Aboriginal Sentencing

The Honourable Justice Dean Mildren RFD

The decision of the High Court in *Mabo and Others v The State of Queensland (No 2)*[1], raised the question of whether, if laws relating to native title survived the Crown's acquisition of sovereignty and the radical title to the land, by parity of reasoning customary Aboriginal criminal law would also be recognised by the common law. In *Walker v The State of New South Wales*[2] , an action was brought in the original jurisdiction of The High Court to test that proposition. Mason CJ struck out the statement of claim and dismissed the action, holding at p 49:

> It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.

The authority cited by his Honour in support of this passage is the Racial Discrimination Act 1975 (Cth), s 10. In any event, his Honour went on to hold that even if the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. His Honour said, supra, at 50:

> English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.

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[1] (1992) 175 CLR 1
[2] (1994-95) 182 CLR 45

These principles have been accepted by the Court of Appeal in the Northern Territory in *DPP Reference No 1 of 1999*[3]. Nevertheless, Australian criminal law has given some recognition to Aboriginal customary law in two ways. First, within the Northern Territory there are specific statutory provisions which have the effect of exempting Aboriginals following customary law from criminal responsibility in certain defined situations. For example, in the Northern Territory an Aboriginal man cannot be charged with the carnal knowledge of a female under 16 to whom he is tribally married[4]; nor can an Aboriginal be charged with maintaining an unlawful sexual relationship with a child under 16[5] to whom he is tribally married; nor with indecent dealing of a child under 16, if the defendant is tribally married to the child[6]. Also, an Aboriginal who exercises a customary right to use the land or waterways or resources of an area, is not by doing so acting in violation of the Fisheries Act (NT)[7]. Aboriginal people in the Northern Territory are not subject to compulsory voting, but may vote if they so choose[8].

Secondly, the courts have accepted that Aboriginality, whilst not in itself a mitigating circumstance, can in certain circumstances be mitigating. In *Juli* [9], the Western Australian Court of Criminal Appeal said that the drunkenness of a Kimberley Aboriginal was a mitigating factor because it reflected the socio-economic

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[3] (1999-2001) 10 NTLR 1 at 9-10
[4] Criminal Code, s 129(1) read with the definition of "unlawfully" in s 126 and the definition of "husband and wife" in s 1, and see *Hales v Jamilmira*, unreported [2003] NTCA 9.
[5] Criminal Code, s 131A(2) read with the definitions referred to in fn[1] , supra.
[6] Criminal Code, s 132(2) read with the definitions referred to in fn[1] , supra.
[7] Fisheries Act (NT), s 53.
[8] Northern Territory Electoral Regulations, reg. 25(5). This is a blanket exemption.
[9] (1990) A Crim R 31

circumstances and environment in which the defendant had grown up[10]. Moreover, the Court cited with approval an unreported decision of Muirhead J in *Iginiwuni*[11] that whilst both Aboriginal and non-Aboriginal people are subject to the same laws the Courts, when dealing with Aborigines have endeavoured to make allowance for ethnic, environmental and cultural factors[12]. A similar approach is to be found in New South Wales where Wood J in *Fernando* [13], after reviewing a number of authorities, set out certain principles relevant to the sentencing of Aboriginal offenders[14]. In addition to some of the matters I have already mentioned, his Honour pointed out that a lengthy term of imprisonment may be particularly, and even unduly, harsh when it is served in an environment foreign to him and dominated by inmates and prison officers of European background with little understanding of his culture, society or personality. The decision of Wood J has subsequently been followed and applied by the Court of Criminal Appeal of New South Wales[15].

In the Northern Territory, the courts have not only recognised those principles, but have developed them further to take into account circumstances not likely to arise elsewhere, particularly in the area of payback punishment. There are a long line of cases, both in the Federal Court of Australia[16] and in the Court of Criminal Appeal of

[10] See at p 36 per Malcolm CJ; at 40 per Pidgean J. See also *Friday* (1985) 14 A Crim R 471 a decision of the Court of Criminal Appeal, Qld; *Daniel* (1997) 94 A Crim R 96 where the authorities are comprehensively reviewed.
[11] Supreme Court of the NT; SCC No 6 of 1978, 12 March 1975.
[12] *Juli*, supra, at pps 37 and 40.
[13] (1992) 76 A Crim R 58
[14] At pps 62-63.
[15] See *Stone* (1995) 84 A Crim R 218.
[16] See *Jandurin v R* (1982) 44 ALR 424; *Neal v R* (1982) 149 CLR 305; (1982) 42 ALR 609 (a decision of the High Court).

the Northern Territory[17] that recognise that the imposition of traditional tribal punishment, whether lawful or not[18], is a mitigating factor. Indeed, where tribal punishment is threatened but not yet carried out, the Court assesses the likelihood of the punishment being carried out in the future and the extent of it, and makes an appropriate allowance[19]. Other matters of relevance include the fact that Aborigines' average life expectancy is less than the wider community and thereby may contra-indicate a very long sentence.

Another relevant factor may be that the behaviour of the defendant was the consequence of social and moral pressures acting upon the accused as a result of Aboriginal customary law. A recent example of this was dealt with by the Court of Appeal of the Northern Territory in *Hales v Jamilmira*[20], when an appeal involving the sentence of an Aboriginal for having carnal knowledge of his promised wife was considered. In that case, the defendant and his promised wife were not yet tribally married but under customary law it was acceptable for the defendant to have sexual intercourse with the female in question, even though she was only 15. The Court of Criminal Appeal of South Australia has also recognised the effect of traditional culture in carrying out an offence in circumstances where the offender believed that he was being threatened by Kadaitcha men[21].

[17] See *R v Minor* (1992) 79 NTR 1; *Mununguri v The Queen* (1994) 4 NTLR 63.
[18] *Mamarika v R* (1982) 42 ALR 94.
[19] See *R v Minor* (1992) 79 NTLR 1.
[20] Unreported [2003] NTCA 9
[21] *Shannon* (1991) 56 A Crim R 56 at 58, 61-62.

On the other hand, the Courts have refused to recognise customary law where to do so would offend established sentencing principles. Thus, an offender cannot be sentenced to a longer term than is just merely to protect him from the application of customary laws such as traditional punishment[22]. Similar principles apply with respect to bail. If an offender is entitled to bail and seeks it, it is irrelevant that the offender intends to undergo tribal punishment whilst on bail[23]. And whilst the courts have recognised that the views of the local Aboriginal community are relevant to sentencing, they cannot result in a more severe sentence than is warranted by the circumstances of the offence and of the offender[24]. But where there has been a significant crime of violence, the courts will impose condign punishment on Aboriginal offenders. This is not less so where the victim of the crime is also Aboriginal. As the Court of Criminal Appeal of he Northern Territory said in *Wurramurra*[25]:

> The courts have been concerned to send what has been described as "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.

As the High Court observed in *Veen v The Queen (No. 2)*[26], sentencing is not a purely logical exercise and its troublesome nature arises because of the unavoidable difficulty

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[22] *Jackie Jamieson v R* (Court of Criminal Appeal WA, 7 April 1965); *R v Gilmiri* (unreported, Supreme Court of NT, 21 March 1979).
[23] See *The Recognition of Aboriginal Customary Laws,* (1986) ALRC 31 at para 506; c.f. *R v Jungarai* (1981) 9 NTR 30 at 31-32; *Barnes* (1997) 96 A Crim R 593.
[24] *R v Minor* (1992) 79 NTR 1 at 14; *Munungurr v The Queen* (1994) 4 NTLR 63 at 71.
[25] (1999) 105 A Crim R 512 at 520.
[26] (1987-1988) 164 CLR 465 at 476-477.

in giving weight to each of the principles of punishment, and might I respectfully add, balancing matters going to mitigation against the seriousness of the offending. How this is achieved in practice is not easy, but obviously there are limits beyond which traditional customary law or other factors which have been recognised as mitigating in the sentencing of Aboriginal can have any significant weight, as for instance in the case of repeat offenders or offenders who are a danger to the public[27].

[27] See for instance, *Harrison Green* (2000) 109 A Crim R 392; *Veen v The Queen (No 2)* (1987-1988) 164 CLR 465.