Sentencing Aboriginal offenders in Australia and Canada: A comparative analysis

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Introduction

Aboriginal offenders are heavily overrepesented in both the Australian and Canadian criminal justice systems. In Australia, Indigenous offenders account for 28 percent of the prison population, in spite of only representing 2 percent of the general population. In Canada, it is 23 and 4 percent respectively. I would add that the overrepresentation of Aboriginal women is a particular cause for concern, as they account for over a third of the female prison population in both countries, while juveniles in Australia account for over 50 percent of the youth detention population (compared with 26 percent in Canada).

In today's paper, we reflect on some of the directions the Canadian Supreme Court has taken to redress this overrepresentation of Aboriginal offenders, namely, by accounting for Aboriginal circumstances in sentencing, and contrast this with in the judicial position Australia. We argue that the High Court's approach in *Bugmy v The Queen* represents a missed opportunity to promote non-custodial and restorative sentencing avenues for Aboriginal Australians reduce their overrepresentation in the criminal justice system.

Sentencing principles

Canada

In 1996, in recognition of Aboriginal overrepresentation in the justice system, the Canadian government introduced a new provision into its Criminal Code, section 718.2, which provides that a sentencing court consider

> all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders.*

By explicitly directing attention to the 'circumstances of aboriginal offenders', the legislation acknowledges the unique position of Aboriginal Canadians. This may stem from their systemic disadvantage, their overrepresentation or their postcolonial status.

This has been interpreted by academics as relevant to the collective or individual circumstances of the Aboriginal offender.[1]

Australia

In Australia, legislation in some states recognises cultural background as a factor in sentencing and otherwise provides wide discretion for courts to consider aggravating or mitigating circumstances. The High Court has held that an offender's Aboriginal background is relevant where it affects the individual offender's culpability. However, the Court has stopped short of recognising the collective experience of Indigenous Australians, including over-representation in prisons.

Canadian case law

In 1999, the Canadian Supreme Court handed down its decision in *Gladue*[2]. The offender in this case, Jamie Gladue, was a 19 year old Aboriginal woman who fatally stabbed her boyfriend in a jealous rage. She pleaded guilty to manslaughter and at the sentence hearing, the judge took into account a number of mitigating factors, including her youth, her status as a mother and good prior record. However, he found that there were no special circumstances arising from either the offender's or the victim's Aboriginal status, as they were both living in an urban area off reserve and, according to the judge, not "within the aboriginal community as such". As such, the judge determined that s 718.2 did not apply and sentenced her to three years' imprisonment.

Gladue's appeals to both the Court of Appeal and Supreme Court were unsuccessful, but the Supreme Court took the opportunity to examine the scope of s 718.2(e) and set out a number of general principles, including that:

- The provision is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.
- Together with other provisions in the Canadian Criminal Code, it had 'placed a new emphasis upon decreasing the use of incarceration'.
- The provision alters the method for determining a fit sentence for Aboriginal offenders and requires judges to consider:
    - the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
    - the types of sentencing procedures and sanctions that may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

[1] See Richard Edney, 'Imprisonment as a Last Resort for Indigenous Offenders: Some Lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 23.
[2] [1999] 1 SCR 688.

- Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people, and of the priority given in Aboriginal cultures to a restorative approach to sentencing.
- The provision applies to all aboriginal persons, regardless of where they live.

In *Ipeelee*,[3] the Supreme Court reaffirmed the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives. The Court noted that there is *no* need to establish a causal link between the offender's background factors and the offence before the court in order to have these factors taken into account and that these 'interconnections are simply too complex', although the Court made it clear that an offender's individual circumstances must still be linked to the experience of Aboriginal Canadians more generally.

Secondly, the Court reiterated that the *Gladue* principles apply in *all* cases involving Aboriginal offenders, and this is a positive duty, rather than a matter for their discretion. The Court also held that when sentencing an Aboriginal offender, courts *must* take judicial notice of the collective experience.

The Court stated at [60]:

> To be clear, courts must take judicial notice of such matters as the history of colonisation, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.

I will return to this point later.

Australian case law

Let us move now to Australia, to consider recent developments there. In October last year, the High Court of Australia (our equivalent of the Supreme Court) handed down its decision in *Bugmy*.[4] Before discussing this decision, however, we need to provide some context for it, especially the 1982 High Court case of *Neal*.[5] In that case, Justice Brennan observed:

[3] [2012] 1 SCR 433.
[4] (2013) 87 ALJR 1022.
[5] (1982) 149 CLR 305.

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.[6]

This statement stands for the principle that in order to achieve equal justice, sentencing courts must take into account relevant facts that exist by reason only of an offender's Aboriginality – and this has never been seriously questioned, though there have been differences on the issue of both *when* the Aboriginality of an Indigenous offender will be relevant in sentencing, and *how* Aboriginality will be relevant.

Another important case to provide the background context for the High Court's recent decision is the NSW case of *Fernando*,[7] which set out the eight principles for sentencing Indigenous offenders from disadvantaged communities and discussed how their background may be relevant in mitigation. However, subsequent decisions appear to have limited their application.

It is against this background that we now come to the case of William Bugmy, a 29-year-old Indigenous man from a remote town in NSW, who was on remand for assaulting police, resisting police, escaping from police custody, intimidating police and causing malicious damage by fire. The facts of the offence are that he was upset that his visitors might not arrive at the prison in time to see him, and a correctional officer told him he would see if the visiting hours could be extended. Bugmy became increasingly agitated and threatened to 'split open' the officer, who called for support. Bugmy then threatened the other officers and threw pool balls at them. One of these balls hit the first correctional officer, and caused him to lose his sight in one eye.

Bugmy's personal circumstances reveal extreme disadvantage. He grew up in a remote community and his childhood involved exposure to violence and alcohol, and he started drinking and using cannabis at the age of 12. He had only been educated to the 7th grade and had poor literacy and numeracy skills. He also had a history of head injuries and suffered from auditory hallucinations and psychotic symptoms, which may have been indicative of undiagnosed schizophrenia.

He had a lengthy criminal history from the age of 13, including numerous instances of break, enter and steal, assault, resist police and damage to property, and had served long terms of imprisonment for these offences. It was submitted to the High Court that he had spent every birthday of his adult life in custody. He had never attended a detoxification or rehabilitation facility, despite asking for help with managing his alcohol abuse on numerous occasions. He had a negative attitude towards authority

[6] Ibid 326.
[7] (1992) 76 A Crim R 58.

figures, particularly the police, which were seen by an expert witness as attributable to family 'cultural issues'.

At first instance, the sentencing judge noted the defence counsel's submissions that Bugmy was 'an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment' and '*Fernando* type considerations applied'. He imposed a total sentence of six years and three months, with a non-parole period of four years and three months. The NSW Director of Public Prosecutions appealed against the sentence, arguing that the sentence was manifestly inadequate and the sentencing judge had given too much weight to Bugmy's subjective factors. The DPP submitted that his lengthy criminal history diminished the significance of subjective factors. The NSW Court of Criminal Appeal allowed the appeal and increased the total sentence to 7½ years, with a non-parole period of five years, but did so without actually considering whether the sentence had been inadequate.

Bugmy appealed to the High Court, which allowed the appeal on the ground that the Court of Criminal Appeal had failed to determine the ground of appeal that had been before it, namely, whether Bugmy's sentence was manifestly inadequate. It held that subjective factors do not diminish over time and that culpability is relevant to sentencing. The High Court remitted the matter to the Court of Appeal for resentencing.

The Court stated that it is necessary to point to material facts of the offender's deprivation rather than general findings of systemic Aboriginal disadvantage. The Court fell short of applying the Canadian principle that sentencing should promote restorative (rather than punitive) sentences for Aboriginal offenders, given their over-representation in prisons. It did not regard overrepresentation as a relevant fact of deprivation.

Bugmy's counsel submitted that the statements in *Gladue* and *Ipeelee* in respect of the unique systemic factors applying to the sentencing of Aboriginal offenders in Canada should have equal application to the sentencing of Aboriginal offenders in NSW (and perhaps, by implication, elsewhere in Australia). This submission was not accepted by the High Court, which held that the Canadian jurisprudence needed to be read in the context of s 718.2(e), which does not have any counterpart in the NSW legislation applicable to Bugmy. Indeed, the High Court raised the spectre that an equivalent provision in Australia might be racially discriminatory as it precludes individualised justice.

Analysis of Bugmy in the context of individualised justice

Now, was the High Court actually warranted in dismissing the Canadian position? In our view, this starts with an analysis of whether s 718.2(e) is discriminatory. As made

clear by the Supreme Court in *Gladue*, and reiterated *Ipeelee*, s 718.2(e) was not intended to interfere with the principle of individualised justice, or the need to ensure equality before the law in sentencing. It was not intended to operate as a race-based discount. To the contrary, the provision was designed to remedy a systemic judicial failure to take proper account of the unique circumstances of individual Aboriginal offenders coming before the court.

As the Canadian Supreme Court held in *Ipeelee* at [78]:

> Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

It follows that the legislative intention was to remedy a judicial failure. It was to address discrimination in the sentencing process, rather than to introduce it. Accordingly, it is the fact of the judicial failure to achieve equality that is critical, not the fact that it was first recognised by the legislature in Canada and that a remedial provision was enacted. The High Court did not consider whether an equivalent systemic judicial failure exists in Australia. If it does, then it is appropriate to consider whether the Canadian approach should be adopted as promoting equality before the law, rather than undermining it.

Second, there is the issue of judicial notice of the collective experience of Aboriginal people and the need for a causal nexus between the group experience and individual offending. In *Bugmy*, the High Court dismissed what it said was a 'submission that courts should take judicial notice of the systemic background or deprivation of Aboriginal offenders' as being 'antithetical to individualised justice'. In fact, the Canadian Supreme Court was at great pains to explain in *Gladue* and *Ipeelee* that considering the experience of Aboriginal Canadians did not amount to an abrogation of the principle of equality before the law or a disregard for the principle of individualised justice. Indeed it is quite the reverse.

The High Court's apparent concern was to ensure that no racially discriminatory assumptions are made by sentencing courts from the fact of an offender's group membership, noting at [41]:

> Aboriginal Australians as a group are subject to social and economic disadvantage measure across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender.

This arguably conflates the approach mandated by the Canadian Supreme Court in *Ipeelee* with respect to judicial notice. Properly understood, the Canadian approach

involves two steps. First, the taking of judicial notice with respect to the experience of Aboriginal Canadians as a group. And second, consideration of the extent to which the offender's individual circumstances can be understood by reference to this group experience. As you will recall, the Supreme Court in *Ipeelee* stated that courts *must* take judicial notice of such issues as colonisation, poorer school attainment and higher suicide rates (all of which apply equally in the Australian context), but that this would not necessarily justify a different sentence – rather, such information provides the 'necessary context for understanding and evaluating the case-specific information presented [in relation to the specific offender]'.

This approach does *not* involve discriminatory assumptions, and retains the focus on individualised justice. What it also does is focus attention on the link between the group and individual experiences. In addition, it enables a facilitative approach, so although a link must be established, it does not place a burden on an Aboriginal offender to prove that this link is 'causal'.[8] The Canadian approach recognises that it is difficult to provide strict proof of how systemic and background factors play out in the lives of the individual, but the Canadian courts are ready to infer this. The High Court seems to ignore this reality.

Finally, there is the issue of how the High Court characterised Indigenous status – although it endorsed the earlier decision of *Neal*, in *Bugmy*, it appears to have confined the issue of Aboriginality in sentencing by referring to it as simply an example of taking disadvantage into account. The Canadian position is more akin to the original principle in the earlier case of *Neal*, in that 'all material facts' relevant to sentencing that arises out of group membership are to be taken into account – whether this be a particular disadvantage, difference, or even advantage.

Conclusion

The focus of the High Court in *Bugmy* is on *disadvantage* and the negative impacts of group membership. We would prefer to see Australia embrace the positive potential of group membership and the need for Aboriginal-specific rehabilitation options which are developed and delivered by Aboriginal communities. Importantly, we need to accept, as the Supreme Court of Canada has done, that overrepresentation in prisons is an innate part of the Indigenous experience of disadvantage. This is a problem that arises from the criminal justice system and it is therefore incumbent on the criminal justice system to play its part in remedying it.

[8] *Ipeelee* [2012] 1 SCR 433 [82]-[83].