the community – period of just over a year on parole prior to commission of these offences longest period he had spent in the community as an adult

> [30] …He put that "success" relative to the rest of his life down to, very strict supervision and support. The material before me supports that conclusion. The support of a psychologist and parole officer continued but after the first 12 months it was not as intensive.
>
> [31] Although he had a psychologist and parole officer to turn to, he did not seek their support when he began offending.
>
> [32] This is, frankly, not surprising. Every study I have read, and my significant experience in dealing with people in custody since I started practice in the mid-1970s indicates that long terms of imprisonment have a generally negative impact on prisoners.
>
> [33] Prison environments are extreme in many respects. They are physically and psychologically taxing. They impose rigid routines on offenders. They remove any capacity for individual decision making about aspects of the person's ordinary life. Often, long terms of imprisonment lead to institutionalisation. This means that the longer a person spends in custody the less their ability to live independently and exercise personal responsibility. If a person has never lived a normal life in the community, it is very hard for them to learn how to lead a normal life on release. Prisoners existing and living in inherently violent environment learn to use aggression and violence, they lose self-worth, and they tend to blame others, and take out on others, their own failings. All of which occurred here: "Impacts of Imprisonment and Remand in Custody" (2022) *The Bugmy Bar Book Project*.

***Gowans* [2024] NSWDC 482** (Haesler SC DCJ)

Multiple offences including robbery and break and enter - reference to chapter from Bugmy Bar Book and negative impacts of incarceration on offenders – balancing appropriate punishment with opportunity for rehabilitation

- Sentencing Judge accepted psychologist report detailing evidence of offender's childhood trauma - reference to "Impacts of Imprisonment and Remand in Custody" (2022) The **Bugmy Bar Book Project** – offender demonstrated some insight and expressed intention to undertake culturally informed residential rehabilitation plan through an indigenous centre

> [53] Gaol itself causes trauma. The community should understand that the longer people are locked in gaol the worse that they can become
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> …
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> [55] Sentencing Judges face a dilemma; community safety requires a person to be removed from the community. At the same time, by removing a person and keeping them in gaol can make them worse. This is particularly so for someone like Gowans who has underlying psychological, and trauma induced symptoms, as they have impaired judgment and are not rational decision makers.
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> …
>
> [57] Too long a period in gaol can cause him to lose motivation and to adjust to gaol and not plan and work for the future. At the same time, he has to understand that he cannot behave as

> he did and that further behaviour in that nature will inevitably lead to further and lengthier gaol sentences.
>
> …
>
> [60] A finding of special circumstances will enable him the opportunity to engage in culturally appropriate rehabilitation programs. He has to be provided with some ownership of his own sentencing outcome. He has to become, not just a problem, but part of the solution. He has to actively participate in his rehabilitation.

***R E* [2023] NSWCCA 184** (Stern JA, Fagan and Yehia JJ)

Sexual offences – Crown appeal - evidence of inadequate medical care in custody

- Crown appeal against sentence for multiple sexual offences
- At sentence hearing Sentencing Judge took into account respondent's history of cancer and evidence establishing respondent not receiving appropriate medical care in custody – rejected Crown submission that medical services of Justice Health commensurate with those available in wider community and that it would not be justified to impose lesser sentence or to find special circumstances on basis of respondent's health issues – imposed 'lenient' sentence with 'very generous finding of special circumstances: **at [46], [48]**

  > [47] Her Honour was justified in these conclusions. The evidence showed that the respondent's medical care had been neglected and that Justice Health's claims in its brochure could not be taken at face value. This is not the first time that assertions by Justice Health concerning its capacity to provide healthcare for inmates have been presented to a sentencing judge but have been shown to be gravely unreliable: see *Brierley v R* [2022] NSWCCA 26. The really serious circumstance proved by uncontested medical records in the respondent's case was that his clinical management had been interrupted by imprisonment at a critical stage, when a course of treatment for a diagnosed progressive disease had been undertaken and follow-up with a PET scan and endoscopy was necessary in order to ascertain whether further treatment would be needed. It would be obvious to anyone that the follow-up was time-critical. The notation of Justice Health personnel, on the day of his admission to prison, was "Priority semi urgent". On the face of the material before the sentencing judge a delay of more than 4 months without those procedures having been conducted, or even an appointment made with an external provider, was medically neglectful. It would not be going too far to say that it was inhumane to keep a prison inmate, in the respondent's state of health, under suspense for over 4 months, not knowing whether his condition may be deteriorating, not knowing whether the further testing that he requires will be provided or, if so, when.

- Found sentence not manifestly inadequate in circumstances of case – "Had the Court taken a different view of the adequacy of the sentence, it would inevitably have exercised its discretion not to increase it in view of the further four months of delay in provision of essential and urgent medical attention since the respondent was before the District Court.": **at [49]-[53]**

***Eaton* [2023] NSWCCA 125** (Hamill J, Lonergan and Ierace JJ agreeing)

Crown appeal against sentence for dangerous navigation causing death – full time custodial sentence 'no small thing'

- Crown appeal against sentence of imprisonment for death of four year old in kayaking accident
- Error found in assessment of objective seriousness of offence – despite error found sentence not inadequate but comfortably within the wide discretion entrusted to the sentencing Judge in circumstances of case: **at [81], [88]**
- In considering application of *Whyte* guideline judgment quoted with approval comments of Yehia J in ***Bresnahan*** [2022] NSWCCA 288 on punitive nature of imprisonment

> [69] The guideline involved two distinct components. The first, as modified in *Whyte*, was that "a custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgement". Judge McGrath applied this aspect of the guideline and, despite the respondent's compelling personal circumstances and their impact on her moral culpability, imposed a full-time custodial sentence. That is no small thing. As Yehia J wrote recently: (*Bresnahan* [2022] NSWCCA 288 at [150])
>
> > "It must be remembered that imprisonment is uniquely punitive because it involves the complete loss of liberty, loss of personal autonomy, loss of privacy, forced association, restriction of movement, and exposure to violence and intimidation. In Mainwaring v R [2009] NSWCCA 207, Harrison J (at [71]) made an observation with which I respectfully agree:
> >
> > > 'Any period of imprisonment must be understood for what it is: onerous, unpleasant, oppressive and burdensome. It is, as it should be, the last available punitive resort in any civilised system of criminal justice. Public discussions about the need to deter crime by the imposition of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences. In contrast, I have no doubt that the learned trial judge was acutely aware of such matters, as his careful disposition of the case reveals.'"

Vincent **[2023] NSWSC 8** (Yehia J)

Bail application – reference to Bugmy Bar Book Chapter detailing negative impacts of incarceration – impact on First Nations women

- Bail granted for Aboriginal woman charged with stalking and intimidation and being armed with intent
- Acknowledged research from ***Bugmy*** **Bar Book Chapter: 'Impacts of Imprisonment and Remand in Custody**' describing negative impacts on the physical and mental health of incarcerated individuals which persist after release - includes loss of housing, barriers to employment, significant negative impacts on families and communities, loss of culture and disconnection from Country and community, increased risk of subsequent contact with the criminal justice system and increased risk of self harm and depression - research further shows impacts more pronounced for Aboriginal and/or Torres Strait Islander Peoples, particularly women: **at [16]-[21]**

> [22] The Bugmy Bar Book research is a useful resource which has assisted the Court in understanding the impact of remand in custody, even for short periods. The research lends

> context to the material that has been tendered on behalf of the applicant which relates directly to her individual circumstances and background. The impact of incarceration on First Nations Peoples, and, in particular, First Nations women should never be under-estimated.

- Applicant's underlying mental health and drug issues will be better treated and managed outside of custodial environment - such treatment and care will better serve protection of community: **at [23]**

***Palmer v Australian Capital Territory (No 2)* [2023] ACTSC 340** (McCallum CJ)

Claim by prisoner for damages for assault and battery – description of difficult custodial conditions at time of incident – reference to Bugmy Bar Book Chapter on Impact of Incarceration

- Plaintiff kept in overflow area of prison for several days without access to exercise area or shower facilities – injured by prison officers during forcible removal from cell after becoming angry and smashing window in door or cell – whether use of force necessary and reasonable in circumstances of case.
- Chief Justice acknowledged conditions challenging and stressful for prisoners and staff presenting difficult management issues: **at [1]-[12]**

> [7] … It has been acknowledged that imprisonment is often "seriously detrimental for the prisoner" and can exacerbate behavioural problems: *Boulton v R* [2014] VSCA 342; 46 VR 308 at [108]–[109] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).
>
> [8] …Custodial isolation and overcrowding risks exacerbating mental illness, as noted in the Inquiry into Victoria's Criminal Justice System (2022) at pg 594 (cited in the Bugmy Bar Book chapter on "Impacts of Imprisonment and Remand in Custody"):
>
> > Practices such as use of isolation, restricting visits from family and friends, overcrowding, poor access to health services and programs, and negative interactions with correctional officers have a significant impact upon mental health. The psychiatric impacts of prison are particularly acute for Aboriginal and Torres Strait Islander people. For example, Aboriginal women in prison are hospitalised for mental illness at triple the rate of Aboriginal women in the community.
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> …
>
> [12] This dangerous, intractable tension between the rights of prisoners and the safety of corrections officers will continue so long as full-time imprisonment remains the primary form of punishment for serious offences and prisons continue to be overcrowded, under-resourced and unable to offer prisoners any real opportunities for education and reform.

- Concluded use of force not necessary and reasonable – awarded damages for injuries.

***Bresnahan* [2022] NSWCCA 288** (Yehia J in dissent on re-sentence)

Appeal against custodial sentence for proceeds of crime offences – punitive nature of imprisonment

- Court allowed appeal against sentence – majority (Beech-Jones CJ at CL and Walton J) imposed lesser sentence of imprisonment
- Yehia J, in dissent, proposed Intensive Correction Order – referred to the punitive nature of imprisonment:

> [150] It must be remembered that imprisonment is uniquely punitive because it involves the complete loss of liberty, loss of personal autonomy, loss of privacy, forced association, restriction of movement, and exposure to violence and intimidation. In *Mainwaring* [2009] NSWCCA 207, Harrison J (at [71]) made an observation with which I respectfully agree:
>
> > "Any period of imprisonment must be understood for what it is: onerous, unpleasant, oppressive and burdensome. It is, as it should be, the last available punitive resort in any civilised system of criminal justice. Public discussions about the need to deter crime by the imposition of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences. In contrast, I have no doubt that the learned trial judge was acutely aware of such matters, as his careful disposition of the case reveals."

***Brierley* [2022] NSWCCA 26** (Fagan J; Beech-Jones CJ at CL and Harrison J agreeing)

Possession of child abuse material offences – evidence of inadequate facilities in custody for elderly and frail prisoner

- Applicant 84 year old frail prisoner – Sentencing Judge accepted assurances from Justice Health that applicant's needs could be provided for within custodial system through specialist units catering for older prisoners with medium to high needs: **at [37]**
- On appeal Court accepted evidence of serious adverse developments in applicant's physical health not evidence before Sentencing Judge: **at [22]-[34]**
- Also accepted evidence of conditions of applicant's imprisonment subsequent to imposition of sentence – evidence established no vacancies in facilities for elderly prisoners with low to medium needs and fact that applicant housed in mainstream prison: **at [35]-[46]**

> [43] The evidence before her Honour showed that the Kevin Waller Unit has 26 beds and that at the date of the sentence proceeding, they were all occupied. The Crown has not sought to challenge or rebut the applicant's affidavits. There is no evidence of what assessment Justice Health has made of the applicant's needs but if he has been assessed as ineligible for any higher level of care than placement in a mainstream cell without a shower that he can safely use, then the criteria being applied must constitute, of themselves, seriously deficient provision for the welfare of a prisoner in this class. If the applicant's circumstances do qualify him to be housed in a unit where at least low to moderate aged care needs can be met, then the only explanation of him not being so placed must be unavailability. Whether the present unsafe placement arises from the adoption of inappropriate criteria or from lack of resources, the applicant's evidence supports a conclusion that Corrective Services, in conjunction with Justice Health, is not able to provide conditions of imprisonment to the reasonable standard of safety and humanity that her Honour evidently understood would be provided when the sentence was passed.
>
> …
>
> [46] … It transpires that, in circumstances where the unit suitable for elderly prisoners with low to medium needs is at capacity, the applicant is simply relegated to a mainstream cell that is not equipped in fundamental respects for the management of a frail, unstable man of 84 years.
>
> [47] The applicant's affidavits suggest that limited resources are available to Corrective Services for the accommodation of geriatric prisoners who are at an advanced stage of

> physical and mental decline. In light of that scarcity, it can now be seen to have been counter-productive for Mr Rajiv Anand, on behalf of Justice Health, to have provided his report to her Honour in the aspirational and unrealistic terms that he adopted. If the sentencing judge had been frankly informed that, due to the Kevin Waller unit being at capacity, safe care for an inmate such as the applicant could not be assured, then her Honour would have had proper material upon which to consider a shorter term or an alternative sentencing option. Sentencing judges cannot make sound decisions with respect to geriatric offenders who are frail and/or in serious ill-health unless accurate information about conditions of custody is supplied. If lack of adequate facilities for such prisoners is chronic rather than temporary, then it will be the responsibility of the Director of Public Prosecutions to bring to the attention of the Executive that this shortfall in the capacity of the prison system may lead to sentencing judges being unable to impose otherwise appropriate terms of imprisonment in circumstances such as the present.

- Appeal allowed and sentence reduced

***Police v Kinnara Connors* [2022] ACTMC 6** (Special Magistrate Hopkins)

Assault offences – decision of Galambany Circle sentencing Court – impact of custodial sentence on young offender with good prospects of rehabilitation

- 20 year old Aboriginal youth – childhood exposure to family violence, drug and alcohol abuse and separation from carers and loved ones – racism and interruption of education
- Evidence of 'extraordinary progress' made during engagement with Worldview Foundation program providing holistic life management programs and employment opportunities for Aboriginal and Torres Strait Islander people facing disadvantage: **at [55]-[59]**
- In considering appropriateness of Intensive Corrections Order referred to **Bugmy Bar Book,** 'Impacts of Imprisonment and Remand in Custody' (November 2022)

> [65] In considering whether to impose an ICO, it is necessary to have a realistic appreciation of the potential negative consequences, for you and for the community, of a term of imprisonment served in full-time custody: see, e.g., Bugmy Bar Book, Impacts of Imprisonment and Remand in Custody (November 2022). Imprisonment is often seriously detrimental for the person detained, particularly when they are young and have never served a sentence of imprisonment before: *Dixon* (1975) ACTR 13, 19-20. Opportunities and incentives for rehabilitation are limited and forced cohabitation with those convicted of criminal offences can operate as 'a catalyst for renewed criminal activity upon release': *Boulton* [2014] VSCA 342 [107]-[108]; 46 VR 308, 334.
>
> [66] In your case there is little doubt that to sentence you to a term of imprisonment to be served in full-time custody would bring to an end and potentially reverse the progress you have made towards rehabilitation.

***Bartholomew* [2021] NSWDC 307** (Lerve DCJ)

Sentence for armed robbery offences – offences committed on parole – need for support upon release from custody

- Offences committed five and seven days after release to parole for armed robbery offence – offender gave account of being released to parole with little support or resources

> [32] He was released from custody at the Lithgow Correctional Centre on 2 September 2020 and when released there was no one there to meet him. He had $100 from his gaol account. This was the extent of the funds available to the offender. A taxi was called but never arrived but he was given a lift to the Lithgow Railway Station where he purchased a ticket and travelled to Sydney. He did not have a mobile phone and for that reason had not spoken to his Nan, with whom he intended to stay the first night. He knew where she lived and stayed with her that night. The following day he travelled by train to Wagga Wagga, arriving in the early hours of the morning of 4 September 2020.
>
> [33] The offender's evidence continued that he went to his brother's home and his brother answered the door. His brother told him he could not stay there because he and his partner had just had a baby. The offender was therefore homeless. His father was not an option as his life with his father when younger was "pretty awful". I will deal with that after summarising the offender's evidence.
>
> [34] The offender went on to say that he went to Community Corrections. He confirmed the contents of the affidavit that they offered emergency accommodation but it was a motel some 5 km from central Wagga Wagga. The offender thought he would end up back in gaol and "gave up then and there". It seems that the system failed this offender. While giving evidence the offender was asked by his counsel whether he wanted to go back to gaol and he replied, "a little bit".

- Sentencing Judge concluded that after spending considerable time in juvenile and adult custody offender will need 'intensive and extensive supervision upon his eventual release from custody' and 'support to develop a pro-social network of peers in the community in order to gain a sense of belonging...': **at [38]-[42]**

Boulton; Clements; Fitzgerald [2014] VSCA 342; (2014) 46 VR 308; (2014) 248 A Crim R 153 (Maxwell P, Nettle JA, Neave JA, Redlich JA, Osborn JA)

Guideline judgment for use of Community Corrections Order – comparison of CCO with prison sentence – restrictive and detrimental impact of incarceration highlighted

> [105] There is the loss of personal autonomy and of privacy, and the associated loss of control over choice of activities and choice of associates. The prisoner is subject to strict discipline, restriction of movement, forced association with other prisoners and — for a substantial part of each day — confinement in a small cell (in many instances, a cell shared with a cellmate not of the prisoner's choosing). There is, moreover, exposure to the risks associated with the confinement of large numbers of people in a small space — violence, bullying, intimidation.
>
> …
>
> [107] Importantly for present purposes, these features of the restrictive prison environment also have the consequence that the opportunities, and incentives, for rehabilitation are very limited. For example, there is no access to sustained treatment for psychological problems or addiction. Access to anger management and sex offender treatment programs is rationed, and such programs are often unavailable to those sentenced to short prison terms.
>
> [108] In addition, imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage.

[109] These same points were made with great force 40 years ago by Fox J in *R v Dixon* (1975) ACTR 13 at 19-20. His Honour said:

> In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. ... Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. The irony is that prison authorities are among the strongest advocates of reform.
>
> ...
>
> When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.

[110] In 2013, this Court in *DPP v Anderson* (2013) 228 A Crim R 128 endorsed Fox J's criticisms:

> There is no reason to believe that in 2013 the adult prison system has changed sufficiently to remove these concerns, notwithstanding considerable efforts by many people over a long period. The community would still ask today, as his Honour suggested then, why the prison system has to be 'so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation are given a real opportunity for self-improvement'. Time and again, courts are told that correctional authorities are simply not adequately resourced to provide the sorts of facilities which are essential if those in prison — many of whom have very serious psychological and behavioural problems — are to be meaningfully rehabilitated and assisted so that, when they are released, they will have some real prospect of reintegration into the community.

***Parsons; Poore* [2002] NSWCCA 296** (Smart AJ, Handley JA and Sully J agreeing)

Crown appeal against sentence of periodic detention for armed robbery offence – no error in considering negative impact of incarceration

- Crown appeal against sentence of periodic detention for offence of armed robbery dismissed

- Case for each respondent included evidence of difficult and deprived childhood – found no error in Sentencing Judge taking into account impact of incarceration in light of this background:

> [53] The judge said, amongst other things:
>
> > "...if I sentence either of these young men to full time custody the awful problems that they have had in their lives thus far will be compounded and they will be in an absolutely hopeless situation…"
>
> …
>
> [66] I do not think that that observation, in the context, evidences the error suggested. It is a comment consistent with *Yardley v Betts* (1979) 22 SASR 108 at 112-3 which was referred to by Wood CJ at CL in *Blackman and Walters* at para 44 with evident approval (para 45). It is not irrelevant to take into account the effect which a sentence is likely to have.

***Blackman; Walters* [2001] NSWCCA 121** (Wood CJ at CL; Stein JA and Studdert J agreeing)

Crown appeal against suspended sentence for armed robbery – exceptional circumstances – consideration of negative impact of incarceration on future rehabilitation

- Crown appeal against suspended sentence for offence of armed robbery dismissed in view of exceptional circumstances
- Case for each respondent included evidence each had achieved substantial rehabilitation including use of delay between offence and arrest to break away from criminal associates: **at [42]**

> [45] This has particular relevance for the present case. His Honour was, in my view, entitled to find that the position of each respondent was wholly exceptional, and that each had achieved a remarkable level of rehabilitation. Additionally, as I have previously noted, it was only by reason of their admissions, that their guilt could ever have been established. Moreover, if they had been sentenced to full time custody, they would have been at considerable personal risk by reason of the assistance given, which would have made their detention arduous and limited their opportunity to participate in the kinds of rehabilitation programs that would have been appropriate for young offenders. There was every reason to suppose that to send them to gaol would have been more likely to turn them towards a criminal way of life, than to maintain the degree of rehabilitation which each had, of his own effort *and initiative, achieved. (emphasis added)*